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“PLAY IN THE JOINTS” AND A PLAYGROUND: BUILDING A NEW TEST POST-TRINITY LUTHERAN
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On October 19, 2017, the free-speech circus rolled into Gainesville, Florida. The contentious crowd—Richard Spencer and a cadre of alt-right white nationalists—brought their traveling spectacle to a public university for the first time since deadly violence erupted in Charlottesville, Virginia—home to the University of Virginia—about two months earlier.
The University of Florida ("UF") afforded Spencer access to a campus auditorium. But a trio of other public, land-grant institutions—Michigan State University, Ohio State University, and Pennsylvania State University—did not. All three were sued for blocking Spencer and, in the process, attempting to bring his speaking tour to an inglorious finish.

A major problem, however, for the schools currently battling Spencer is that his UF appearance demonstrated he can speak on campus without either inciting violence or using words directed to producing imminent lawless action. In other words, for an exceedingly exorbitant price tag, the circus may continue unimpeded, with the UF visit serving as Spencer's Exhibit No. 1. It is a supreme irony. Whereas public universities once highlighted the violence in Charlottesville to justify banning him, Spencer now can point to UF to illustrate why such censorship is unconstitutional.

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5 Spencer’s talk occurred at the “the 1,700-seat Curtis M. Phillips Center for the Performing Arts,” which is located “in the southwestern part of campus.” Rachel Axon, ‘It’s Basically a Powder Keg Right Now’; Florida Braces for Speech by Prominent White Nationalist, USA TODAY, Oct. 19, 2017, at 3A.
9 See supra notes 6–8 (citing the complaints filed against each of the three universities). In January, 2018, Michigan State University agreed to let Spencer speak on campus, thereby bringing to a close the lawsuit filed against it. David Jesse, White Supremacist Richard Spencer Will Speaker at Michigan State After All, DET. FREE PRESS (Jan. 18, 2018, 12:24 PM), https://www.freep.com/story/news/local/michigan/2018/01/18/richard-spencer-michigan-state-university/1044354001/.
10 See infra note 12 and accompanying text (noting that it cost more than $600,000 in security measures to host Spencer at UF).
11 For example, in denying Richard Spencer access to campus, Michigan State University asserted its “decision was made due to significant concerns about public safety in the wake of the tragic violence in Charlottesville.” David Jesse, Group Decrees Antifa’s ‘Heckler’s Veto,’ USA TODAY, Sept. 5, 2017, at 6B. Similarly, Pennsylvania State University President Eric Barron denied Spencer access to the University Park campus “[i]n light of the recent violence and tragedy in Charlottesville.” Press Release, Eric J. Barron, President, Penn. State Univ., Richard Spencer is Not Welcome to Speak at Penn State (Aug. 22, 2017),
Indeed, the UF-Spencer spectacle, thanks to more than $600,000 in taxpayer-funded security costs, the presence of 500-plus law enforcement personnel, and a state of emergency declared by Sunshine State Governor Rick Scott, went off with only minor on-campus violence. As the Miami Herald reported, “[w]hat conflict did occur—pepper spraying, punching, chasing—was largely instigated by anti-fascist protesters.”

Furthermore, Spencer’s words were nowhere close to meeting the high threshold for unlawful incitement to violence—one of the rare categories of speech unprotected by the First Amendment—created by the United States Supreme Court nearly fifty years ago in Brandenburg v. Ohio. Instead, the speech devolved into a futile shouting match between Spencer and “a boisterous audience packed with opponents” who came not to praise him, but to bury Spencer with a raucous...


12 See Paige Fry, Alt-Right Speech at UF Relatively Peaceful, PALM BEACH POST (Fla.), Oct. 20, 2017, at 1A (“The state’s flagship public university spent more than $600,000 on security on and near its campus to prepare for Richard Spencer’s appearance and brought in more than 500 uniformed officers to police streets and control crowds under a state of emergency declared by Gov. Rick Scott.”).

13 See Cindy Swirko & Daniel Smithson, Behind-Scenes Logistics at Protest Let Officers Control Chaos, GAINESVILLE SUN (Fla.), Oct. 21, 2017, at A1, A6 (“Few incidents occurred on the University of Florida campus when Spencer, who espouses white nationalist beliefs, spoke.”).

A shooting later transpired off campus, approximately ninety minutes after the conclusion of Spencer’s talk. Susan Svrluga & Lori Rozsa, Three Men Charged in Shooting After White Nationalist’s Speech in Florida, WASH. POST, Oct. 22, 2017, at A18. Three men, identified by police as white nationalists who attended the Spencer event, where charged with attempted homicide. Id.

14 Alex Harris & Martin Vassolo, UF Drowns out Spencer with “Peace and Unity,” MIAMI HERALD, Oct. 20, 2017, at 1A.


16 The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See Gitlow v. New York, 268 U.S. 652, 666 (1925).

17 395 U.S. 444 (1969). The Court in Brandenburg held that “that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” Id. at 447.

18 Rick Neale, Spencer’s Words Wasted on Unwelcoming Ears in Fla.; Protesters Outside, Hecklers Inside: White Nationalist’s Speech Flops at University, USA TODAY, Oct. 20, 2017, at 2A.
cacophony of chants and jeers. In that endeavor, they certainly succeeded and “mostly drowned out his speech.”

As one newspaper succinctly encapsulated it, “[s]houting and booing from the protesters in the hall—which included plenty of empty space and a small contingent of his supporters in the first few rows—left Spencer unable to make a sustained speech. Instead, he traded insults with the crowd.”

Indeed, the protestors greeted “Spencer with mocking chants and raised fists, denying the provocateur an unchallenged platform to share his widely derided views on race in America.”

Bluntly put, more than half a million dollars was wasted in the name of the First Amendment on an event featuring neither a formal speech nor anything close to serious dialogue and discussion. If the massive police presence at UF prevented a so-called heckler’s veto and allowed Spencer to talk without being physically assaulted by a hostile mob, it also didn’t forestall a tsunami of counter speech that swamped Spencer. It

19 See Joe Heim et al., Spencer Speech Met by Protests, WASH. POST, Oct. 20, 2017, at A3 (reporting that Spencer was “drowned out . . . by a hailstorm of chants, shouting and mockery,” noting that “[t]he protest and chants in the auditorium began as soon as the event began and continued until Spencer finally walked offstage 90 minutes later,” and quoting Spencer as calling the audience “shrieking and grunting morons”).


22 Id.

23 See generally DON R. PEMBER & CLAY CALVERT, MASS MEDIA LAW 42 (19th ed. 2015) (asserting that a heckler’s veto transpires “when a crowd or audience’s reaction to a speech or message is allowed to control and silence that speech”); Brett G. Johnson, Heckler’s Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech, 21 COMM. L. & POL’Y 175, 215–19 (2016) (explaining that “[i]n hostile audience cases, the referees are the police who provide protection for unpopular speakers, as well as the jurists who continue to uphold the principle that these speakers are deserving of such protection,” and contending that the heckler’s veto doctrine “stand[s] for the principle that state actors have a duty to protect speakers from hostile audiences who would seek to either do harm to speakers, or threaten to do harm and thereby force law enforcement to silence speakers”).

24 Justice Louis Brandeis famously explained the counter speech doctrine ninety years ago, asserting that “[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.” Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see also Robert D. Richards & Clay Calvert, Counterspeech 2000: A New Look at the Old Remedy for “Bad” Speech, 2000 BYU L. REV. 553, 553–54 (“Rather than censor allegedly harmful speech and thereby risk violating the First Amendment protection of expression, or file a lawsuit that threatens to punish speech perceived as harmful, the preferred remedy is to add more speech to the metaphorical marketplace of ideas.”).
was all very much theatre of the absurd, with a complete breakdown of coherent communication. At least two intriguing issues arise from the UF experience. The first is the collapse of on-campus, civilized conversations when an audience is confronted by a speaker who espouses offensive, disquieting viewpoints. The second is the exploitation by extremist speakers of public universities to garner high-profile stages from which to gain the media spotlight they crave. These twin issues are addressed below.

I. THE COLLAPSE OF CAMPUS CONVERSATIONS: EITHER SHUT UP OR WE’LL SHUT YOU UP

Richard Spencer has no one to blame but himself for allowing protestors into the auditorium where he spoke at UF. After all, it was his organization—the National Policy Institute—that distributed the tickets to the event. But the spectacle that ensued in the auditorium raises larger cultural questions about whether, in the era of Twitter rants and instant outrage, it is even possible for people to respectfully listen to discomfiting messages on a college campus.

Columbia University Professor Tim Wu recently lamented the deterioration of the expressive environment in the United States. Although Wu focused on what he aptly called “[t]he angry, censorial online mob” and “abusive online mobs,” similar attention must be paid to abusive, real-world

25 See Martin Esslin, The Theatre of the Absurd, 4 Tul. Drama Rev. 3, 5 (1960) (noting, in the seminal article on the topic, that theatre of the absurd is characterized, among other things, by a “futility and pointlessness of human effort” and the “impossibility of human communication” that “shows the world as an incomprehensible place”).
27 Tim Wu, Is the First Amendment Obsolete?, in EMERGING THREATS 2 (David Pozen ed., 2017), https://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20First%20Amendment%20Obsolete.pdf (“We live in a golden age of efforts by governments and other actors to control speech, discredit and harass the press, and manipulate public debate. Yet as these efforts mount, and the expressive environment deteriorates, the First Amendment has been confined to a narrow and frequently irrelevant role.”) (emphasis added).
28 Id. at 14.
29 Id. at 11.
mobs that, as the University of California, Berkeley witnessed in 2017, sometimes resort to violence to squelch speech to which they object.  

Even when physical violence does not occur, speakers are still not permitted to talk when hostile students take over a venue. For instance, at William & Mary in October 2017, members of the college’s Black Lives Matter chapter, chanting “[l]iberalism is white supremacy,” rushed the stage and thwarted an attorney from the American Civil Liberties Union from making a presentation innocuously called “Students and the 1st Amendment.”  

Also in October 2017, a chanting group of students at the University of Oregon in Eugene “stormed the stage as President Michael Schill was to give his annual State of the University speech. The students, some holding signs, including one that said ‘Take back our campus,’ were protesting Schill’s leadership, including the treatment of minority students and tuition increases.” The speech was cancelled and “Schill walked out of the auditorium without ever taking the podium.”  

Lurking behind such incidents are shifting cultural views, as well as divisions along racial and political lines, about the importance of protecting free expression. The Cato Institute’s 2017 survey of Americans’ attitudes toward free speech and tolerance reveals the following:

- The vast majority—76%—of those surveyed felt “that recent campus protests and cancellations of controversial speakers are part of a ‘broader pattern’ of how college students deal with offensive ideas.” Put bluntly, if an idea offends you, then shut up the speaker. Why bother listening?

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• Demonstrating support for a heckler's veto, 35 58% of those surveyed by Cato think that "colleges should cancel controversial speakers if administrators believe the students will stage a violent protest otherwise," 36 with the figure rising to a whopping 74% among Democrats surveyed. 37 In stark contrast, 54% of Republicans surveyed said that colleges should not cancel the speaker if students threaten violence. 38

• Reflecting both racial and political divisions, the survey found that "[s]trong liberals (52%), African Americans (54%), and Latinos (54%) stand out with slim majorities who believe it's more important for colleges to prohibit offensive and biased speech on campus. Conversely, majorities of regular liberals (66%), conservatives (73%), and white Americans (73%) think colleges need to expose students to a wide variety of perspectives even if they are offensive or prejudiced." 39

A 2017 survey of college students conducted by YouGov on behalf of the Foundation for Individual Rights in Education revealed divisions along the lines of political affiliation when it comes to disinventing controversial speakers. "Democratic students are 19 percentage points more likely than their Republican peers to agree that there are times a speaker should be disinvented," the report notes. 40 Specifically, "[a]lmost half of Republicans (47%) and two-thirds of Democrats (66%) support disinitations in some instances." 41

A 2016 survey conducted by Gallup for the Knight Foundation and the Newseum Institute reflected differences in beliefs among college students based on race. Specifically, 41% of black students surveyed believed that colleges should be able to restrict the expression of "political views that are upsetting or

35 See supra note 23 and accompanying text (discussing the concept of a heckler's veto).
36 Ekins, supra note 34, at 4.
37 Id.
38 Id.
39 Id. at 41.
41 Id.
offensive to certain groups.”\textsuperscript{42} In contrast, only 24% of white students felt colleges should restrict such political views.\textsuperscript{43}

Perhaps the growing intolerance in college for hearing disagreeable speech is simply generational. As Erwin Chemerinsky and Howard Gillman recently wrote, the current crop of college students “is the first generation of students educated, from a young age, not to bully. For as long as they can remember, their schools have organized ‘tolerance weeks.’”\textsuperscript{44} Ironically, of course, the only thing that some of them seem unable to do is tolerate the intolerant speech of others.

Ultimately, and regardless of why it occurred, what transpired at UF when Richard Spencer attempted to speak there was disappointing. As a columnist for one Florida newspaper put it, “As much as I hate what Spencer has to say, he should have been able to say it. The danger in not allowing free speech is the tide during these contentious times can turn quickly and take aim at different beliefs tomorrow.”\textsuperscript{45}

Lata Nott, executive director of the First Amendment Center of the Newseum Institute, stresses another problem with shouting down speakers. “It demonstrates a visceral fear of ideas, as if it’s not enough to disagree with someone’s opinion, or even vehemently oppose it—instead, \textit{they must not be allowed to express it in the first place},” she writes.\textsuperscript{46} She adds that:

\begin{quote}
Shouting down a speaker like Richard Spencer makes students feel like they’ve defeated a neo-Nazi—but it’s uncertain what kind of impact this has on the white supremacist movement as a whole. Sometimes we forget that freedom of speech doesn’t just refer to the right to talk; it also encompasses the right to hear others speak. The rising antagonism toward speech we disagree with doesn’t necessarily violate the First Amendment, but this attitude can be corrosive to its spirit.\textsuperscript{47}
\end{quote}

\textsuperscript{43} \textit{Id}.
\textsuperscript{44} \textit{Erwin Chemerinsky & Howard Gillman, Free Speech on Campus} 10 (2017).
\textsuperscript{47} \textit{Id}. 

Thus, it is readily evident that free speech advocates and, in particular, free speech educators now face a daunting task of promoting ideals of civil discourse and discussion when speakers with disagreeable viewpoints come to campus. It is not mere hyperbole to believe that the very notion of a public university as a marketplace of ideas—something embraced by the U.S. Supreme Court\(^{48}\)—lies in the balance.

II. EXPLOITING PUBLIC UNIVERSITIES: THE BILL FOR COVERING COSTS OF EXTREMIST CIRCUSES

Beyond the collapse of conversation, Richard Spencer's UF visit highlights another issue. Specifically, a critical problem today, as UF President Kent Fuchs opined in the pages of the \textit{Wall Street Journal} shortly after Richard Spencer's UF visit, is that public universities “may become hostage to Nazis or other extremists—forced to stand by as these groups capitalize on their university’s visibility and prestige to amplify their vile messages.” \(^{49}\) In brief, Richard Spencer is causing the militarization—recall the more than 500 law enforcement personnel to keep the peace at UF\(^{50}\)—and weaponization of government property. A \textit{Tampa Bay Times} article crisply captured Spencer’s exploitation and hijacking of the First Amendment this way:

Spencer and other fringe-right provocateurs have seized on prestigious public universities as launching pads for their viral stunts. Beyond a built-in audience of students and press, these speakers get to stand upon the First Amendment, which makes it difficult for public institutions to push away speakers with even the vilest of beliefs, and with even the most hostile of potential audiences.\(^{51}\)

It’s an issue now spilling over from the halls of academia to the chambers of the U.S. Capitol. As Senator Lamar Alexander, R-Tenn., chairman of the Senate Committee on

\begin{footnotesize}
\begin{itemize}
\item \(^{48}\) See \textit{Healy v. James}, 408 U.S. 169, 180 (1972) (opining that “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas’” (quoting \textit{Keyishian v. Bd. of Regents}, 385 U.S. 589, 603 (1967))).
\item \(^{50}\) \textit{Supra} note 12 and accompanying text.
\end{itemize}
\end{footnotesize}
there is the question of deliberately inflammatory speakers, and the protests and riots in response that push the freedom of speech to a limit that creates chaos. Sometimes these demonstrations turn into tragedy as we saw recently in Charlottesville. And just last week at the University of Florida, when the white supremacist Richard Spencer was speaking, his supporters and protestors caused the university to spend $600,000 on security, bring in over 1000 law enforcement officers and cause the governor to declare a state of emergency. It is a familiar problem in a country that prizes freedom. If you’re a university president, what do you do about this?\(^\text{52}\)

The answer to Senator Alexander’s question, of course, varies. As noted above, some university presidents have denied Spencer access and now face lawsuits.\(^\text{53}\) But for those like UF President Kent Fuchs that grant him access, the price tag is high, and their campuses are turned into militarized zones. UF had to cover the cost of the security, rather than shifting it to Spencer, because the U.S. Supreme Court held in *Forsyth County v. Nationalist Movement*\(^\text{54}\) that “[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.”\(^\text{55}\) But as UF spokeswoman Janine Sikes explained, “[p]ublic institutions cannot continue to pay this kind of money.”\(^\text{56}\)

In his *Wall Street Journal* column, Fuchs suggested that a “partial solution could entail a new Federal Extremist Speakers Fund to help universities with their exorbitant security costs. That would shift the financial burden of following the First Amendment to the government that requires universities to do


\(^{53}\) See supra notes 6–8 (citing the complaints filed on behalf of Spencer against Michigan State University, Ohio State University, and Pennsylvania State University).


\(^{55}\) Id. at 134–35.

Such a proposal, however, merely moves the burden from one governmental entity (a public university) to another (the federal government), with taxpayers ultimately paying in the end.

The fact, of course, is that Richard Spencer could just as easily rent space in a ballroom at a Hilton or Hyatt hotel and, in turn, have total control over the audience. Such venues, however, would not allow Spencer to invoke the First Amendment and play the role of victim when he is denied access to a public university campus. They also would not provide him with the large, angry crowds that generate massive news media coverage for his message. For now, then, public universities are being exploited for events that carry little educational value.

III. CONCLUSION

One of the more interesting tidbits of data gleaned by the Cato Institute survey cited earlier is that “51% of strong liberals say it’s ‘morally acceptable’ to punch Nazis.” Outside the auditorium where Richard Spencer spoke at UF, white nationalist Randy Furniss—wearing a shirt festooned with swastikas—was punched in the face by an unknown assailant. Furniss, who wasn’t speaking and was merely walking through the crowd when he was punched, told the Gainesville Sun that people “were hitting me on the back of the head and sitting on me . . . . It wasn’t black people, it was white people, they were getting everybody riled up.”

Indeed, the presence of extremist speakers on college campuses certainly has many riled up. As this Essay suggested, a larger issue raised by Spencer’s UF appearance is whether the riling up and agitation he provokes also reflects a societal change in how people respond to messages with which they vehemently disagree. The collapse of conversations on public university campuses and the rise of attitudes in favor of stifling speakers are profoundly troubling developments for the future of the First Amendment freedom of speech. Yet at the same

57 Fuchs & Altschuler, supra note 49, at A17.
58 Ekins, supra note 34, at 1.
time, as this Essay pointed out, it is equally worrisome that educational institutions are being exploited and held financially hostage in the name of the First Amendment by extremist speakers. There are no easy solutions to either problem, but starting to examine them now, as the Richard Spencer circus raucously rolls on, is critical.
FAIRNESS DOCTRINE 2.0: THE EVER-EXPANDING DEFINITION OF NEUTRALITY UNDER THE FIRST AMENDMENT

W. Mike Jayne*

ABSTRACT

Since the early days of dial-up service, prominent voices have urged government regulation of speech on the Internet. A cross-section of policymakers and pundits are now calling for a change in the status quo, while others warn that recent developments could spur a departure from the “hands-off” policy of the FCC.

During the net neutrality debates, many critics feared that the Open Internet Order would lead to greater FCC control of the Internet, with some even going further: warning that the agency would implement some form of a new Fairness Doctrine for the medium. Despite the Restoring Internet Freedom’s essential repeal of the Open Internet Order, these concerns have been given credence by calls for crackdowns on fake news and extremism; for platform, search, and app neutrality; and for government intervention to stop the censorship policies of Silicon Valley companies.

This Article begins by surveying several developments that give rise to this alarmism. It examines whether the FCC would have the statutory authority to regulate content on the Internet. It then considers several policy proposals before assessing the constitutionality of any regulatory intervention. It argues that greater regulation of online political content will chill free speech, spawn unintended consequences, and run afoul of the Constitution. It argues that an attempt to enforce any type of Fairness Doctrine for the Internet will be too difficult to administer, leading to suffocating litigation; unfair application to ISPs, platforms, and websites; and an intellectually diminished Internet.

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I. INTRODUCTION

Bloggers beware: according to former Federal Election Commission (FEC) Chairman Lee Goodman, Americans are one vote away from a “Chinese censorship board,” in which you could be fined for posting about politics during election seasons.\(^1\) Goodman’s warning followed an FEC decision that narrowly staved off setting precedent for new rules requiring citizen bloggers to register with the government and provide financial records.\(^2\) After review of a complaint in October 2014, the six members of the FEC deadlocked three-three along partisan lines, resulting in dismissal of a case,\(^3\) but igniting debate about limits to the FEC’s regulation of Internet political speech. Under the current rule, issued in 2006, the FEC can regulate only two categories of online political commentary: campaign content and paid advertising.\(^4\) The FEC has purview over candidates, parties, and political action committees (PACs) in other media,\(^5\) so the rule’s rationale is that campaigns should not be able to avoid restrictions and requirements simply by moving the same content online. Similarly, campaign finance laws apply to television and radio advertising, and the rule extends that authority to the Internet as well.\(^6\)

At issue before the commission were two videos created by a nonprofit and posted to YouTube during the 2014 congressional midterm season.\(^7\) Because the organization was not a campaign entity subject to existing FEC regulation and did not pay for the videos or their placement, the FEC’s three Republican members reasoned that the nonprofit was not subject to any restrictions or reporting requirements under

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\(^2\) Id.

\(^3\) Checks and Balances for Economic Growth, MUR 6729 (FEC Oct. 24, 2014) (statement of Chairman Lee E. Goodman et al.), http://eqs.fec.gov/eqsdocusMUR/14044363864.pdf (“Consistent with [the Office of General Counsel]’s recommendation, we voted to find no reason to believe a violation occurred and the matter was closed.”).


\(^6\) Internet Communications, 71 Fed. Reg. at 18,589.

current rules.\(^8\) Four members must vote to hear a case, \(^9\) so the deadlock precluded a formal ruling on the matter. But then-

FEC Vice Chair Ann Ravel vowed that the Commission would revisit the issue in 2015 to consider changing the current rule\(^10\) that leaves the Internet largely unregulated as a unique medium of “low cost” and “widespread accessibility.”\(^11\) Ravel and like-minded advocates argue that the 2006 rule fails to foresee how the Internet is evolving, and how sophisticated PACs, campaigns, and political operatives can skirt campaign finance laws governing traditional political advertising by publishing comparable, if not identical, material online.\(^12\)

On February 11, 2015, the FEC held hearings on campaign finance regulation, including new rules for Internet political speech, receiving more than 32,000 comments in response to its public notice.\(^13\) Less than two weeks later, Commissioner Lee Goodman and Ajit Pai of the Federal Communications Commission (FCC) countered with a joint column criticizing the plan.\(^14\) They argue greater regulation of online political content will unfairly target citizen groups, bloggers, and social media users by imposing onerous registration and reporting requirements that will ultimately curb free speech.\(^15\) Even if the FEC does not amend the 2006 rule, it argues that the current ad-hoc, case-by-case approach to adjudicating Internet political content—determined largely by the make-up of the commission at the time of any given ruling—will discourage many from posting or publishing online political content, resulting in a chilling of speech.\(^16\)

FCC Chairman Pai has also criticized prior initiatives by his own agency, such as the “Multi-Market Study of Critical Information Needs,” which would have sent FCC agents to

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\(^8\) Id.
\(^11\) Internet Communications, 71 Fed. Reg. at 18,589.
\(^12\) See Statement of Vice Chair Anne M. Ravel Encouraging Public Comments, supra note 10.
\(^15\) Id.
\(^16\) Id.
question reporters, editors, and broadcast station chiefs about their news practices, an effort he argued was a step toward reinstituting the now-defunct “Fairness Doctrine” of policing political news content.\footnote{Ajit Pai, \textit{The FCC Wades Into the Newsroom}, \textit{Wall St. J.} (Feb. 10, 2014, 7:26 PM), http://www.wsj.com/news/articles/SB10001424052702304680904579366903828607327cb=logged0.4133963421443206.} The FCC backed away from the study in response to controversy.\footnote{Julian Hattem, \textit{FCC Pulls Plug on Press Study}, \textit{The Hill} (Feb. 21, 2014, 4:03 PM), http://thehill.com/policy/technology/198943-fcc-kills-contested-press-study.} Corydon B. Dunham, NBC’s former executive legal counsel of twenty-five years,\footnote{Ginny Grimsley, \textit{Former NBC Legal Exec Cory Dunham Warns of New Threats to Free Speech}, \textit{Marketwire} (Mar. 9, 2012, 2:34 PM), http://www.marketwire.com/press-release/former-nbc-legal-exec-cory-dunham-warns-of-new-threat-to-free-speech-1630259.htm.} warns that the FCC seeks to control TV and radio news through a revamped “Localism, Balance and Diversity Doctrine” that would establish regulations and appoint boards to monitor broadcast stations’ exercise of news judgment.\footnote{Corydon B. Dunham, \textit{Government Control of News: A Constitutional Challenge} 3 (2011).} Given that the FCC is currently auctioning off much of the broadcast spectrum to wireless broadband providers to expand and improve smartphone service,\footnote{Matt Hamblen, \textit{FAQ: The FCC’s Upcoming Broadcast-TV Spectrum Auction}, \textit{Computer World} (Oct. 16, 2015, 12:09 PM), http://www.computerworld.com/article/2994217/mobile-wireless/faq-the-fcc-s-upcoming-broadcast-tv-spectrum-auction.html.} Dunham fears that narrowing the already scarce range of broadcast frequencies will intensify competition for the dwindling number of TV station licenses.\footnote{Dunham, \textit{supra} note 20, at 2.} Because TV stations must apply to the FCC for licenses to operate, he argues that this increased competition will give the FCC greater leverage over station managers, who in turn may worry that their editorial judgments could affect the likelihood that the FCC will renew their licenses.\footnote{\textit{Id.}} This may dampen stations’ enthusiasm for covering certain issues, shaping the content of not only what they broadcast, but what they share online.

While the FEC and FCC have independent statutory authority, they are both means by which government can regulate public debate, an objective of many academics, politicians, and policymakers who are frustrated by both the \textit{Citizens United v. FEC}\footnote{558 U.S. 310 (2010).} decision striking restrictions on campaign spending\footnote{\textit{Id.} at 372.} and the current state of mass media. Traditionally, many proponents of greater government control online have been liberals or Democrats, but recent allegations
of censorship by tech giants such as Google\textsuperscript{26} (whose parent company Alphabet was the second largest donor to the 2016 Clinton campaign\textsuperscript{27}), YouTube (a subsidiary of Google),\textsuperscript{28} Facebook,\textsuperscript{29} and Twitter,\textsuperscript{30} have elicited calls by some conservatives and Republicans for government to referee the Net.\textsuperscript{31}

Lawmakers are increasingly zeroing in on Silicon Valley, and several of them head relevant committees of jurisdiction. Commerce Committee chairman Senator John Thune, R-S.D., sent a letter to Facebook CEO Mark Zuckerberg, demanding the company disclose how it generates its news feeds.\textsuperscript{32} Twitter banned Rep. Marsha Blackburn (R-Tenn.), Chairman of the House Subcommittee on Energy and Technology, from posting a Senate campaign ad that its curators deemed too inflammatory for its criticisms of Planned Parenthood.\textsuperscript{33} The following day, Twitter reversed course, but not before Blackburn pounced on the incident as a fundraising opportunity.\textsuperscript{34} Prior to announcing his intention to resign, then-Senator Al Franken, D-Minn., ranking member of the Senate Judiciary Subcommittee on Privacy, Technology and the Law, called for expanding net neutrality to cover content generated

\textsuperscript{26} Blake Neff, \textit{Video: Is Google Manipulating Searches to be Pro-Hillary?}, \textit{DAILY CALLER} (June 9, 2016, 6:55 PM), http://dailycaller.com/2016/06/09/video-is-google-manipulating-searches-to-be-pro-hillary/.


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Meanwhile, Democratic lawmakers are urging the FEC to develop new rules for political advertising on social media after Facebook disclosed that Russians were purchasing ads on its platform to influence the 2016 presidential election.\footnote{See Kate Conger, \textit{Congress Wants New Rules for Online Political Advertising After Russian Facebook Ads}, \textit{Gizmodo} (Sept. 20, 2017, 3:00 PM), https://gizmodo.com/congress-wants-new-rules-for-online-political-advertising-after-russian-facebook-ads-1818591930.} These tech companies are already facing pressure from European lawmakers to combat terrorism, extremism, “hate speech,” and fake news by aggressively curating their users’ content.\footnote{See Danica Kirka, \textit{U.S. Tech May Find Their Future Shaped by Europe}, \textit{Chi. Trib.} (Oct. 17, 2017, 10:00 AM), http://www.chicagotribune.com/bluesky/technology/sns-bc-eu--europe-controlling-the-internet-20171017-story.html.
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} The bill, titled \textit{Allow States and Victims to Fight Online Sex Trafficking Act (FOSTA)}, makes an exception to Section 230 of the Communications Decency Act.\footnote{See H.R. 1865, 115th Cong. (2017).} Section 230 allows websites to post third party content without being responsible for it,\footnote{47 U.S.C. § 230(c) (2012).} and it has been instrumental in fostering innovation and protecting free speech online.\footnote{See Section 230 of the Communications Decency Act, \textit{Elect. Frontier Found.}, https://www.eff.org/issues/cda230 (last visited May 3, 2018).} Critics argue this exception, even for a worthy cause, is a slippery slope that could lead to
greater online censorship in the future.\textsuperscript{44} Considered alongside these developments, the 2016 election may eventually be regarded as a watershed in terms of the Internet’s place in American public affairs.

Proponents of greater government control might see their best chance for reshaping the channels of mass communication dependent on a Democratic president in the White House.\textsuperscript{45} Naturally, the election and re-election of President Obama worried opponents that agencies would seek to do just that.\textsuperscript{46} For example, the appointment of regulatory enthusiast Cass Sunstein, who has previously called for government regulation of online political content,\textsuperscript{47} as Administrator of the Office of Information and Regulatory Affairs stoked ongoing worry that the Obama Administration was poised to exert greater control of the Web.\textsuperscript{48} President Trump caused consternation while a candidate when he floated the idea of “closing up” the Internet to combat terrorism.\textsuperscript{49} Though regulation of online political commentary and rules governing Internet campaigning failed to achieve salience in the 2016 presidential election, candidate Donald Trump’s upset had consequences. Commissioner Pai was President Trump’s pick for Chairman and, as discussed below, the FCC has

\textsuperscript{46} See Lachlan Markay, Dem Regulators Again Target Protections for Online Political Speech, WASH. FREE BEACON (Aug. 10, 2016, 3:00 PM), http://freebeacon.com/issues/dem-regulators-target-protections-online-political-speech/.
embarked on a new direction. Two vacant seats on the FEC to be filled by President Trump appointees portend policy ramifications for that agency as well.

Until recently, attention was fixed on the U.S. Supreme Court’s pending decision on whether to grant certiorari to review the U.S. Court of Appeals for the D.C. Circuit’s 2016 decision upholding the FCC’s 2015 Open Internet Order, commonly known as net neutrality. Given the order’s effective repeal by the Commission’s recent promulgation of the Restoring Internet Freedom Order, the case will likely be deemed moot. But there is nothing stopping a future administration from reinstating net neutrality. And while most of the net neutrality debate is focused on the rule’s technical and economic issues, voices ranging from former FCC Commissioner Robert McDowell to constitutional luminary Lawrence Tribe have alleged that net neutrality runs afoul of the First Amendment for at least two reasons: first, broadband Internet service providers (ISPs) are speakers for First Amendment purposes, and second, net neutrality invites government into decisions about speech. Tribe contends that the First Amendment prohibits government not just from censoring speech, but from forcing private groups to carry or transmit speech. Tribe maintains that net neutrality is based on a mistaken premise that government is empowered to referee private speech, but the First Amendment’s purpose is not to ensure audiences equal access to all speakers, and the

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57 Id. at 2.
58 Id.
government is not free to second-guess ISPs regarding control of their networks.59 Yet the First Amendment debate is far from an academic one, as a casual Internet search will reveal. There is a substantial body of alarmist commentary that net neutrality and/or pressure from lawmakers could open the door for the FCC to regulate online political content just as it did for political content on radio and television under the Fairness Doctrine. This is because much of the rationale for the FCC’s regulation of the broadcast spectrum (radio and TV) is that the medium is a public good, a justification that could plausibly be extended to the Internet.60 As mentioned, the FCC is currently auctioning off much of the broadcast spectrum to wireless broadband providers.61 Transferring the FCC-controlled broadcast spectrum to the wireless broadband network of the Internet could invite the FCC to regulate the latter as part of its turf.62 As discussed below, some critics fear the FCC will train its regulatory crosshairs not just on ISPs, companies that provide access to the Internet, but on so called “edge providers,” entities that provide content and services to users once they are connected to the Net.63 What then-Senator Franken called for64 is already being rolled out in Europe.65 While net neutrality was about limiting the behavior of ISPs, the concept of platform neutrality encompasses restrictions on software systems.66 As platform neutrality proponent Professor Frank Pasquale describes it, “[t]he core idea of neutrality is to prevent massive intermediaries from distorting either private

59 Id.
60 Commissioner Robert M. McDowell, Remarks at the Media Institute Dinner (Jan. 28, 2009) (transcript available at https://www.rcfp.org/newsitems/docs/20090129_162426_fairness_doctrine.pdf) [hereinafter McDowell, Remarks at the Media Institute].
64 Franken, supra note 35.
commerce or the public sphere simply by virtue of their size, network power or surveillance capacities” (emphasis added). The terms “search neutrality” and “app neutrality” have already entered the lexicon.

If the FCC moves to regulate political speech, whether on an “open Internet” or otherwise, then its best-known blueprint would be its so-called Fairness Doctrine, the agency’s near-forty-year policy of regulating the political speech of TV and radio stations. The Fairness Doctrine (discussed in more detail below) required broadcast license holders to devote airtime to controversial issues of public importance and to present opposing viewpoints on these issues. While the Fairness Doctrine was abandoned in 1987 and officially wiped from the Code of Federal Regulations in 2011, its resurrection is routinely debated. While proponents of the Fairness Doctrine have failed to reinstitute it in its traditional form, net neutrality has stoked fresh fears that the Doctrine could be applied to the Internet. As former FCC Commissioner Robert McDowell remarks: “That’s just Marketing 101: if your brand is controversial, make a new brand. The Doctrine could be intertwined into other communication policy initiatives that are more certain to move through the system, such as localism, diversity or net neutrality.”

This Article argues that the FEC and FCC should not move to promulgate rules governing political content on the Internet, because they would be counterproductive and contrary to inviolable First Amendment values, faring no better in promoting robust debate than the Fairness Doctrine did for television or radio. It concludes that the practical and technical challenges of enforcing political content rules would be more trouble than they are worth. Finally, because the Supreme Court has yet to define the permissible scope of government

70 See id.
73 McDowell, Remarks at the Media Institute, supra note 60.
74 Id.
regulation of the medium, this Article culls together the Court’s principal rulings on communications law to predict that it would likely strike down FEC and FCC rules that required ISPs and websites to provide certain political content, whether those rules were in the form of a reprised Fairness Doctrine or that of a different regime altogether.

In order to place this debate in its proper context, a brief overview of the FCC’s role in regulating broadcast media under its Fairness Doctrine policy is in order.

II. BACKGROUND

A. The Fairness Doctrine’s Troubled History Demonstrates the Unintended Consequences of Regulating Communications Technology’s Political Content

Former Commissioner McDowell and Chairman Pai have invoked the Fairness Doctrine in debates over the FCC’s role in regulating the Internet because many of the arguments both for and against greater government policing of online political content were often made in the public quarrel over the agency’s best-known foray into content regulation.\textsuperscript{75}

The Fairness Doctrine was a policy of the FCC during the second half of the 20th Century.\textsuperscript{76} It was intended to serve the public interest in having robust coverage and debate of public affairs on radio and television.\textsuperscript{77} While the goal of this policy was at least initially laudable, controversy later arose as to whether the policy was at best ineffective, or worse, had the opposite effect of diminishing public affairs coverage.\textsuperscript{78} Understanding the Fairness Doctrine is crucial to understanding how political content regulations could impact users’ online experiences.

There is a limited range of frequencies within the electromagnetic spectrum for transmitting broadcast (TV and radio) communications.\textsuperscript{79} The FCC’s predecessor, the Federal Radio Commission, was formed to regulate the “free-for-all” caused by too many broadcasters fighting over available frequencies, a situation akin to several people shouting into the


\textsuperscript{76} See id.


\textsuperscript{78} Red Lion Broad. Co. v. FCC, 395 U.S. 367, 383 (1969) (“[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust.”).
same microphone. The Communications Act of 1934 created the FCC and charged the agency with regulating radio along with cable, telegraph, and telephone systems. The Congressional solution to managing access to radio was to have the Commission grant stations exclusive licenses for specific frequencies, necessarily excluding other speakers from using the “public good” of the airwaves to voice their messages and birthing the concept of spectrum scarcity. Beginning in 1929, the Commission agreed to hear complaints from those denied by stations an opportunity to express their views. This acknowledgement of citizens’ standing was the underpinning of the idea that, because airwaves are a public good, those granted licenses had a duty to use their stations in the public interest and should be regulated to ensure they do so. This policy evolved through case law until 1949, when an FCC report—drawing on statutory authorization from Section 326 of the Communications Act of 1934 and its legislative history—established the Fairness Doctrine’s two parts. First, broadcasters were required to air issues that were “so critical or of such great public importance that it would be unreasonable for a licensee to ignore them completely.” Second, broadcasters had an “affirmative duty” to provide an opportunity for dueling positions on these issues. This duty arose from the right of the public to have access to information “rather than any right on the part of the Government, any broadcast licensee or any individual member of the public to broadcast his own particular views on any matter,” as it is the

80 McDowell, Remarks at the Media Institute, supra note 60.
82 Id.
84 See Weiss v. United States, 308 U.S. 321, 328 (“The Government correctly asserts that the main purpose of the Communications Act of 1934 was to extend the jurisdiction of the existing Radio Commission to embrace telegraph and telephone communications as well as those by radio.”).
85 Id.
87 Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375–76 (“Before 1927, the allocation of frequencies was left entirely to the private sector, and the result was chaos. It quickly became apparent that broadcast frequencies constituted a scarce resource whose use could be regulated and rationalized only by the Government. Without government control, the medium would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard.”).
88 See McDowell, Remarks at the Media Institute, supra note 60.
90 T. Barton Carter et al., The First Amendment and the Fifth Estate 183 (7th ed. 2008).
91 The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, 48 F.C.C.2d 1, 10 (1974).
“foundation stone of the American system of broadcasting.”\(^9^3\)
This report is generally regarded as the moment when the Doctrine took effect, lasting nearly four decades until it was abandoned in 1987.\(^9^4\)

The Supreme Court upheld the doctrine most famously in the 1969 Red Lion decision,\(^9^5\) finding lawful an FCC order to a radio station to provide a journalist who was attacked by a clergyman/commentator during the station's program an opportunity to respond on air.\(^9^6\) The Court based its decision on the scarcity principle, holding that because broadcast stations are limited in number by the electromagnetic spectrum, the government had the right to regulate them in the public interest.\(^9^7\) It added an additional reason a few years later: television and radio users constitute a “captive audience,” in that unlike newspaper readers who can actively flip through material and ignore articles and advertisements, broadcast audiences are subject to whatever content is transmitted over the finite number of stations at any given time and therefore have less choice.\(^9^8\) But the Court stated that constitutional questions would need to be revisited if the Doctrine ever proved to reduce diversity of opinion by stymieing speech rather than promoting a wide range of viewpoints.\(^9^9\)

In 1985, the FCC issued a report following a study of the Fairness Doctrine’s effects on broadcasters.\(^1^0^0\) The report found that the rule had a chilling effect on free speech by making broadcasters wary of airing views on many topics, and that it often inadvertently favored corporate interests at the expense of less-financed and less-organized citizen coalitions.\(^1^0^1\)

The FCC voted to abolish the Fairness Doctrine in 1987 for three main reasons: it allowed government to question the news judgments of broadcasters, threatening the First Amendment bulwark of a free press; it chilled speech, as broadcasters avoided airing controversial issues that would invite complaints; and finally, emerging technology (think cable

\(^9^3\) Id. at 1249.
\(^9^6\) Id. at 367.
\(^9^7\) Id.
\(^9^9\) Red Lion Broad. Co., 395 U.S. at 393 (“And if experience with the administration of those doctrines indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications.”).
\(^1^0^0\) Gen. Fairness Doctrine Obligations of Broad. Licensees, 102 F.C.C. 2d 142, 145 (1985).
\(^1^0^1\) Dominic E. Madworkdt, More Folly Than Fairness: The Fairness Doctrine, The First Amendment, and the Internet Age, 22 Regent U.L. Rev. 405, 419 (2010).
television) rendered the “scarcity” rationale of the court moot.\textsuperscript{102} The agency formally erased the policy from the Code of Federal Regulations in 2011.\textsuperscript{103} Yet in the interim, the issue was far from settled, a perennial flashpoint. Congress drafted legislation to statutorily reinstate the Doctrine at least three times during four presidential administrations following its demise, most recently within the Media Ownership Reform Act of 2005.\textsuperscript{104} In 2007, after several Democratic senators called for reinstatement of the Doctrine in an effort to curb the influence of conservative talk radio, the House of Representatives voted 309-115 to bar the FCC from bringing it back.\textsuperscript{105} But except for President Clinton, who lost control of Congress in 1994, and with it any hope of legislating the Fairness Doctrine, every chief executive from President Reagan to President Obama has publicly opposed it. Though he has remained mostly silent on the controversy, a recent pair of tweets\textsuperscript{106} from President Trump prompted some to speculate that he was calling for its return.\textsuperscript{107} During the campaign, candidate Trump seemed to disparage the Doctrine in linking it to net neutrality,\textsuperscript{108} a point of view discussed below.

The Fairness Doctrine remains a perennial issue. While prominent policymakers no longer call for it by name, many fear the objectives of the Doctrine are being pursued through other policies, such as localism. Localism involves a system of community advisory boards that monitor broadcast stations’ content and advise the FCC on whether to renew the stations’

\begin{footnotesize}
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\item \textsuperscript{102} Overbeck & Beimas, \textit{ supra} note \textsuperscript{1}.\textsuperscript{106}
\item \textsuperscript{106} Donald J. Trump (@realDonaldTrump), T\textit{WITTER} (Oct. 7, 2017, 7:00 AM), https://twitter.com/realdonaldtrump/status/916634286811435008 (“Late Night host are dealing with the Democrats for their very 'unfunny' & repetitive material, always anti-Trump! Should we get Equal Time?”); Donald J. Trump (@realDonaldTrump), T\textit{WITTER} (Oct. 7, 2017, 5:04 AM), https://twitter.com/realdonaldtrump/status/916635236238274561 (“More and more people are suggesting that Republicans (and me) should be given Equal Time on T.V. when you look at the one-sided coverage?”).
\item \textsuperscript{108} Donald J. Trump (@realDonaldTrump), T\textit{WITTER} (Nov. 12, 2014, 10:58 AM), https://twitter.com/realdonaldtrump/status/532608358508167168?lang=en (“Obama’s attack on the internet is another top down power grab. Net neutrality is the Fairness Doctrine. Will target conservative media.”).
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licenses, potentially compromising the stations' independence by pressuring them to please advisory board members. Then-Commissioner Pai was not alone in expressing concern that the FCC’s Critical Information Needs study was a move toward a renewed Fairness Doctrine.109 In December 2013, sixteen Republican members of the House Committee on Energy and Commerce sent then-FCC Chairman Wheeler a letter blasting the study as a “Fairness Doctrine 2.0.”110 Others allege that Fairness Doctrine proponents, smarting from recent legislative defeats, have backed off broadcast to pursue broadband.111 Commentators have regarded net neutrality with suspicion, questioning whether the FCC’s then-new policy could pave the way for future rules governing online political content.112 Senator Ted Cruz of Texas has called net neutrality “Obamacare for the Internet.”113 But is it a Fairness Doctrine for the Internet? The idea that net neutrality would be a means toward regulating online political speech has been met with widespread ridicule.

B. The Net Neutrality Debate Is Not Going Away, And Its Implications for Shaping Content Should Not Be Ignored

Most commentary concerning net neutrality deals with how ISPs transmit content, whether Title II, which is discussed below, is the proper framework for regulation, and the economics of net neutrality applied to producers and consumers of Internet service. But there has been a First Amendment aspect to the debate, and its ramifications for how net neutrality could influence online content should not be overlooked.

While the FCC has reversed course on net neutrality by effectively repealing the Open Internet Order, the latter remains important for at least two reasons. First, there is nothing to stop the FCC under a future administration from reprising net neutrality as official U.S. policy, and it is doubtful that its supporters will drop the issue any time soon. Democratic Senators recently introduced a resolution of disapproval under

109 See Pai, supra note 17 and accompanying text.
the Congressional Review Act to override the Restoring Internet Freedom order. Though one vote shy of the required 51 needed in the Senate and bereft of any chance it will pass the House or be signed by President Trump, the gesture sets up an election issue many Democrats see as a winning one. State attorneys general have announced lawsuits against the new order, while state lawmakers have introduced net neutrality legislation. Second, if net neutrality were to make a comeback, it could arrive in something very similar to the Open Internet Order. The latter was a product of trial and error, the FCC’s third attempt after losing twice to court challenges. Net neutrality could also open the door to, or be a step toward, platform, app, search and/or content neutrality.

If the substance of the Open Internet Order were to be reinstated by a future administration, the FCC would be the new referee of the Internet. While that may not affect users’ online experiences in the short term, it could have consequences for the Internet in the future. Net neutrality, a term coined by Tim Wu, a Columbia Law professor and advocate for greater government control of online political content, refers to the principle that ISPs must transmit all online content in a ‘neutral’ fashion. This means that ISPs cannot block content from reaching their users, cannot speed up or slow down content, or enter into “paid prioritization” arrangements with content providers to give them preferential treatment. Net neutrality supporters believe these rules will best protect users from potential abuses by ISPs. They seem to fear ISPs’ control over the Internet more than control by government. Net neutrality critics, by contrast, fear government intrusion into the Internet more than unfettered ISPs. They argue that FCC control of the Net will drive up

115 Id.
121 Id.
costs, stifle innovation, and perhaps compromise Internet speeds.\textsuperscript{122} Most of the public debate over net neutrality has been about its effects on the cost and quality of Internet service, and whether the free market or government regulation is better able to maximize the Internet’s potential while protecting its consumers. But Tribe and others have questioned the Order’s accordance with the First Amendment rights of ISPs.\textsuperscript{123}

The FCC attempted to promulgate net neutrality in a binding rule in 2014, but the U.S. Court of Appeals for the District of Columbia Circuit struck it down.\textsuperscript{124} The court held that the FCC lacked jurisdiction over the Internet because the medium was then classified under Title I of the Communications Act of 1934 as an information service.\textsuperscript{125} In March 2015, the FCC issued its Open Internet Order, which attempted to resolve its lack of authority by reclassifying the Internet as a telecommunications service covered under the Act.\textsuperscript{126} This essentially put the Internet on par with telephone networks and empowered the FCC to exert comparable oversight. Because many telephone regulations would be ill-suited if applied to the Web, the FCC exercised forbearance in issuing the Order by exempting the Internet from many of the Title II regulations applicable to telecommunications services, and instead applying only fourteen sections from Title II—at least at the time.\textsuperscript{127} In June 2016, the D.C. Circuit upheld the new order.\textsuperscript{128} Recently, however, the FCC voted 3-2 in favor of a proposed rule, “Restoring Internet Freedom,” that scraps the Open Internet Order altogether, or at least until a future administration reinstates it.\textsuperscript{129} Now published in final form, the order awaits approval by the Office of Management and Budget.\textsuperscript{130} Writing a day after Chairman Pai unveiled the proposed rule, Tim Wu predicted a court would strike it down, presumably because the rule lacked sufficient evidentiary support for such a significant departure from the Open Internet Order.\textsuperscript{131} In any case, these developments underscore an

\begin{itemize}
  \item Id.
  \item Tribe & Goldstein \textit{supra} note 56.
  \item Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014).
  \item Id. at 638.
  \item \textit{In re Protecting and Promoting the Open Internet}, 30 FCC Rcd. 5601, 5603 (2015).
  \item Id.
  \item U.S. Telecom Ass’n v. FCC, 825 F.3d 674 (D.C. Cir. 2016).
  \item \textit{In re Restoring Internet Freedom}, 32 FCC Rcd. 4434 (2017).
  \item Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 28, 2018) (to be codified at 47 C.F.R. pts. 1, 8, and 20).
underlying reality: that absent a Supreme Court ruling, the net neutrality debates will likely endure in perpetuity, perhaps as a political struggle played out every time a new president is elected.

In an era of media convergence, when TV, radio, print, and cable content are consolidated on the single medium of the Internet, it is at least plausible that Fairness Doctrine proponents would abandon the unsuccessful strategy of reimposing the rule on broadcast in order to pursue the much more enticing prospect of regulating political content on the Internet.\textsuperscript{132} Tech scholar Brent Skorup has drawn attention to Wu's own admission before Congress that Wu's ideal role for the FCC goes beyond that of a mere traffic cop monitoring transmission speeds: net neutrality is needed so that the FCC has the ability to shape "media policy, social policy, oversight of the political process, [and] issues of free speech."\textsuperscript{133}

Because the Open Internet Order granted the FCC greater purview over ISPs by reclassifying them as common carriers, it afforded the FCC the familiar rationale of regulating a public utility (broadband access) for a public good. This good may become even more "public" as government invests taxpayer resources in developing the nation's broadband infrastructure to promote access,\textsuperscript{134} as well as by reallocating broadcast frequencies for wireless broadband channels. As Rep. Marsha Blackburn, R-Tenn., Chairman of the House Committee on Energy and Commerce's Subcommittee on Communications and Technology, noted: "I've been very concerned about net neutrality turning out to be the Fairness Doctrine of the Internet, and having that applied to websites."\textsuperscript{135} She echoes observers' concerns that European Union advisory boards have called for a "Web fairness doctrine" requiring websites from those of small blogs to big news organizations to

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\textsuperscript{132} Thierer, supra note 112.
\textsuperscript{134} U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-751, TELECOMMUNICATIONS: BROADBAND DEVELOPMENT PLAN SHOULD INCLUDE PERFORMANCE GOALS AND MEASURES TO GUIDE FEDERAL INVESTMENT (2013).
\end{flushright}
post opposing viewpoints or face fines. That regulation of ISPs, entities that provide Internet access, could lead to regulation of “edge providers,” entities that provide online content and services, is a prospect mulled by many experts who see ISPs and edge providers as part of an inseparable virtuous-cycle ecosystem. Because the line between what constitutes a telecommunications service versus an information service is blurry, the FCC could parse the nature of the services offered by edge providers to eventually classify them as telecommunications services subject to Title II regulation. The intentions of the 2015 order’s drafters and their decision to exercise forbearance in applying other provisions of Title II would not bar a future FCC from going further. In doing so, they could affect the speech of edge providers. Former FCC Chairman Tom Wheeler reflects the view of many that such concerns are misplaced and that net neutrality would have little effect on Internet political speech. “This is no more a plan to regulate the Internet than the First Amendment is a plan to regulate free speech.”

In any event, developments in Europe, calls for regulation of online platforms, and protests of those suspended or banned from online services promise to keep net neutrality, platform neutrality, and their underlying First Amendment implications front and center in the public debate.

C. Whether the FCC Could Hatch a Fairness Doctrine 2.0 Depends on Both its Statutory and Constitutional Authority.

Judging whether critics of net neutrality are justified in their concern for free speech requires determining first whether the FCC could interpret its governing statutes as authorizing it to regulate the substance of content in addition to how it is transmitted, and whether it could regulate edge providers in addition to ISPs. Though it has been superseded, one could scour the 400-page Open Internet Order for express grounds to establish a web-based Fairness Doctrine, or for a rationale that could support a future content-based rule. If it does not, then the next question is whether that Order’s reclassification of the Internet from an information service to a telecommunications service, by itself, empowers the FCC more broadly to create a

137 Kovacs, supra note 63.
138 Id.
139 Id.
Fairness Doctrine down the road. Absent new telecommunications legislation, a future FCC would need both a statutory basis and an interpretation of that basis that passes constitutional muster.

III. ANALYSIS

A. The FCC Could Rely on a Reclassification of the Internet as a Title II Telecommunications Service, along with Authority Derived from Section 706 of the Telecommunications Act of 1996, as a Blueprint for Regulating the Content of Edge Providers in the Future.

In his statement dissenting from the 2015 Open Internet Order, then-Commissioner Pai warned that the rule “gives the FCC the power to micromanage virtually every aspect of how the Internet works.”141 If the Restoring Internet Freedom order is struck by a court or the Open Internet Order’s provisions are reinstated by a future FCC, the Commission will need to pass three tests before exercising any authority over edge providers or the content of online speech: it must act pursuant to a valid rule, properly derived from lawful statute, within the bounds of the Constitution. At first glance, the 2015 Order does not appear to govern edge providers or the substance of online content. It referred specifically to ISPs in the “last-mile” of Internet service, so it seemed to exclude edge providers from the ambit of its express provisions.142 While ISPs theoretically could, and often do, provide content at points of access (think start-up pages), the Order did not appear to include explicit expressive restrictions or requirements pertaining to ISPs. As part of its reclassification, the Order applied fourteen Title II sections to the Internet.143 But aside from proscribing “unjust and unreasonable” practices144 in the context of speeding up, slowing down, blocking, or entering into paid prioritization agreements with content providers, there is nothing spelled out in the Order that directly involves the FCC in regulating speech or expression.

But if there was a Trojan horse in the Order, it was the so-called “General Conduct Rule” which read as follows:

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143 Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5603.
144 Id. at 5726–27.
Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users’ ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers’ ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.\(^{145}\)

As possibly the most controversial provision of the Order, the General Conduct Rule drew criticism from both supporters and opponents of net neutrality.\(^{146}\) It purported to supplement three bright-line rules (no blocking, throttling, or paid prioritization) with a fourth and more flexible tool for preventing ISPs from engaging in unforeseen conduct deemed harmful to an “open” Internet.\(^{147}\) This rule was explained by reference to a list of seven “non-exhaustive” factors: (1) end-user control; (2) competitive effects; (3) consumer protection; (4) effects on innovation, investment, or broadband deployment; (5) free expression; (6) application on an agnostic basis (nondiscrimination against end-users); and (7) standard practices.\(^{148}\) Each factor was described in a short paragraph.\(^{149}\)

Given that one of seven factors was the impact on free speech and expression, at least one commentator asserted that the FCC could use the General Conduct Rule to decree something very close to the Fairness Doctrine: finding websites too one-sided as to threaten free speech by not providing sufficient coverage to contrary views.\(^{150}\) Even among those who did not go so far, critics complained that the rule created too much uncertainty.\(^{151}\) They argued that ISPs would be dissuaded

\(^{145}\) Id. at 5609.


\(^{147}\) Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5659–60.

\(^{148}\) Id. at 5661–64.

\(^{149}\) Id.


\(^{151}\) Seyukh, supra note 146.
from innovation and investment;\textsuperscript{152} companies with deep pockets\textsuperscript{153} and close ties to the Commission would have an unfair advantage,\textsuperscript{154} consumers would not know when they had a valid complaint,\textsuperscript{155} and the FCC would have a blank check to ban practices it did not like.\textsuperscript{156} Even then-Chairman Wheeler was unsure of the boundaries cabining the FCC’s new authority. When asked at a press conference to outline the General Conduct Rule’s parameters, he replied, “We don’t really know. We don’t know where things go next.”\textsuperscript{157}

The petitioners in \textit{United States Telecom} challenged the General Conduct Rule as unconstitutionally vague, but the D.C. Circuit was not persuaded.\textsuperscript{158} It found the seven factors and the paragraphs explaining them provided enough context to satisfy due process concerns, writing “we can never expect mathematical certainty from our language.”\textsuperscript{159}

It is possible, though not entirely probable, that a future FCC would rely on something very similar to the General Conduct Rule to police edge providers. Consider the language of the free expression factor:

Practices that threaten the use of the Internet as a platform for free expression would likely unreasonably interfere with or unreasonably disadvantage consumers’ and edge providers’ ability to use BIAS to communicate with each other, thereby causing harm to that ability. Further, such practices would dampen consumer demand for broadband services, disrupting the virtuous cycle, and harming end user and edge provider use of the Internet under the legal standard we set forth today.\textsuperscript{160}

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\item \textsuperscript{152} Corynne McSherry, \textit{Dear FCC: Rethink The Vague "General Conduct" Rule}, ELEC. FRONTIER FOUND. (Feb. 24, 2015), https://www.eff.org/deeplinks/2015/02/dear-fcc-rethink-those-vague-general-conduct-rules.
\item \textsuperscript{153} Allen Gibby, \textit{The Internet Conduct Rule Must Die}, TRUTH ON THE MARKET (May 18, 2017), https://truthonthemarket.com/2017/05/18/the-internet-conduct-rule-must-die/.
\item \textsuperscript{154} McSherry, supra note 152.
\item \textsuperscript{155} Seyukh, supra note 146.
\item \textsuperscript{156} Gibby, supra note 153.
\item \textsuperscript{158} U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 734–36 (D.C. Cir. 2016).
\item \textsuperscript{159} Id. at 736.
\item \textsuperscript{160} In re Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5663 (2015).
\end{itemize}
The sixth factor’s description also provides empowering language for a more activist FCC:

Application-agnostic (sometimes referred to as use-agnostic) practices likely do not cause an unreasonable interference or an unreasonable disadvantage to end users' or edge providers' ability to use BIAS to communicate with each other. Application-agnostic practices do not interfere with end users' choices about which content, applications, services, or devices to use, nor do they distort competition and unreasonably disadvantage certain edge providers. As such, they likely would not cause harm by unreasonably interfering with or disadvantaging end users or edge providers' ability to communicate using BIAS.161

While these provisions were crafted in the context of regulating ISPs, the positions expressed are similar to France’s Conseil National du Numérique’s rationale for implementing a policy of platform neutrality, which is set off in bold type in the commission’s report: "The goals behind the neutrality principle should also be factored into the development of digital platforms: while extremely useful and innovative, their growth must not be allowed to hamper the use of Internet as a forum for creation, free expression and the exchange of ideas."162

These factors suggest that online entities that prevent Internet users from transmitting and receiving the content of their choice could be in violation of the Order’s substance, illustrating that other types of neutrality are not as far removed as a cursory reading of the rule may indicate. The Order was directed at companies who provide access to the Internet, so a future FCC would likely need a more expansive rule to apply these conduct standards to platforms and other edge providers.

But a reclassification under Title II of the Communications Act of 1934 essentially makes ISPs common carriers that must act in the public interest. One prevailing interpretation is that ISPs are like public utility companies providing electricity.163 As such, they have been granted

161 Id. at 5663–64.  
government permission to harness and provide the public good of the Internet, and as a condition of such permission, they must adhere to government rules of conduct.\textsuperscript{164}

The common carrier interpretation carried the day with the D.C. Circuit.\textsuperscript{165} It found the Commission’s reclassification under Title II permissible and dismissed arguments that broadband service was distinguishable from other forms of common carriage.\textsuperscript{166} The court held that, like telephone and telegraph networks, ISPs facilitate a neutral platform for speech purposes.\textsuperscript{167} But it went on to acknowledge a hypothetical: ISPs that went beyond providing access to the entire Internet to instead offer less than “substantially all” websites would be engaging in content curation, thereby exercising First Amendment speech.\textsuperscript{168} Brent Skorup points out that this might actually encourage ISPs to engage in censorship or content discrimination in order to escape the ambit of what was in the Open Internet Order.\textsuperscript{169} Under those circumstances, the curating ISP would be cloaked with Section 230 of the Communications Decency Act,\textsuperscript{170} which Skorup notes is inconsistent with the Title II rationale that ISPs are mere conduits in the same way that telephone networks are.\textsuperscript{171} This suggests that at a minimum, net neutrality has the potential to shape content indirectly by encouraging ISPs to curate or restrict content, a form of indirect censorship. Recall that this was a criticism of the Fairness Doctrine—that stations would refuse to publish some content altogether to avoid running afoul of the FCC. Because profit-seeking companies will respond to popular preferences and pressure, ISPs would likely ban unpopular speech as part of any efforts at content curation. But unpopular speech is precisely the sort of speech the First Amendment was designed to protect.\textsuperscript{172}

Title II of the Communications Act of 1934 is not the only possible statutory justification for this paradigm. During the net neutrality debates, advocates differed over how the FCC was to respond to the D.C. Circuit’s 2014 decision\textsuperscript{173} denying

\begin{thebibliography}{99}
\bibitem{164} Id.
\bibitem{165} See U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016).
\bibitem{166} Id. at 740–42.
\bibitem{167} Id. at 742.
\bibitem{168} Id. at 743.
\bibitem{169} Skorup, \textit{supra} note 133.
\bibitem{170} 47 U.S.C. § 230(c) (2012).
\bibitem{171} Skorup, \textit{supra} note 133.
\bibitem{173} Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).
\end{thebibliography}
the agency’s second attempt at net neutrality. While most proponents saw Title II as the way forward, then-Chairman Wheeler favored two paragraphs from Section 706 of the Telecommunications Act of 1996 as the appropriate source of FCC authority. The Open Internet Order relied on both statutes.

Opponents of the rule argue the FCC could potentially wield much of the power it held over broadcast stations against ISPs by relying on Section 706. The section reads in pertinent part that the FCC:

Shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Such authority suggests, that at the very least, the FCC may rely on the public interest rationale that undergirded the Fairness Doctrine. Harold Feld, senior vice president of Public Knowledge, a nonprofit that supports net neutrality, said the FCC’s authority could even extend to edge providers who use the Internet to distribute their content. Judge Silberman of the U.S. Court of Appeals for the D.C. Circuit warned in the 2014 Verizon v. FCC decision that the FCC’s reclassification under Section 706 “would virtually free the Commission from its congressional tether” by giving it “virtually unlimited power to

176 In re Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5603 (2015).  
179 Reardon, supra note 177.
regulate the Internet.” Though the Order seems to rely more on Title II of the 1934 Act, Section 706 could provide additional cover for future FCC control of the Internet, and it might even prove more resilient in withstanding a court challenge.

In a sense, Title II reclassification relies on a public utility theory based on the duties of ISPs, while the 706 approach focuses on a public interest theory emphasizing the FCC’s responsibilities as a steward of the public good. While the Internet’s infrastructure is largely the product of private investment, one can regard the “ether” of the World Wide Web as a public good, perhaps even as public property justifying FCC regulation, albeit without it being a scarce resource in the same way the electromagnetic spectrum is.

That this public good or public property is a public forum is a short step from a statutory interpretation into a constitutional argument. Professor Dawn Nunziato laments the lack of truly public spaces on the Internet, arguing that the medium has become indispensable for the exercise of meaningful First Amendment rights. She surveys alternative views of First Amendment protection. The more widely recognized, and perhaps more generally accepted, view is that the First Amendment is a check against government encroachment on speech—that it enshrines a negative liberty. Another take regards the First Amendment as a positive right, as a facilitator of free speech. This view is reflected in the Supreme Court’s public forum doctrine, which holds the state responsible for setting aside public spaces where First Amendment rights can be exercised free of censorship. Nunizato argues that courts and policymakers must ensure that adequate public forums exist on the Internet. Professor Noah Zatz concurs, calling for government to play an active role not only in providing public forums, but in ensuring that the ever-expanding Web is organized in a way that achieves diversity of opinion.

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181 Though the Order imposes common carrier obligations on ISPs, it reflects the nascent view that providing Internet access is an essential public service.
183 Id. at 1117.
184 Id.
185 Id.
186 Id.
187 Id. at 1171.
related to a right of association, a Fourteenth Amendment Due Process protection most famously enunciated by the Supreme Court in *NAACP v. Alabama.*[^189^] Along this line of reasoning, individuals have a right to connect with one another online, in chat rooms, on social media, or on domain-name registered sites.

Indeed, these are exactly the arguments that Prager University makes in its lawsuit against YouTube.[^190^] Prager University is “a nonprofit that produces short educational videos from conservative perspectives,” usually featuring computer animations and a professor or expert who seeks to counter a popular liberal or media narrative.[^191^] More than three dozen Prager University videos have been placed in restricted mode within the last year, depriving the nonprofit of advertising revenue and of much of its targeted audience, university students.[^192^] In its complaint, Prager University makes a First Amendment claim, alleging that YouTube violated both its right to speak and its right to assemble within the public forum of the Internet.[^193^] It goes on to state that, because YouTube held itself out as a public forum on the Internet, it became a state actor in regulating speech on its site and engaged in viewpoint discrimination by censoring Prager University videos.[^194^] Such lawsuits are likely to be increasingly common so long as platforms censor or ban particular users based on their politics.

One need not subscribe to the public good or public forum view of the Internet to recognize that the public utility/common carrier rationale of the Title II approach suggests that ISPs are merely conduits of broadband service, not independent entities with the right to decide what content reaches their users. This directly conflicts with the view that ISPs are First Amendment speakers with the right to make editorial decisions about the content they transmit. Such an interpretation could invite the FCC (and perhaps the FEC) to ensure that ISPs engaging in content curation—and perhaps platforms and other edge providers—do not discriminate against certain speakers, setting up a fight over free speech.

[^192^]: *Id.*
[^193^]: See Complaint, supra note 190, at 35.
[^194^]: *Id.* at 32.
Former Chairman Wheeler stated in 2014 that while the Commission is not going to take over the Internet, it would not “abandon its responsibility to oversee that broadband networks operate in the public interest” and that it was “committed to maintaining our networks as conduits” “for channels of all of the forms of speech protected by the First Amendment.”

Though the implications of this pledge can be debated, the reference to the First Amendment portends a powder-keg of a controversy that may erupt in future net neutrality skirmishes, particularly if future commissioners have more ambitious regulatory goals.

Since the early days of dial-up service, prominent voices have called for government regulation of speech on the Internet. For example, Cass Sunstein challenged the very precept of the Web as a “marketplace of ideas,” arguing that democracy will be disserved by a free Internet, because users will seek only websites that reinforce their existing viewpoints. His solutions include taxpayer subsidized speech and rules that require websites to carry viewpoints opposed to the statements expressed on those sites.

Sunstein’s proposal raises the following question: What exactly would be regulated, and by whom? His policy prescriptions, along with those of other proponents of increased Internet content regulation like Professor Andrew Chin, have been directed at websites. Former FEC Commissioner Ravel’s proposed rules would apply to individual campaign websites and creations like videos. The Fairness Doctrine applied to radio and TV stations and their broadcasts, which principally entailed news and public access programming. But would an Internet Fairness Doctrine apply to all edge providers, every website, to news-focused websites, or only those of broadcast license holders that publish their TV or radio content online? Initially, the First Amendment-based net neutrality debates focused almost exclusively on ISPs, large companies that provide access to the content of individual websites. These companies include AT&T, Comcast, Cox, Verizon, and Spectrum. The Open Internet Order specifically


197 Id. at 1798–99.


199 See Statement of Vice Chair Ann M. Ravel Encouraging Public Comments, supra note 10.

200 See Matthews, supra note 69 (providing an explanation of the Fairness Doctrine).
referred to Broadband Internet Access Service (BIAS).\textsuperscript{201} Aside from access to simple websites, ISPs provide access to content-providing companies like Amazon and Netflix that create and/or distribute videos and programs.\textsuperscript{202} Many ISPs are also content providers. For instance, Comcast owns NBCUniversal and delivers TV shows, news, and movies through its Xfinity Internet service.\textsuperscript{203}

Today, however, it is large platforms, not ISPs, that are drawing ire from tech observers and regulators, and not just because of their anticompetitive behavior. During a one-month span in 2017, Google (along with Apple) banned the social media app Gab from its Android app store, because it did not censor its users’ speech\textsuperscript{204} and was alleged to be a haven for the alt-right.\textsuperscript{205} It demonetized several videos it considered too controversial, and it threatened to ban publishers from using its advertising services for violating Google’s ban on hate speech.\textsuperscript{206} As Professor Adam Candeub noted, “Android and Apple’s mobile app stores often practice political censorship, as have domain name and website hosting services. Kicking a website off its domain name or excluding an app from all [j]Phones restricts content creators far more than any ISP could.”\textsuperscript{207} Chairman Pai, who agrees with this assessment of the power/influence differential, recently wrote that there are questions worth raising about Silicon Valley companies’ lack of transparency in the way they manage content.\textsuperscript{208}

A challenge to any future FCC rule establishing some form of an Internet Fairness Doctrine would invite the Supreme Court to establish whether content regulations on the Internet are constitutional, and in answering this question, might

\textsuperscript{201} In re Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5609–10 (2015).

\textsuperscript{202} Mike Snider, Roger Yu & Emily Brown, What is Net Neutrality and What Does it Mean for Me?, USA TODAY (Feb. 27, 2015, 8:04 PM), http://www.usatoday.com/story/tech/2015/02/24/net-neutrality-what-is-it-mean-for-me/23237737/.

\textsuperscript{203} Id.


\textsuperscript{206} See Singer, supra note 204.


establish whether ISPs are speakers for First Amendment purposes. The latter would have implications for net neutrality, as this was a key argument made by Verizon in its 2014 case. But the Court might also be faced with the constitutional status of platforms and individual websites, as well as for web-based entities somewhere in between, such as open-source software, search engines, browsers like Mozilla’s Firefox, and digital-media services like Apple’s iTunes. This raises three questions: (1) Would a Fairness Doctrine or some form of FCC content regulation be desirable?; (2) Would it be feasible?; and (3) Would it be constitutional?

B. The FCC Should Refrain from Regulating Political Speech on the Net

The first question is a normative one: Should the FCC exert greater influence over the Internet’s political content? For the same reasons listed in the 1985 report on the Fairness Doctrine, the answer is no.209 Most importantly, not only was the Fairness Doctrine unsuccessful in promoting a variety of opinion, but it actually had the opposite effect of hindering diverse viewpoints.210 The Commission found that by 1985, the “multiplicity of voices in the marketplace” did a better job of giving audiences a wide range of issue perspectives than the Doctrine ever did.211 Today, cable and the Internet have multiplied this ‘multiplicity of viewpoints’ many-fold beyond what the 1985 Commission could have envisioned. Secondly, the Commission decided that the Doctrine intruded too far into the journalistic freedom of broadcasters.212

Finally, the potential for abuse by the Fairness Doctrine is hard to ignore. Former Commissioner McDowell cites the scholarship of former CBS News president and former Columbia University professor Fred Friendly in arguing that both Democratic and Republican presidential administrations have viewed the Fairness Doctrine as a potential political weapon.213 Gearing up for his reelection against Senator Barry Goldwater, and chagrined by talk radio opposition to his Nuclear Test Ban Treaty, President Kennedy directed aides to


210 See id. at 147 (“[W]e find that the fairness doctrine, in operation, actually inhibits the presentation of controversial issues of public importance to the detriment of the public and in degradation of the editorial prerogatives of broadcast journalists.”).

211 Id.

212 Id. at 148.

213 McDowell, Remarks at the Media Institute, supra note 60 (discussing Fred Friendly’s The Good Guys, The Bad Guys and the First Amendment).
leverage the FCC against stations critical of his policy.\textsuperscript{214} This involved an Administration operative listening to broadcasts in the basement of his Bethesda home, tape recording programming, and demanding transcripts from the stations.\textsuperscript{215} Later, the Democratic National Committee provided kits for left-leaning advocacy groups to “harass” radio stations with threats of Fairness Doctrine litigation into providing airtime to respond.\textsuperscript{216} Such an artifice would not be lost on the Nixon Administration.\textsuperscript{217} Officials who were later implicated in the Watergate cover-up referred to the Red Lion-bulwarked Fairness Doctrine as a way to “eliminate once and for all” programs critical of the Administration.\textsuperscript{218} Imagine future presidents resorting to a reprised Fairness Doctrine to undermine the opposition party by discouraging ISPs or websites from discussing political issues lest they be sued or fined.

\textbf{C. Several Approaches to Regulating Political Speech Online Have Been Proposed, But Each is Problematic, Making Such Regulation a Bad Idea}

If some form of a Fairness Doctrine were to be implemented online, at least two questions would need to be answered. First, to what would the policy apply: ISPs and edge providers alike? Second, what requirements or restrictions would it entail, a simple ban on censoring content or an affirmative duty to offer opposing viewpoints?

To avoid confusion in terminology, it must be acknowledged that net neutrality discussions frequently focus on the dichotomy of what is often called “content neutrality” and “packet neutrality.”\textsuperscript{219} Used in this sense, “content neutrality” has a viewpoint neutral connotation and instead means requiring ISPs to treat categories of data the same (videos, emails, audio clips, etc.) without discriminating within those categories based on the opinions or substance expressed, while packet neutrality means treating all categories of data the same.\textsuperscript{220} This section discusses “content” in terms of the substance of what is conveyed rather than referring to file types or categories of data.

\begin{itemize}
\item \textsuperscript{214} Fred W. Friendly, The Good Guys, The Bad Guys and The First Amendment 32–33 (1976).
\item \textsuperscript{215} Id. at 35.
\item \textsuperscript{216} Id.
\item \textsuperscript{217} Id. at 131.
\item \textsuperscript{218} Id.
\item \textsuperscript{220} Id. at 13–14.
\end{itemize}
The dichotomy between ISPs that provide connection to the Internet and edge providers that supply the content of the Net is not entirely clear-cut. Line drawing is difficult, as almost all ISPs provide sponsored content on start-up pages or through software or web-based tools, thereby engaging in some form of content curation. “Edge providers” run the gamut from powerful social media platforms like Facebook to simple webpages. Policymakers would first need to decide what to regulate.

One rationale for regulating ISPs is the noncompetitive nature of the telecommunications industry in most markets. Seventy-five percent of the public has only one choice of broadband provider. In contrast, a user blocked by Google can theoretically select a rival service. But is there really another search engine on par? There certainly is no comparable alternative to Facebook and Twitter, and an app booted from both the Apple and Google Play stores is effectively doomed. This suggests regulators might focus on entities with disproportionate control, influence, or market share. This might be something akin to an antitrust approach to policymaking and enforcement; albeit one focused on issues of speech and expression and less on economics and innovation. One must be mindful of the distinction between regulating based on First Amendment values and regulating based on antitrust concerns, as there are different considerations involved. The latter is a topic unto itself and not the subject of this Article. Here also, whether from an antitrust or free speech focus, line drawing is a fraught issue.

If Congress and/or the FCC were to heed calls for platform regulation, it is possible policymakers could adopt the definition “interactive computer service” from Section 230 of the Communications Decency Act as its standard. This would give it broad authority to regulate ISPs, platforms, and perhaps smaller entities. This standard would help define the principal actors by capturing the major online entities and essentially reverse Section 230 in a principal way: it would remove platforms’ immunity and subject them to liability for their curation choices. Enforcement discretion could fill in gaps.

221 Bode, supra note 68.
222 Id.
223 See Singer, supra note 204.
224 47 U.S.C. § 230(f)(2) (2012) (“The term ‘interactive computer service’ means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.”).
The FCC (and perhaps even the FEC in regard to campaigns and elections) would then need to flesh out a new Fairness Doctrine. The more modest and incremental approach would be to prohibit major platforms from censoring speech, essentially imposing common carrier duties on them. As Professor Candeub notes, the Supreme Court has defined a “common carrier” as a “company that makes a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing.” The FCC could rely on Title II net neutrality principles as legal justification to extend common carrier principles from ISPs to edge providers. Social media companies often hold themselves out as de facto common carriers by describing themselves in terms similar to the Court’s definition. Candeub points to Twitter’s mission statement, which is to “[g]ive everyone the power to create and share ideas and information instantly, without barriers.” Aggrieved parties who are suspended or banned could then call Twitter’s bluff.

The more sweeping alternative would be to establish an affirmative duty to carry content that expresses opposing views. This would be more in the spirit of the Fairness Doctrine that governed television and radio. Aside from an obligation to carry all content transmitted by users, certain entities, like platforms or chief news sources, would have a duty to actively curate content from varying perspectives. Not only could they not refuse to carry certain speech, but they would also be required to promote content that might not otherwise have reached their platforms or websites. However, a Fairness Doctrine of this persuasion would arguably have less legal support or precedent than a Title II-inspired common carrier regime that merely restricted censorship. Establishing a balanced content requirement would also pose greater problems of administration.

If ISPs or edge providers were subject to a Fairness Doctrine that required them to provide “balanced content,” they would face a technically daunting task due to the decoupling between transmission and content. Unlike

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225 See Candeub, supra note 207.
227 See Candeub, supra note 207.
228 Id.
229 Id.
231 See Leonhardt, supra note 219, at 9.
broadcast stations which control both the transmission and content of what they produce, ISPs mostly transmit others’ content, and by connecting users to the Internet, grant them access to other ISPs over which they have no control. This would seem to provide a rationale for a Fairness Doctrine that applied only to individual websites. Individual websites, like broadcast stations, create their own content, and would thus seemingly bear greater responsibility for providing balanced political discussion. Somewhere in the middle lie many larger platforms, like Facebook. These platforms provide their own content, but they also rely on algorithms to generate personalized content based on the browsing behavior of their end-users. The values of public forum doctrine for speakers on the Net could conflict with the right of users to remain in their own echo chambers. Thus, the question of what to regulate again evades an easy answer.

Several models have been floated, many dating back to the years when America Online reigned. Academic Andrew Chin has proposed must-carry regulations for the most popular websites, determined by the number of hits over a given period, perhaps weekly. The most popular sites would be required to reserve space for websites participating in a voluntary public exchange. This exchange would consist of websites that agree to post links to one another’s sites based on an automated, rotating basis. Chin argues this would be a content-neutral regulation that could survive the tier of intermediate scrutiny applied by the Supreme Court to the medium of cable TV in Turner, in which the Court upheld must-carry rules on cable companies. Of course, Chin’s system favors some content by default, as it is likely that only less-popular sites would participate in the exchange to increase visits to their pages. Such must-carry regulations would disproportionately direct Web traffic to these less popular Web pages than they would receive in the absence of being featured on the exchange. One question is how the FCC or other regulatory body would successfully monitor such traffic. Sunstein has also argued for must-carry provisions in addition to public funding for the posting of contrary viewpoints. Professor Noah Zatz envisions a system in which any party that wants to offer an

232 Id.
234 Id. at 330.
235 Id. at 311.
236 Id.
237 See Turner Broad. Sys. v. FCC, 520 U.S. 180, 185, 224–25 (1997); see also discussion infra Part III.D.
238 Sunstein, supra note 196, at 1780.
opposing view to an existing webpage can petition a government agency like the FCC or an authorized third party to encode a pop-up window or additional browser tab into the Web page’s code. The argument is that this would not impact the First Amendment rights of the Web page owner or operator, because it would not change the page at all, but merely trigger an additional tab to appear in the site visitor’s browser. This would address the concerns of those like Nunziato who argue that online public forums often must be “interstitial” to be meaningful.

Of course, the administrative feasibility of an agency responding to an incalculable number of requests for individual Web page encoding, for an ever-expanding Internet, seems doubtful. Even if a third party contracted for this work in a public-private partnership, the FCC or some agency would still need to conduct effective oversight. Zatz’s proposal seems dated given how much the Internet has developed in the last two decades.

More modern proposals include those of Public Knowledge Vice President Harold Feld to develop different rules for different entities. Building on a concept of a “right to reach an audience” through major search engines, Professor Jennifer Chandler has proposed mandates that search engines publicly disclose how they index and rank search results. She contends that search engines should be required to publicly list any websites they exclude from searches, along with advertisements or results that the search engines receive payment for. Like then-Senator Franken, D-Minn., Professor Pasquale has called for a more expansive definition of net neutrality, pushing “neutrality beyond the ‘pipes’ of the internet, to hardware, critical software, dominant search engines, social networks, and apps.” This reflects a prevalent

239 Zatz, supra note 188, at 210–12.
240 Id.
241 Nunziato, supra note 182, at 1148. Building on Zatz’s thematic analogy of “Sidewalks in Cyberspace,” Nunziato offers the example of protestors using a sidewalk outside a company’s headquarters to protest its employment practices: without the sidewalk or an area nearby, the protesters could not effectively address the subject of their speech. Id.
244 Id.
245 Franken, supra note 35.
246 Pasquale, supra note 67, at 498.
European perspective delineated by the French advisory commission Conseil National du Numérique in its national report on platform neutrality.\textsuperscript{247} Identifying Apple, Amazon, Expedia, Facebook, Google, Microsoft, Netflix, Twitter, and Yahoo! as examples, the commission calls for disclosure requirements on the companies’ content-management systems, such as the workings of their algorithms.\textsuperscript{248} It urges development of “interventions and penalties,”\textsuperscript{249} establishment of “neutrality rating agencies,”\textsuperscript{250} and legal remedies for aggrieved users.\textsuperscript{251} In perhaps its most activist language, the commission echoes Chandler’s invocation of a “right to reach an audience”\textsuperscript{252} by arguing for neutrality that both protects the liberty to speak, and advances an “offensive angle aimed at developing user power in the long term, promoting economic and social progress.”\textsuperscript{253} If the commission means empowering users by ensuring their voices would be heard in a balanced public forum, this sounds a lot like a Fairness Doctrine for the Twenty-first Century. It is also possible that either the FEC or FCC could resort to a variation of the filtering software already being applied to 95 percent of citizens’ content in the United Kingdom, a development that amounts to prior restraint.\textsuperscript{254} Rather than censoring content outright, the software could be used to flag content for fairness concerns.

The common thread among these proposals is the dual problem of line-drawing and administrability. As former Commissioner McDowell points out, the FCC simply does not have enough staff to scrutinize the countless editorial choices made by ISPs, platforms, and websites every day.\textsuperscript{255} Even if it did, it would be forced to analyze public affairs issues of varying novelty and complexity to determine the contrasting viewpoints on any given issue (often more than a binary choice between opposing sides).\textsuperscript{256} It would need to decide who should present those opposing views, as well as when and how they should be presented.\textsuperscript{257} Although technically complying with the requirement of providing balanced perspectives, “interactive

\textsuperscript{247} Conseil National du Numérique, supra note 162.
\textsuperscript{248} Id. at 4–5.
\textsuperscript{249} Id. at 7.
\textsuperscript{250} Id.
\textsuperscript{251} Id. at 8.
\textsuperscript{252} See Chandler, supra note 243, at 1098.
\textsuperscript{253} Conseil National du Numérique, supra note 162, at 6.
\textsuperscript{255} McDowell, Remarks at the Media Institute, supra note 60, at 9.
\textsuperscript{256} Id.
\textsuperscript{257} Id.
computer services” if we borrowed the Section 230 definition,\textsuperscript{258} could present extreme positions that distort viewpoints, make opposing perspectives seem ridiculous, or create “straw man” arguments.\textsuperscript{259}

Perhaps the most promising is Hal Singer’s answer to the problem inherent in applying antitrust remedies to free speech challenges.\textsuperscript{260} Singer argues that antitrust agencies may overlook Internet developments, like effects on speech or content, that are not reflected in price or other market variables.\textsuperscript{261} He also argues that the consumer-welfare standard that plaintiffs must satisfy in antitrust cases to recover is too high to make lawsuits practical, because it is difficult to prove the concrete harm required for standing.\textsuperscript{262} Finally, he contends that the slow pace of lawsuits is ill-suited to the rapidly evolving ecosystem of the Internet.\textsuperscript{263}

Singer proposes a tribunal loosely modeled after the one used to adjudicate discrimination complaints under the Cable Television Consumer Protection and Competition Act of 1992.\textsuperscript{264} However, unlike the tribunal under the Cable Act, which was overseen by the FCC, Singer’s body would function like an Article I court, independent of the agency’s influence.\textsuperscript{265} While it would serve an antitrust function, “there is no reason why the tribunal could not accommodate complaints against dominant Internet intermediaries, such as Google and Facebook.”\textsuperscript{266} This would be a complaint-based system of regulation, which would depend on private-party-initiated litigation to bring the conduct of online entities to regulators’ attention.

However, the potential for incessant litigation, unfairness in levying penalties among Internet entities, and the prospect of constitutional infringement all caution against the FCC enforcing such a doctrine.

A more modest proposal would be for the government to provide its own versions of search engines, platforms, and directories in line with public access stations on local radio and

\textsuperscript{259} McDowell, Remarks at the Media Institute, supra note 60, at 10.
\textsuperscript{261} See id.
\textsuperscript{262} See id. at 2, 6.
\textsuperscript{263} Id. at 2.
\textsuperscript{265} Singer, supra note 260, at 2.
\textsuperscript{266} Id. at 3.
TV, and in the same spirit of such long-held, widespread agreement as that of supporting public libraries for books and postal subsidies for newspapers.\footnote{Chin, supra note 198, at 329–30.} Government subsidizes public broadcast stations PBS (TV) and NPR (radio), so perhaps it could do likewise for an Internet platform. Of course, that could result, at least to some degree, in government making its own decisions about which speech to carry. It is also doubtful that government would create platforms that are comparable to entities like Google and Facebook in popularity or influence. There is a reason why the “invisible hand” of a market-oriented Internet has thrived without heavy-handed regulation for more than two decades: no government agency could possibly regulate speech efficiently or fairly across so vast a dimension. While there might be some merit in these proposals, regulators should proceed cautiously given the potential for unintended consequences and the government’s difficulty in keeping abreast of the rapidly developing Internet.

\textit{D. Courts Would Likely Strike Down Any Attempt by the FCC to Regulate Political Speech on the Internet as an Unconstitutional Infringement of First Amendment Protection}

Irrespective of the wisdom in a Fairness Doctrine for the Internet, the FCC’s authority would likely be challenged as to whether it is properly derived from Title II of the Communications Act of 1934 and/or Section 706 of the Telecommunications Act of 1996. If the answer to this administrative law inquiry was yes, then a revived Fairness Doctrine would likely invite the Supreme Court to decide whether FCC regulation of Internet content violates the First Amendment. In doing so, its ruling would potentially have consequences for any FEC attempt to regulate online campaign speech beyond what it does now. Both proponents and opponents of government regulation of political speech can draw encouragement from the absence of any single, all-encompassing guideline as to the emerging medium of the Internet. Both sides can make plausible arguments from scattered case law.

Generally, content-based laws are presumptively unconstitutional and can only be upheld if the government proves they are narrowly tailored to serve compelling state interests.\footnote{Reed v. Town of Gilbert, 135 S. Ct. 2218, 2222 (2015).} In reviewing content-based laws, courts are to apply the highest level or “tier” of judicial review: strict scrutiny.\footnote{Gregory Maggs & Peter Smith, Constitutional Law: A Contemporary Approach, 929 (3d ed. 2015).}
Strict scrutiny is distinguished from less-searching forms of judicial review, like rational basis review and intermediate scrutiny, by two requirements that a law must meet: (1) it must be necessary to serve a “compelling” state interest and (2) it must be “narrowly drawn” to achieve that interest.\textsuperscript{270} Still, the court has not treated all communications media the same, affording some more protections than others. As Justice Jackson observed, “The moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each, in my view, is a law unto itself.”\textsuperscript{271} Thus, it is difficult to say conclusively what the Court may decide for the Internet.

As discussed above, the Court has upheld FCC regulation of broadcast content based on the scarcity\textsuperscript{272} and captive audience\textsuperscript{273} rationales: There are only so many TV and radio stations, and people are forced to watch or listen to whatever comes across those channels. While suggesting broadcast stations were speakers for First Amendment purposes, the Court essentially held that their First Amendment rights could be curtailed in the public interest, e.g. for the sake of the broadcast medium. But the Court has not stopped at allowing government regulation of broadcast stations for the sake of the broadcast medium. It has done so for the sake of the stations themselves. While conceding that cable programmers and cable operators are likewise speakers entitled to First Amendment protection,\textsuperscript{274} the Court has upheld FCC must-carry provisions that require cable companies to include broadcast TV channels in their packages to keep broadcast stations from going out of business.\textsuperscript{275} Despite emergent technologies like cable, the Court held that broadcast was still “demonstrably a principal source of information and entertainment for a great part of the Nation's population.”\textsuperscript{276} It found that an important government interest justified must-carry rules, namely “promoting the widespread dissemination of information from a multiplicity of sources.”\textsuperscript{277} With broadcast media being transferred to the Internet, would a similar rationale extend FCC regulation to license holders of the wireless broadband spectrum, emboldening the agency to impose must-carry rules or a Fairness Doctrine of some form?

\textsuperscript{270} Id.
\textsuperscript{271} Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).
\textsuperscript{276} Id. at 190.
\textsuperscript{277} Id. at 189.
When the must-carry cable TV issue was first before the Court, it distinguished the medium from content-based rules on newspapers addressed in Miami Herald Publishing Co. v. Tornillo, holding that cable providers play a “bottleneck,” “gatekeeper” function in terms of providing subscribers access in the home. Given that cable providers have control over such a “critical pathway of communication” and can silence the speech of others with a “mere flick of the switch,” government was justified in treating them differently. Thus, regulation of cable triggered only intermediate scrutiny. If the issue were before the Court today, would the contemporary ISP that provides cable/Internet access to consumers fare likewise? What about dominant platforms?

Professor Noah Zatz argues that they should. Zatz urges application of public forum doctrine, calling for government to address the issue of Internet access bottlenecks by designating areas of the Internet as public forums and actively structuring the Web in a way that achieves viewpoint diversity. There are no doubt parallels among cable television providers, ISPs, and large platforms. Lawsuits, like the one filed by Prager University, advocate for a more scoping interpretation of public forum doctrine that encompasses online platforms. The scholarship of Zatz and Nunziato has become the substance of litigation.

There is reason to suspect that the Court’s view on the issue is evolving. Jeremy Carl and Professor Mark Grabowski point to Packingham v. North Carolina. There, the Court unanimously decided that a North Carolina law barring registered sex offenders from accessing social media violated

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278 Turner Broad. Sys., 512 U.S. at 656.
279 Id. at 656–57.
280 Id. at 657.
281 Zatz, supra note 188, at 206–07.
282 Id. at 210–12.
284 Zatz, supra note 188.
285 Nunziato, supra notes 182, 254.
286 See Complaint, supra note 190.
287 Carl, supra note 31.
the First Amendment. Recognizing this was the first case taken by the Court “to address the relationship between the First Amendment and the modern Internet,” Justice Kennedy wrote that social media “websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.” While it may be tempting to read the holding striking down a flawed statute too broadly, the case is certainly fodder for champions of a robust public forum doctrine. Grabowski also notes an implication when the case is read alongside the Court’s holding in *Pruneyard Shopping Center v. Robins.* The decision in the latter case affirmed that state constitutions could go further than the Bill of Rights in protecting a right to speak, so long as they do not violate other provisions of the U.S Constitution. It upheld a California Supreme Court decision that extended public forum doctrine to a private shopping mall. Rejecting a First Amendment claim that the shopping mall’s owner was being forced to carry the speech of students who were trying to get petition signatures on the premises, the Court distinguished the mall owner from the newspaper editor in *Tornillo,* holding that while an editor would be liable under the statute in that case for the content of what was published in his newspaper, the owner would not be identified with, nor responsible for, the expressive activities of the mall-going students. As Grabowski recognizes, today’s students would post a petition on social media, now arguably more critical as a public forum than a shopping mall was to the California Supreme Court, and the Golden State, where most—if not all—Silicon Valley companies reside, might require these private companies to make their forums public. As California goes so goes the nation? Its legislature, like those of other states, is considering bills to make net neutrality state policy. Whatever happens in court with the FCC over the issue of preemption, it could move for other types of neutrality. Advocates for a right to speak in the Internet’s dominant public forums voice the First Amendment theory that freedom of

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290 Id. at 1732.
291 Id. at 1737.
292 Grabowski, supra note 288.
293 447 U.S. 74 (1980).
294 Id. at 81.
295 Id. at 79.
296 Id. at 88.
297 Grabowski, supra note 288.
299 Grabowski, supra note 288.
300 Kang, supra note 117.
speech executes a truth-seeking function by fostering a “marketplace of ideas.”

On the other hand, in Reno v. ACLU, the Court affirmed singular protection for the Internet as a medium “of unlimited, low-cost capacity for communication of all kinds” in striking down an anti-indecency law, despite the much lesser protection afforded to obscenity than other categories of speech. The Court held that the captive audience rationale behind regulating broadcast stations was inapplicable because Internet users must take affirmative steps to access content and seldom arrive at a given web page by accident. This suggests that a core rationale for broadcast regulation could not be invoked in favor of an Internet Fairness Doctrine.

Print media, such as newspapers and magazines, enjoy the strongest First Amendment protection, as the Court struck down a must-carry-analogous statute that required newspapers to provide political candidates free space to respond to editorial criticism in Tornillo. Because the Fairness Doctrine has hitherto applied only to television and radio stations, the Court would need to determine whether ISPs, platforms, websites, and perhaps everything in between, are more like radio and television stations, as in Red Lion, or more like newspapers or magazines, as in Tornillo. While the Court relied on the rationale of spectrum scarcity in the former case and not in the latter, suggesting that while there are only so many radio frequencies, there is enough tree pulp for anyone to publish a newspaper or pamphlet, an alternative argument is that there are far more broadcast stations in certain areas of the country than there are viable newspapers. The year Tornillo was decided, the newspaper at issue, the Miami Herald, had a circulation of 396,797 and was the regional print hegemon. The six radio stations and three television stations in the same area had much more to fear from competition than the Herald, a virtual monopoly in the region. Practically speaking, the effect on the public is the same. In a time of media consolidation that threatens to reduce the number of major ISPs, could a similar rationale be extended to regulate how Spectrum and AT&T—

301 MAGGS & SMITH, supra note 269, at 928.
303 Id. at 870.
304 Id. at 867.
306 FRIENDLY, supra note 214, at 195–96.
307 Id. at 196 (citing an internal audit of the Miami Herald from July 1, 1974 to June 30, 1975).
308 Id.
309 Id.
who often have monopolies in particular markets—provide Internet content to consumers?

That the modern Internet aggregates content from radio, broadcast television, cable television, and print media onto a single platform only underscores the uncertainty around this question.310 The traditional view of the First Amendment is that it is a restriction on government interference with speech and does not apply to the decisions of private actors as to whether to create speech or carry the speech of others.311 The use of “the,” a definite article before “freedom of speech” in the First Amendment,312 lends support to the view that the freedom had a specific meaning and scope that predated the Constitution.313 Constitutional experts note314 Justice Scalia’s take that, the “core abuse” the First Amendment guarded against was “the scheme of licensing laws implemented by the monarch and Parliament to contain the evils of the printing press in 16th- and 17th-century England.”315 Under Professor Tribe’s views, ISPs are like newspapers with a right to exclude speech:

The Constitution applies equally even outside traditional print or electronic media, so that, for example, the government cannot require an individual to open his doors and turn his home into a forum for protesters. Further, like a newspaper, a BSP [ISP] has a limited capacity to distribute information and accordingly enjoys the right to decide how to apportion that space. And as noted, BSPs make decisions about the delivery of particular content as they continue to innovate in the products, services, and business models they employ.316

For constitutional purposes, is there a distinction between ISPs that provide access to the Internet, like Comcast and Verizon; platforms, like Google and Apple that provide services once connected to the Net; and individual websites like

312 U.S. CONST. amend. I.
313 Maggs & Smith, supra note 269, at 926.
314 Id. at 927.
316 Tribe & Goldstein, supra note 56, at 3.
CNN and Drudge Report that provide content? Would an Internet Fairness Doctrine apply to all three categories? ISPs, search engines, and news sites all provide links to other webpages. And in choosing which links to include on their interface, they make expressive choices about which speech to convey. In one sense, they are no different than more traditional ‘speakers’ like newspapers, books, and pamphlets in quoting, citing, or referring to other speakers. On the other hand, they provide a direct, immediate connection to these other speakers through publicly available hyperlinks, essentially providing a public forum consistent with the Zatz school of thought that subjects them to some modicum of government regulation. An Internet Fairness Doctrine becomes more tenable under Title II when the Web is viewed as a public good or public forum. However, these web-based entities make editorial decisions about which speech to transmit, making them more like broadcast stations and newspapers, and less like mere common carriers or conduits for the speech of others.

It is for just this reason that the Court would likely strike down content-based regulations as unconstitutional. Recall that in Red Lion, the Court based its decision on spectrum scarcity while reserving the option of reevaluating the Fairness Doctrine if conditions changed or it proved counterproductive in promoting viewpoint diversity. Today, the Red Lion Court would barely recognize the media landscape and could hardly fault it for failing to provide a robust exchange of conflicting opinion. That proponents of a reprised Fairness Doctrine or government regulation of online content mean well is of no import. “Innocent motives do not eliminate the danger” that laws created for a benign purpose may one day be used to censor.

IV. CONCLUSION

Whether the Fairness Doctrine is restored in familiar form or incorporated into new Internet policy, the debate over government’s role in regulating online political speech will likely continue. Though the specter of net neutrality that roiled fears of a more interventionist FCC has been rolled back, the Open Internet Order was neither necessary nor sufficient for a new regulatory regime. As the goings-on of the FEC have illustrated, proponents of a more activist government in shaping

317 See Chin, supra note 198, at 311.
318 See generally Zatz, supra note 188.
Internet content have multiple ends, and multiple means for achieving such policy goals. If anything, frustration over the state of campaign finance law, both online and offline; political censorship on platforms; fake news, extremism and even crime like sex trafficking, have galvanized academics, policymakers, and politicians toward exploring different approaches to the prevailing hands-off policy that is the legacy of the modern Internet.

But the Fairness Doctrine provides a cautionary tale of unintended consequences. It rested on a shaky constitutional promontory that has since been swept away by a new tide of technology. Though noble in purpose, its aims and means are ill suited to today’s Internet, and policymakers should take note. For the foregoing reasons, greater regulation of Internet political content will chill free speech, prove impractical to implement as a policy matter, and ultimately, is likely to be ruled unconstitutional.
THE FREE PRESS AND NATIONAL SECURITY:
RENEWING THE CASE FOR A FEDERAL SHIELD LAW

Alan Wehbé

ABSTRACT

Freedom of the press is a cherished freedom enshrined in the First Amendment and upheld in myriad contexts. However, under the prevailing case law and without a federal shield law, the executive branch may be able to “annex the journalistic profession as an investigative arm of government” to reveal its ‘confidential’ sources as aid to prosecution. This would serve to chill the freedom of the press and conflicts with the spirit of the First Amendment. In many cases, courts have failed to extend the common law to such protection. The legislative branch should step in to make such protection clear. For example, in the field of national security, where the stakes are so high, the Government utilizes federal laws, such as the Espionage Act, to prosecute so state shield laws provide inconsistent and insufficient protection against federal prosecution. The case for a federal shield law is heightened in the matters of national security, which is different and where, arguably, the stakes are higher. Based upon the aforementioned discussion, this Article reinvigorates the argument in favor of a federal reporter’s shield law, specifically implemented as an evidentiary privilege under the Federal Rules of Evidence.

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THE FREE PRESS AND NATIONAL SECURITY:
RENEWING THE CASE FOR A FEDERAL SHIELD LAW

By sunset on August 13, 2017, after a day of tensions and sometimes-violent protests, three people died in Charlottesville, Virginia. The event surrounded the highly charged decision by the City of Charlottesville to remove the name and statue of Confederate General Robert E. Lee from a local park. The ensuing legal drama of permits and city politics quickly took a back seat to the human drama of protests, counter-protests, and eventually the alleged murder of a woman in attendance that day. In the immediate aftermath, many compelling legal and societal issues surfaced (or resurfaced), such as whether to identify the events as fueled by bigotry and hate and whether to label the alleged murder as an act of domestic terrorism. The magnitude of attention these events received clearly underscores the importance in our national psyche of the First Amendment and its protections on freedoms of expression, association, and the press.

I. INTRODUCTION

Freedom of the press can be obliterated overnight by some dictator’s imposition of censorship or by the slow
nibbling away at a free press through successive bits of repressive legislation enacted by a nation's lawmakers.\(^7\)

Freedom of the press is a cherished freedom enshrined in the First Amendment and upheld in myriad contexts.\(^8\) However, under the prevailing case law and without a federal shield law, the executive branch may be able to “annex the journalistic profession as an investigative arm of government” to reveal its “confidential” sources as aid to prosecution.\(^9\) This would serve to chill the freedom of the press and conflicts with the spirit of the First Amendment.\(^10\) In many cases, courts have failed to

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\(^9\) Bramzburg v. Hayes, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting); see also id. at 667, 709 (holding that newsmen can be required to testify in state or federal courts in order to reveal confidential sources); see generally United States v. Sterling, 724 F.3d 482, 517 (4th Cir. 2013) (reversing an Eastern District of Virginia ruling supporting First Amendment and/or common law reporter’s privilege); Jane E. Kirtley, Reporter’s Privilege in the 21st Century: Despite the Ongoing Controversy Concerning Adoption of a Federal Reporter’s Privilege Statute, the Idea is Neither New, Nor Novel, 25 DEL. LAW. 12, 13 (2008) (discussing ways in which the government has attempted to “annex” journalists); Kathryn A. Rosenbaum, Note, Protecting More than the Front Page: Codifying a Reporter’s Privilege for Digital and Citizen Journalists, 89 NOTRE DAME L. REV. 1427 (2014) (discussing the government’s targeting of journalists in prosecutions and arguing for a federal shield law); Leslie Siegel, Note, Trampling On The Fourth Estate: The Need For A Federal Reporter Shield Law Providing Absolute Protection Against Compelled Disclosure Of News Sources And Information, 67 OHIO ST. L.J. 469 (2006) (arguing for a federal shield law while discussing Bramzburg and subsequent cases).

\(^10\) U.S. CONST., amend. I; see also Mary-Rose Papandrea, Citizen Journalism and the Reporter’s Privilege, 91 MINN. L. REV. 515, 561 (2007) (noting “just as the lack of a privilege would chill communications between psychologists and their patients and prevent the information litigants seek from ever coming into evidence, the lack of a journalist privilege will chill communications from sources”); Robert T. Sherwin, Comment, “Source” of Protection: The Status of the Reporter’s Privilege in Texas and a Call to Arms for the State’s Legislators and Journalists, 32 TEX. TECH. L. REV. 137 (2000) (discussing the news industry’s argument that compelling disclosures chills news sources).
extend the common law to such protection, so the legislative branch should step in to make such protection clear. For example, in the high stakes field of national security, the Government utilizes federal laws (such as the Espionage Act) to prosecute. State shield laws provide inconsistent and insufficient protection against federal prosecution. The case for a federal shield law is heightened in the matters of national security, which is different, and where, arguably, the stakes are higher.

II. Freedom Of The Press

An informed populace is a hallmark of the American representative democracy. The free press is a necessary and integral part of informing the populace. As District Judge Warren noted, the free press can be obliterated by broad strokes, or little by little. In addition to the threat of government overreach, the free press also faces threats from the importance of headlines and ratings; an ever-expanding and amorphous

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14 See, e.g., Katz v. United States, 389 U.S. 347, 358 n.23 (1967) (“Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.”).

15 U.S. CONST., amend. I; Chief Justice R. Fred Lewis, A Call to Justice: The Importance of Civic Education, 80 FLA. B.J. 12, 13 (2006) (“[W]ithout a populace informed about their civic duties, the rights and freedoms promised by our constitutional structure may not be realized.”); Dianne Post, Soundoff: Failing Grade, 50 ARIZ. ATT’Y 8, 8 (May 2014) (“In order for a democracy to flourish, it needs an educated populace who have been taught the basic values of the country, the political process and factual knowledge.”).


definition of what is a journalist; and in the specific case of national security—legitimate tension with government and public safety interests. This Article argues that reinvigorating and revising the case for a federal shield law will solve this problem, especially in matters related to national security.

A. News Industry Challenges

The news media is focused on headlines and ratings in the current environment, distracting in many cases from an actual search for the truth. In a 2015 talk, Lara Setrakian argues that there are three ways to fix the problems in the news industry which include building a news that is “built on deep-domain knowledge,” with a “kind of Hippocratic oath for the news industry, a pledge to first do no harm,” and one able to “embrace complexity . . . to make sense of a complex world.” These recommendations frame the aspirational side of this argument, which is that the argument desires a noble and diligent press. This also raises the question of how to define what or who makes up the press, what or who is a journalist, and should those classifications further constrain what or who gets the protections proposed herein. In making such a determination, questions arise as to how inclusive to make the definition and whether the press should enjoy protections that the citizenry otherwise does not enjoy. These issues also raise the question of journalistic integrity and editorial discretion.

The “Russia Dossier” about then-President-elect Trump, allegedly obtained by CNN and BuzzFeed, shows an example of the type of question faced by the news industry and an opportunity to exercise editorial discretion. Specifically, BuzzFeed published a document

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20 Id.
21 See, e.g., Stephen Daly, Refrain from Crude Behavior: The Need for Journalism Standards in Documentary Filmmaking, 31 ENT. & SPORTS LAW. 1 (2014) (arguing that journalistic ethics should be part of defining a journalist under shield laws); see also SPJ Code of Ethics, SOC’Y OF PROF’L JOURNALISTS, https://www.spj.org/ethicscode.asp (last revised Sept. 6, 2014, 4:49 PM).
22 See discussion infra Section IV.A.
23 See, e.g., Branzburg v. Hayes, 408 U.S. 665 (1972); Rosenbaum, supra note 9.
24 SPJ Code of Ethics, supra note 21; Setrakian, supra note 19.
“carrying explosive, but unverified, allegations about ties between the Russian government and President-elect Donald J. Trump.” At the same time, other news media outlets either declined to report on the document at all (such as Lawfare), or reported only about the existence of such an unverified document (such as CNN). This example underscores an important motivator for the news industry (as discussed by Setrakian): the tension between a search for truth and ratings. This tension further casts light on an important question regarding classifying journalists (and whether they should have different protections), particularly in the context of arguing for, as here, additional legal protections for journalists.

B. National Security Tensions

Courts have routinely held that there are instances in which national security interests change a court’s analysis of a legal issue. This analysis contributes to increased tension when

26 Id.
27 Id.
28 Compare Scott Campbell, BBC is a Slave to Ratings and Copies Us, Says ITV, TELEGRAPH (Jan. 14, 2014, 6:00 AM), http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/media/10569856/BBC-is-a-slave-to-ratings-and-copies-us-says-ITV.html, with Andrew Selbst, The Journalism Ratings Board: An Incentive-Based Approach to Cable News Accountability, 44 U. MICH. J.L. REFORM 467 (2011) (assuming the decline of the news media and proposing an accountability mechanism).
30 See, e.g., Katz v. United States, 389 U.S. 347, 363 (1967) (Harlan, J., concurring) (“In joining the Court’s opinion, I note the Court’s acknowledgment that there are circumstances in which it is reasonable to search without a warrant . . . . We should not require the warrant procedure and the magistrate’s judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.”); United States v. Reynolds, 345 U.S. 1, 10–11 (1953) (noting that government privilege exists when there is a reasonable danger that compulsion of evidence will expose matters which, in the interest of national security should not be divulged, if so privilege is absolute (i.e., not subject to other party’s countervailing interest)); Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579, 598 (1952) (Frankfurter, J., concurring) (“The power to seize . . . has been restricted to particular circumstances such as ‘time of war or when war is imminent,’ the needs of ‘public safety’ or of ‘national security or defense,’ or ‘urgent and impending need.’”); Steel Seizure, 343 U.S. at 635–38 (Jackson, J., concurring) (outlining, in a famous concurrence, executive branch powers and developing a framework where executive power falls into three categories: action with express or implied authority, action contrary to express or implied congressional action, and action in the absence of congressional action.); United States v. U.S. Dist. Court, 407 U.S. 297 (1972) (leaving open the question of whether there is a national security or foreign intelligence exception to the Fourth Amendment); Totten v. United States, 92 U.S.
it comes to freedom of the press related to news about national security matters.\(^{31}\) In further articulating this balance, Justice Stewart noted in his concurrence, “the hallmark of a truly effective internal security system would be the maximum possible disclosure, recognizing that secrecy can best be preserved only when credibility is truly maintained.”\(^{32}\) This shows one learned jurist’s viewpoint that secrecy in national security and government transparency are interdependent.\(^{33}\) This also brings forth the question of where whistleblowers and leakers fall into this discussion,\(^{34}\) ultimately leading to the question of whether a reporter should be able to protect the identity of such individuals in the context of reporting on national security matters. To be absolutely clear, the argument presented herein does not seek to protect any criminal activities, especially not those such as the unauthorized disclosure of classified information or the possession of stolen property.\(^{35}\)

C. Summary of Analysis and Recommendations

Based upon the aforementioned discussion, this Article reinvigorates the argument in favor of a federal reporter’s shield law, specifically implemented as an evidentiary privilege under the Federal Rules of Evidence. In making this case, Section III will look at the background and context of the argument for and against a federal shield law, including surveying a collection of states’ shield laws. Section III will also include a review of select previous efforts to enact a federal shield law and consider why such efforts did not succeed. Finally, Section III will consider the executive branch’s recourse embodied by the ability to prosecute, acknowledging a number of mechanisms by which it can be done.

In Section IV, this Article will examine the integrity of the press and delve briefly into the question of how to define a

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105, 107 (1875) (holding that public policy forbids the trial of something which would reveal state secrets); In re Directives [redacted text] Pursuant to Section 105B of the Foreign Intelligence Surveillance Act, 551 F.3d 1004, 1012 (FISA Ct. Rev. 2008) (holding that “a foreign intelligence exception to the Fourth Amendment’s warrant requirement exists when surveillance is conducted to obtain foreign intelligence for national security purposes and is directed against foreign powers or agents of foreign powers reasonably believed to be located outside the United States”); see generally Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d. 1070 (9th Cir. 2010) (en banc) (granting a huge deference to the government in considering Totten bar or Reynolds privilege).

31 Stone, supra note 18.


33 Id.


35 See discussion infra Section IV.
journalist (including the necessary corollary of whether the press should enjoy protections herein that are not otherwise available to the general public). Section IV will also examine deficits of state reporters’ shield laws, including their ineffectiveness against federal prosecution, the challenge of jurisdiction, and the related question of inconsistent application of the protection. Finally, Section IV will acknowledge the tension between protecting a reporter and allowing the Government to fully prosecute national security-related crimes.

Section V will make the recommendation of a federal shield law. Section V will address the challenge of how to define the scope of the protections, note that it should have civil and criminal applications, and note that this law should not protect otherwise illegal activity. Finally, this Article will conclude acknowledging the numerous challenges outside the scope of this discussion but argue that they are nonetheless addressed by the solution proposed herein.

III. SHIELD LAWS & BRANZBURG

The discussion about a federal reporters’ shield law begins with a survey of state shield laws, an examination of how they function, and where they are found within the state statutory framework. 36 This survey necessarily leads to the Supreme Court’s ruling in Branzburg v. Hayes, 37 and related cases, 38 which will be discussed in greater detail. 39 That discussion will lead to review of previous attempts to enact a federal shield law. 40 Finally, one must consider a note on how the executive branch may pursue enforcement of its national security secrets, after which the discussion can move on to implementation. 41

A. State Shield Laws

According to the Digital Media Law Project, as of “December 2007, thirty-two states and the District of Columbia

36 See, e.g., Laurence B. Alexander & Ellen M. Bush, Shield Laws on Trial: State Court Interpretation of the Journalist’s Statutory Privilege, 23 J. LEGIS. 215 (1997) (discussing state shield laws generally); Shield Laws and Protections of Sources by State, REPORTERS COMM. FOR FREEDOM OF THE PRESS, http://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/shield-laws (last visited May 3, 2018) (displaying, in map form, the existence and type of shield laws among the fifty states); see also discussion infra Section III.A.
37 408 U.S. 665 (1972).
38 E.g., United States v. Sterling, 724 F.3d 482 (4th Cir. 2013).
39 See discussion infra Section III.B.
40 See discussion infra Section III.C.
41 See Stone, supra note 18; discussion infra Sections III–IV.
have statutory shield laws.” The Digital Media Law Project further asserted that, “a number of state courts have also recognized a privilege based on their state constitutions, common law, or the First Amendment.” According to Reporters Committee for Freedom of the Press, “[m]any states have recognized a reporter’s privilege based on state law . . . [i]n addition to case law, 31 states and the District of Columbia have enacted statutes—shield laws—that give journalists some form of privilege against compelled production of confidential or unpublished information.” While many states have unique legal underpinnings to this protection, it is useful to specifically look at three states, each of which has a different approach. In New York, the reporters’ protections are found in civil rights law. In California, this protection can be found in the evidence code. In Maryland, the protection is found under “Courts and Judicial Proceedings.”

New York’s provision operates as an exemption from being adjudged in contempt, with a waiver provision for the journalist. The statute first provides a number of key definitions. The New York law defines a professional journalist as:

one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

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43 Id.
45 N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2018).
46 CAL. EVID. CODE § 1070 (West 2018).
47 MD. CODE ANN., CTS. & JUD. PROC. § 9-112 (West 2017).
48 CIV. RIGHTS §§ 79-h(b)-(c).
50 CIV. RIGHTS § 79-h(a).
51 Id. § 79-h(a)(6).
The New York law then provides two exemptions from contempt, an “absolute protection for confidential news,” and a “qualified protection for nonconfidential news.” To summarize the protection, a “professional journalist” having been working for a qualifying type of news organization (defined in the statute), is exempt from being found in contempt in criminal or civil proceedings for refusing to disclose “any news obtained or received in confidence or the identity of the source of any such news coming into such person’s possession in the course of gathering or obtaining news for publication.” If the person receives such information not in confidence, then the qualified protection of Section 79-h(c) applies, which requires the party seeking to compel such testimony to show that:

the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party’s claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source.

The statute also has a few other provisions, including that information obtained in violation of Section 79-h is inadmissible (including “in any action or proceeding or hearing before any agency”); that protected persons cannot be fined or imprisoned for failure to disclose information protected by Section 79-h(b) or (c); and that privilege extends to certain third parties such as supervisors or employers. Section 79-h also includes a voluntary waiver provision.

In California, the protections are found as a privilege under the California Evidence Code. The “Refusal to disclose news source” section is found in the California Evidence Code’s section on privileges at Section 1070. Section 1070 does not include a section on definitions, but does include one definition. Section 1070 states that the protections therein

52 Id. § 79-h(b).
53 Id. § 79-h(c).
54 Id. § 79-h(b).
55 Id. § 79-h(c).
56 Id. § 79-h(d).
57 Id. § 79-h(e).
58 Id. § 79-h(f).
59 Id. § 79-h(g).
60 CAL. EVID. CODE § 1070 (West 2018).
61 Id.
62 Id. § 1070(c) (defining “unpublished information” as “information not disseminated to the public by the person from whom disclosure is sought, whether or not related information has been disseminated and includes, but is not limited to, all notes, outtakes, photographs, tapes or other data of whatever sort not itself
provided apply to, “[a] publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed.” The California Evidence Code then exempts such persons from being adjudged in contempt “for refusing to disclose . . . the source of any information procured . . . or for refusing to disclose any unpublished information.” The protections again apply when the protected person is acting in his/her capacity as news media. Section 1070(b) extends those protections to radio or television news reporters, but does not appear to include any voluntary waiver provision. The California approach also has mixed results, as discussed in Delaney v. Superior Court.

The Maryland News Media Privilege is found in the Maryland Code under the heading “Courts and Judicial Proceedings,” specifically at Title 9, Witnesses. The News Media Privilege is codified at Section 9-112 and includes definitions and provisions for compelled disclosure. Section 9-112 specifically applies to persons who fall under one of three categories: employed by the news media as defined in the statute, independent contractors of the news media, and students engaged with the news media organizations. The Maryland Code defines the type of information covered by this privilege, which includes sources of information as well as information gathered for the news, but not published. However, unlike New York and California, Maryland has a specific section for compelled disclosure. In order to compel disclosure, the court

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63 Id. § 1070(a).
64 Id.
65 Id.
66 Id. § 1070(b).
67 50 Cal. 3d. 785 (1990); see also Timothy L. Alger, Comment, Promises Not to be Kept: The Illusory Newsgatherer’s Privilege in California, 25 LOY. L.A. L. REV. 155, 177–78 (1991) (expressing skepticism in the effectiveness of the California Reporter’s Shield privilege); Ian W. Craig, Note, Delaney v. Superior Court: Balancing the Interests of Criminal Defendants and Newpersons Under California’s Shield Law, 22 PAC. L.J. 1371, 1397–98 (1991) (examining the California Supreme Court’s application of the California Shield Law in a specific case).
68 MD. CODE ANN., CTs. & JUD. PROC. § 9-112 (West 2017).
69 Id.
70 Id. § 9-112(b). “News media” is defined as “(1) Newspapers; (2) Magazines; (3) Journals; (4) Press associations; (5) News agencies; (6) Wire services; (7) Radio; (8) Television; and (9) Any printed, photographic, mechanical, or electronic means of disseminating news and information to the public.” Id. § 9-112(a).
71 Id. § 9-112(c).
72 Id. § 9-112(d).
must find by clear and convincing evidence: relevance to the issue at hand; that the information “could not, with due diligence, be obtained by any alternate means”; and an “overriding public interest in disclosure.”

It does note that this provision cannot be used to compel disclosure of sources protected under Section 9-112(c)(1) and that the protected person does not waive protection from compulsion by otherwise disseminating the information gained hereby. Maryland also claims to have the first state shield law, but not necessarily the most effective.

B. The Problem with Branzburg

In 1972, the Supreme Court held that “requiring newsmen to appear and testify before state or federal grand juries [does not] abridge[] the freedom of speech and press guaranteed by the First Amendment.” This example further makes a case for the importance of a federal shield law, in part by the boundaries it draws among what protections are inherent under the First Amendment’s guarantee of the freedom of expression and of the press. The legislative branch should pursue legislation that makes these protections clear, and eliminates the tension left by Branzburg.

Paul M. Branzburg was a reporter employed by the Courier-Journal, a newspaper in Louisville, Kentucky. In November of 1969, the Courier-Journal published a story by Branzburg, which described two individuals making hashish, included a photograph of “a pair of hands working above a laboratory table on which was a substance identified by the caption as hashish,” and included that the author promised to protect their identity. Branzburg was then subpoenaed by a state grand jury; he appeared, and he refused to identify the individuals from his story. A state trial court judge ordered Branzburg to answer, and he appealed under the First Amendment, the Kentucky Constitution, and Kentucky’s reporters’ privilege statute, Ky. Rev. Stat. Section 421.100.

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73 Id.
74 Id. § 9-112(c).
75 Id.; see also Timothy M. Mulligan, The Court of Special Appeals of Maryland to the Press Shield Law: “Good Night, and Good Luck,” 41 U. BALTO. L.F. 1 (2010) (noting that Maryland’s shield law was originally passed in 1896 but that current treatment by the courts has been less than absolute).
77 Id.
78 Id. at 667–68.
79 Id. at 668.
80 Id.; Kentucky’s Evidence Code includes § 421.100, entitled “Newspaper, radio or television broadcasting station personnel need not disclose source of information,”
Kentucky Court of Appeals held, in part, that while the privilege allowed a newsman to refuse to divulge a source, it did not permit the reporter to refuse to testify about what “he had observed personally, including the identities of those persons he had observed.”

In a separate case, which was consolidated during appeal, Branzburg reported on drug use in Frankfurt, Kentucky. Branzburg was again subpoenaed to testify regarding, in this case, “the matter of violation of statutes concerning use and sale of drugs.” Branzburg sought to quash the subpoena, meeting with mixed results. Specifically, he was directed to testify to things that he observed, but was allowed to protect the confidential sources. The Kentucky Court of Appeals held consistent with the prior case, and Branzburg sought writ of certiorari to the Supreme Court of the United States, which was granted. Branzburg also included cases out of Massachusetts and California.

As the Supreme Court noted, “[t]he heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.” Concurrently, the Court noted that First Amendment jurisprudence clearly did not “invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability.” The Court then outlined a number of limits to the First Amendment protection of a free press, specifically including:

that the press is not free to publish with impunity everything and anything it desires to publish.

Although it may deter or regulate what is said or

which simply provides, “No person shall be compelled to disclose in any legal proceeding or trial before any court, or before any grand or petit jury, or before the presiding officer of any tribunal, or his agent or agents, or before the General Assembly, or any committee thereof, or before any city or county legislative body, or any committee thereof, or elsewhere, the source of any information procured or obtained by him, and published in a newspaper or by a radio or television broadcasting station by which he is engaged or employed, or with which he is connected.” Ky. Rev. Stat. Ann. § 421.100 (LexisNexis 2018).

81 Branzburg, 408 U.S. at 669.
82 Id.
83 Id. (internal citation omitted).
84 Id. at 669–70.
85 Id.
86 Id. at 671.
87 Id. at 671–79.
88 Id. at 681.
89 Id. at 682.
published, the press may not circulate knowing or reckless falsehoods damaging to private reputation without subjecting itself to liability for damages, including punitive damages, or even criminal prosecution.\textsuperscript{90}

The Court went on to attempt to put the question into the context of whether the press had certain privileges of access or confidentiality.\textsuperscript{91}

Justice Stewart, in dissent, lamented the Court’s view of a reporter’s protection under the First Amendment, writing, “[n]ot only will this decision impair performance of the press’s constitutionally protected functions, but it will, I am convinced, in the long run, harm rather than help the administration of justice,”\textsuperscript{92} Justice Stewart went on to note “the guarantee [of a free press] is ‘not for the benefit of the press so much as for the benefit of all of us.’”\textsuperscript{93} Justice Stewart further opined that the right to a free press included certain other rights that the Court was not upholding, including the right to truly protect the information-gathering process, notably including informants and confidential sources.\textsuperscript{94} Finally, and most presciently, Justice Stewart noted that “[a]fter today’s decision, the potential informant can never be sure that his identity or off-the-record communications will not subsequently be revealed through the compelled testimony of a newsman.”\textsuperscript{95}

The problem with \textit{Branzburg}, therefore, is that it creates an artificial and false dichotomy between a reporter’s ability to protect confidential sources and the reporter’s obligation to testify about facts (to include the source’s identity) that he or she personally knows or observes. This is a distinction without a difference. Where reporters are faced with a Hobson’s choice, they can protect their source’s identity, unless they have seen, met, or know whom the source is—in that case they can be compelled to testify to what they know.

\textsuperscript{91} Id. at 683–87.
\textsuperscript{92} Id. at 725 (Stewart, J., dissenting).
\textsuperscript{93} Id. at 726 (citing \textit{Time, Inc. v. Hill}, 385 U.S. 374, 389 (1967)).
\textsuperscript{94} Id. at 727–29.
\textsuperscript{95} Id. at 731.
C. Prior Attempts at a Federal Shield Law

Several efforts to enact a federal shield law have failed, and at least one scholar has argued that the time for such a law has passed. For example, in 2007, a bill was brought to the senate called the Free Flow of Information Act of 2007. A companion bill was passed in the House of Representatives, but the Free Flow of Information Act of 2007 ultimately failed cloture in the Senate and died in the 110th Congress. The Act started with a section on compelled disclosures from “covered persons,” which set forth due process that would be required in order to compel a covered person to testify or provide documents. Specifically, a federal court would have to make three findings, by a preponderance of the evidence.

First, a court would have to find that the party seeking disclosure had exhausted all other reasonable sources. The second finding required was split into whether or not the matter dealt with a criminal investigation or prosecution; if it did, then the party seeking disclosure would have to show that there were “reasonable grounds” to believe a crime occurred, the disclosure was essential to the prosecution, and that (in the case of leaking related to classified information) the leak “caused significant, clear, and articulable harm to the national security.” If not a criminal case, the finding is simply that the disclosure sought is “essential to the resolution of the matter.” Finally, the court would have to find that nondisclosure would be contrary to the public interest. The proposed legislation then had several exceptions, including those disclosures related to “criminal or tortious conduct . . . to prevent death, kidnapping, or substantial

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98 S. 2035.
100 S. 2035.
101 Id.
102 Id. § 2(a).
103 Id.
104 Id.
105 Id.
106 Id.
bodily injury . . . to prevent terrorist activity or harm to the national security.” 107 The proposal also included a definitions section. 108 Of particular note, the proposal defined “covered person” as “a person who is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such person.” 109 The term “journalism” was defined as, “the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public.” 110 These definitions stand in stark contrast to the complexity and nuances addressed in statutes from New York, 111 California, 112 and Maryland, 113 for example.

While the 2007 bill enjoyed some support, passing in the House of Representatives, it was unable to survive the Senate and was opposed by the Bush administration generally and the Attorney General, Director of National Intelligence, Defense Secretary, and Secretary of Homeland Security specifically. 114 The bill was re-introduced in the 111th Congress as the Free Flow of Information Act of 2009, 115 but this time failed to even come out of committee despite the Obama administration’s support. 116 It is interesting to note that although the Obama administration had been accused of increasing prosecution of leakers to a draconian extent, 117 the Obama administration appears to have fully supported the bill in 2009 and apparently again in 2013. 118

107 Id. §§ 3–5.
108 Id. § 8.
109 Id. § 8(2).
110 Id. § 8(5).
111 N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2018).
112 CAL. EVID. CODE § 1070 (West 2017).
118 Savage, supra note 116; Sullivan et al., supra note 116.
The Free Flow of Information Act of 2013\textsuperscript{119} was introduced during the 113th Congress with many of the major features of the Free Flow of Information Acts of 2007 and 2009, discussed above. There were some changes, however, including making it more explicit that compelling disclosure specifically imposed obligations upon the government.\textsuperscript{120} In addition, the 2013 bill added a requirement for certification by the Attorney General.\textsuperscript{121} The 2013 bill also added an affirmative defense to disclosure if the covered person could, by clear and convincing evidence, show that disclosure would be contrary to the public interest.\textsuperscript{122} Interestingly, the definition of “covered person” morphed into “covered journalist” and grew significantly more nuanced.\textsuperscript{123} The new definition provided for two types of covered persons and spanned more than 720 words,\textsuperscript{124} while the definition in the 2007 version of the bill (before amendment) was twenty-six words.\textsuperscript{125} The new definition was much more expansive in defining the type of organization for which a “covered journalist” must work and included internal references to other statutory provisions, such as the Communications Act of 1934.\textsuperscript{126} The 2013 bill also provided the types of activities that a “covered journalist” would be engaged in (interviews, direct observations) and the intent of such activities.\textsuperscript{127} Finally, the 2013 bill had a subsection in the definition that seemed to be directed specifically at WikiLeaks.\textsuperscript{128}

According to William E. Lee, the efforts at a federal shield law fail because the Supreme Court “remains committed to treating the First Amendment’s press and speech clauses as interchangeable,” meaning that the courts are unlikely to create such law and that “Congress has been unable to solve the problem of national security leaks in a manner that garners bipartisan support.”\textsuperscript{129} Lee further argues that Congress will remain unable to garner sufficient support, in part, because of

\begin{itemize}
  \item \textsuperscript{119} S. 987, 113th Cong. (2013).
  \item \textsuperscript{120} Id. § 2(a)(2).
  \item \textsuperscript{121} Id.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id. § 11(1).
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} S. 2035, 110th Cong. (2007) (“The term ‘covered person’ means a person who is engaged in journalism and includes a supervisor, employer, parent, subsidiary, or affiliate of such person.”).
  \item \textsuperscript{126} S. 987 § 11(1).
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id. § 11(1)(A)(ii)(I) (stating in part that a “covered journalist . . . does not include any person or entity . . . whose principal function, as demonstrated by the totality of such person or entity’s work, is to publish primary source documents that have been disclosed to such person or entity without authorization”).
  \item \textsuperscript{129} Lee, \textit{The Demise of the Federal Shield Law}, supra note 97, at 29.
\end{itemize}
“the emergence of bloggers and ‘citizen-journalists.’”

This Article argues that these are the very reasons that a federal reporter’s shield law is needed.

D. A Note on Prosecution

Lee’s point is consequential, particularly in the field of national security where the government interest is great and the threat considerably grave. However, that is not a sufficient argument to defeat the benefits provided by a federal shield law. Rather, Congress can pass or amend legislation that allows the Government to prosecute the actual crimes surrounding national security such as the Espionage Act or the Atomic Energy Act. Further, the more nuanced definition of “covered journalist,” under the Free Flow of Information Act of 2013 provided exceptions related to national security and terrorism. Perhaps more importantly, this fear conflates leakers with whistleblowers, when they are in fact very different—one being desirable and the other quite detestable. Nonetheless, this supports the argument that the Government should exercise its prosecutorial discretion, rather than the argument that crafting a proper shield law is too difficult and therefore not worthy of the Congress’s time and attention.

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130 Id.


132 See supra notes 93–95 and accompanying text.


IV. OBSTACLES TO A FEDERAL REPORTER’S SHIELD LAW

As discussed through Sections I and II, many scholars have written on, and professional organizations have called for, a federal reporter’s shield law. 138 These arguments and discussions reveal that there are a number of questions that must be addressed in order to fashion an adequate reporter’s shield law that effectively supports the freedom of the press while not unnecessarily protecting criminal activity. The first issue is to acknowledge the challenge in defining who is a journalist. 139 The next question is whether to be explicit that these protections should not immunize criminal activity. 140 Finally, to support this argument, it is important to benefit from lessons learned with state shield laws to overcome their deficits while not protecting criminal activity of any kind.141

A. Who is a Journalist

The question easiest to ask, but perhaps hardest to frame, is, who is a journalist?142 Merriam-Webster defines journalist as “a person engaged in journalism; especially: a writer or editor for a news medium,” or “a writer who aims at a mass audience.”143 Dictionary.com offers a similar definition: “a person who practices the occupation or profession of journalism,” defining journalism as, in part, “the occupation of reporting, writing, editing, photographing, or broadcasting news or of conducting any news organization as a business.” 144 The Cambridge Dictionary offers the following: “someone who collects and

138 See discussion supra Sections I–II.
139 See discussion infra Section IV.A.
140 See discussion infra Section IV.B.
141 See discussion infra Section IV.C.
142 Compare Thomas Kent, Who’s a Journalist: Closing in on a Definition, HUFFPOST (Oct. 3, 2013, 10:47 AM), http://www.huffingtonpost.com/thomas-kent/whos-a-journalist-closing_b_4033856.html (discussing the evolution of the definition of “journalist,” including in the law), and A Day in the Life of a Journalist, PRINCETON REV., https://www.princetonreview.com/careers/85/journalist (last visited Apr. 16, 2017) (“There are many types of journalists, from the local beat newspaper reporter to the foreign correspondent, the magazine feature writer to the freelance book reviewer, and so on. It is difficult to pin down the daily routine of an average journalist.”), with What Does a Journalist Do?, AM. PRESS INST., https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/journalist/ (last visited May 3, 2018) (“Asking who is a journalist is the wrong question, because journalism can be produced by anyone.”).
writes news stories and articles for newspapers, magazines, radio, and television.\textsuperscript{145}

As discussed above, the various state shield laws have also, some more meaningfully than others, attempted to define “journalist.”\textsuperscript{146} The New York definition starts with the clause, “one who, for gain or livelihood,” before even discussing what said person does (“gathering, preparing, collecting, writing, editing, filming, taping or photographing of news”).\textsuperscript{147} The New York definition includes that the activity is carried on, “intended for dissemination to the public.”\textsuperscript{148} The California Evidence Code, as discussed partially above, does not explicitly include a definition of journalist, but implicitly identifies that the protections of Section 1070 apply to a “person connected with or employed” by certain organizations specified.\textsuperscript{149} The Maryland Code also appears to be focused on association or affiliation of the person at the time of the activity in question, specifically whether the individual is “employed by the news media in any news gathering or news disseminating capacity,” including independent contractors and students.\textsuperscript{150}

The proposals for the Free Flow of Information Acts (2007, 2009, and 2013) also had evolving definitions of “journalist.” As discussed above, the initial definition of “covered person” (standing in the place of “journalist” in the act, for the purposes of this discussion), was simply a “person who is engaged in journalism.”\textsuperscript{151} By the 2009 version, the definition expanded in complexity and included a number of factors, including that the person has the “primary intent to investigate events and procure material in order to disseminate to the public news or information.”\textsuperscript{152} The 2009 definition also makes clear that the term journalist does not include those that can roughly be described as spies or terrorists.\textsuperscript{153} Finally, the 2013 definition, topping out at over 720 words, includes a preliminary clause that the person is an employee, contractor, or other type of agent of a

\textsuperscript{146} See discussion supra Section III.A.
\textsuperscript{147} N.Y. CIV. RIGHTS LAW § 79-b(h)(6) (McKinney 2018).
\textsuperscript{148} Id.
\textsuperscript{149} CAL. EVID. CODE § 1070(a) (West 2018).
\textsuperscript{150} MD. CODE ANN., CTS & JUD. PROC. § 9-112(b)-(c) (West 2017).
\textsuperscript{151} S. 2035, 110th Cong., § 8(2) (2007) (defining journalism as “the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public”).
\textsuperscript{152} S. 448, 111th Cong., § 11(2)(A) (2009).
\textsuperscript{153} Id.
news service.154 However, the 2013 definition includes other types of persons, including those with the “primary intent to investigate issues or events.”155

While a more robust discussion of this issue can fill the pages of many papers, this more abbreviated analysis reveals a few key components of the definition, specifically: what does the individual do, why does the individual do it, and for what or whose benefit is it done? In determining how important the definition is, Congress would have to consider whether (as in Branzburg), the citizenry should enjoy the same protections as the press.156

B. Doesn’t a Federal Shield Law Protect Criminal Activity?

One argument against a federal shield law is that it protects criminal activity by, for example, allowing criminals to shield themselves with or by media exposure.157 While this is a very real concern when considering an evidentiary privilege, it is not the intent of a federal reporter’s shield law. For example, as discussed in Section III above, the Free Flow of Information Act of 2013 included several exceptions for criminal conduct.158 Section 3 specifically excepts information “obtained during the course of, alleged criminal conduct by the covered journalist.”159

The section does include a provision allowing for the journalist to receive the information, apparently if not otherwise involved in the criminal activity.160 Section 4 includes a provision excepting (meaning the journalist does not have protection) situations to “prevent death, kidnapping, substantial bodily injury, sex offenses against minors, or incapacitation or destruction of critical infrastructure,” in a provision reminiscent of the Model Rules of Professional Conduct, Rule 1.6(b).161 Section 5 includes a national security exception, similar to Section 4, but oriented to “prevent terrorist activity or harm to the national security.”162 Ultimately, the goal is to draft a law that

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155 Id.
158 See S. 987 §§ 3–5.
159 Id. § 3.
160 Id.
161 Id. § 4; MODEL RULES OF PROF’L CONDUCT r. 1.6(b) (Am. Bar Ass’n 1983).
162 S. 987 § 5.
has clear enough boundaries to prevent the unintentional side effect of immunizing criminal activity.163

C. Deficits of State Shield Laws

There are many potential approaches for states to implement a reporter’s shield law, such as the approaches discussed above,164 but each has many challenges and deficits related to applicability, uniformity, and complexity.165 One such problem is that the absence of a federal shield law has led to the states each pursuing their own approach (or lack thereof), which results in great disparity in protection from state to state.166 Further, the state shield laws examined herein did not seem to have broad application to citizen-journalists, bloggers, or the like.167 Moreover, the state laws have arguably distinct applicability depending on whether they are found in the evidentiary code, rules of procedure, or other places in the state code.168 For example, the New York provision, as discussed above, also applies to actions before an agency,169 but does the California evidentiary privilege? Importantly, state shield laws simply do not protect journalists in federal court, where—especially with regard to national security—prosecution or subpoena may be most likely to occur.170


164 See discussion supra Section III.A.


168 See id.

169 N.Y. CIV. RIGHTS LAW § 79-h(d) (McKinney 2018).

V. RECOMMENDATIONS

Given these obstacles and the record of failure in achieving a federal reporter’s shield law in the 2007, 2009, and 2013 evolutions, a solution is needed that is relatively simple to apply, but more importantly, can hope to gain bipartisan support.\(^{171}\) In order to do so, there should be three qualities: a threshold determination of what constitutes a journalist, a narrowly defined scope of the protection, and an explicit carve out for criminal behavior.

A. Threshold Determination of What Constitutes a Journalist

Given the Supreme Court’s rationale in Branzburg,\(^ {172}\) and the previous failed attempts at the Free Flow of Information Act,\(^ {173}\) the threshold determination of what a journalist is needs to be clear and workable. The previous attempts to make this determination appear to have failed because of a cobbled together definition with criteria ranging from whether the individual is employed by the right type of organization to what intent the individual has at the time of the activity in question. These definitions are probably too complicated and likely focused on the wrong issue if they focus on the individual’s employment. Rather, the law should be drafted such that the dispositive criteria are the intent of the individual (why they are doing the activity), and whether the individual adheres to an identifiable journalistic ethic.\(^ {174}\) The intent behind these two criteria is that it will tend to automatically include those we think of as traditional journalists (i.e. writers for the New York Times, correspondents for CNN, etc.), but also provide a path of inclusion for conscientious bloggers or citizen-journalists. Whereas it may not include BuzzFeed, when behaving as discussed above, it could certainly include a blogger who intends to behave like a “journalist.”\(^ {175}\) In other words, the protection applies to those who behave in the way we would expect a journalist to behave. This is important because it provides the type of accountability that is desirable given the scope of protection in this proposal. Once the protected individuals are established, it remains to establish the scope of the protection.

\(^{171}\) See discussion supra Section III.C.
\(^{173}\) See discussion supra Section III.C.
\(^{174}\) See, e.g., SPJ Code of Ethics, supra note 21.
\(^{175}\) See Ember & Grynbaum, supra note 25.
B. Scope of Protection

The protection provided for journalists, as defined above, should be narrow but nearly absolute. This configuration will tend to give journalists, and thus the citizenry, a uniform expectation of what it means to talk to the press in a confidential manner. To that end, the protection should be nearly absolute, allowing for very specific exceptions that prevent specific serious harms (as outlined above in the proposed Free Flow of Information Act of 2013\textsuperscript{176}). The law should provide a basic protection for the journalist against the need to reveal his or her sources. That is the primary protection. The law should be narrowly drawn in order to only accomplish this goal. Further, the law should be a combination of an evidentiary privilege and a broader law. To that end, the law should be drafted similarly to the New York Section 79-h, but probably also implement an evidentiary privilege as seen in the California version. This dual-application of the protection can achieve the goal of effectively shielding properly defined journalists in the narrow set of circumstances intended.

C. No Immunity for Criminal Prosecution

Lastly, it is most important to note that the reporter’s shield law should be carefully drafted so as not to have the effect of immunizing criminality. As discussed above, there are a number of ways that criminality could manifest itself, but to make this point, consider the case of an individual claiming to be an intelligence community whistleblower who indiscriminately discloses classified information (leaks in violation of the Espionage Act) to a blogger (who behaves like a journalist and would meet the proposed definition). Further assume, \textit{arguendo}, that the blogger reasonably believes that the information he or she has been given (which includes documents) is properly classified as United States Government documents. If the blogger, operating in accordance with an articulated journalistic code of ethics, elects to report about the fact of the disclosures, but upon demand of the United States Government, and an appropriate finding by a federal court, returns the documents at issue to the United States Government, then the proposed protections should shield the reporter from either being prosecuted for possession of the documents (since they were immediately returned after the court’s finding) or compelled to disclose the source of the information and documents. The shield law should absolutely not prevent prosecution of the underlying source; it should simply prevent the executive branch from being able to “annex the journalistic profession as an investigative arm.

\textsuperscript{176} S. 987, 113th Cong. (2013).
VI. Conclusion

The time for a federal shield law has come. This proposal seeks to acknowledge the imperative of freedom of the press while balancing the keen government interest in protecting national security. The issue of protections that ought to be afforded to journalists has been obscured on two metrics. First, in the context—and name—of national security, the Government has increasingly powerful (if not effective) tools designed to root out or prosecute individuals with the apparent ability to enlist the press as an investigative arm by compelling journalists to disclose sources. It is the federal government and federal courts that have the most power, and therefore, state law simply cannot sufficiently guard the diligent journalist. Second, given the proliferation of internet communication and the ease by which one purported journalist can reach massive audiences, it becomes increasingly difficult to adequately define “journalist,” but increasingly important in order to effectuate adequate protections. Nonetheless, many states have endeavored to do so with state shield laws. And the fact that such an overwhelming majority of states have endeavored to enact shield laws certainly shows that there is a widespread and public desire for such protections. To that end, the proposed legislation would settle the door left open by Branzburg and settle many of the discussions opened by the scholars cited throughout this Article. Specifically, it would provide a clearly defined privilege for reporters that is predictable and consistent throughout its application across the country. Not only would these protections benefit the new industry, they would also accommodate the growing body of non-standard journalists and provide the government with a predictable and well-defined boundary in seeking to prevent leaks or prosecute spies and leakers.

177 Branzburg, 408 U.S. at 725.
178 See Rosenbaum, supra note 9, at 1432, 1454, 1455–56 (discussing the government’s targeting of journalists in prosecutions and arguing for a federal shield law).
TAKING ORDERS FROM TWEETS: REDEFINING THE FIRST AMENDMENT BOUNDARIES OF EXECUTIVE SPEECH IN THE AGE OF SOCIAL MEDIA

Sara Swartzwelder

I. INTRODUCTION

When the designers of Twitter were choosing a cute little bird as their logo and drafting their terms of service, it is doubtful that they had the faintest idea that they were creating a platform for declarations of war. On September 23, 2017, President Trump tweeted that if North Korea’s Foreign Minister “echoes thoughts of Little Rocket Man, they won’t be around much longer!” Two days later, Foreign Minister Ri Yong-ho stated that President Donald Trump had declared war on North Korea. Although the White House insisted that the notion was “absurd,” North Korea’s reading of the tweet is hardly patently unreasonable under the circumstances. While the not-so-veiled threat in Trump’s tweet may not legally constitute a formal declaration of war, the mere fact that it was made by a sitting

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5 Id.
U.S. President gives the words themselves significant power—and much higher stakes. North Korean Foreign Minister Yong-ho emphasized that very point: “[e]ven the fact that this comes from someone who is currently holding the seat of the U.S. presidency is clearly a declaration of war.” The response of North Korean officials makes clear the potential danger of such a statement. Even if Trump did not intend, or did not have an eye toward, its possible consequences, it does not lessen the implications of seeing the prospect of war arise out of a remark made on Twitter.

“Twitter wars” are usually petty feuds between celebrities, but incidents like this one have brought speech on Twitter to the forefront of our national—and global—dialogue and thrown into sharp relief the possible necessity of according a greater level of seriousness to social media speech, especially when made by a sitting President. The fast-escalating battery of heated insults and threats between Trump and North Korean leader Kim Jong-un mirrors the tactics that Trump used throughout the 2016 Republican primaries and his presidential campaign, but this Twitter war may have a real war waiting in the wings. A potentially incendiary tweet from a U.S. President, open to interpretation with all the world watching, could lead to any number of different actions or reactions—“the [P]resident[]’s words alone force the U.S. national security community to focus on nuclear weapons.” Unlike any other speaker in the United States, the President’s words can be taken as provoking or even formally initiating an international conflict. And not without cause: the words of a sitting president have the whole arsenal of

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6 Id.
9 Z. Byron Wolf, Presidential Name-Calling: What ‘Little Marco’ Has To Do with ‘Rocket Man’ (and Nuclear Weapons), CNN (Sept. 23, 2017, 1:10 PM), http://www.cnn.com/2017/09/23/politics/presidential-name-calling/index.html (noting that Trump used insulting nicknames towards his political opponents “both on Twitter and at campaign rallies . . . to build support among the faithful” and to emphasize that “his opponent was flawed—and that he was the alpha dog”).
11 Quite literally, as North Korea’s reaction showed. See Sterling et al., supra note 7.
the United States’ power and influence behind them, not to mention its nuclear payload. Independent of the unsettling reality that we live in an age where a stray tweet could start a nuclear war, the fact that what was previously viewed as a casual social media outlet is now center-stage in national and global discussions raises crucial constitutional questions about how First Amendment jurisprudence treats—or should treat—executive speech in the modern day.

Since the advent of the television, U.S. presidents have been able to broadcast messages that reach nearly every home in America simultaneously, so, at first blush, social media simply seems like an upgrade in communication technology. However, with the increasingly ubiquitous role of the Internet and social media in our lives, in politics, and in our overarching political dialogue, it is clear that social media is more than just the latest carrier wave. Our First Amendment standards may need to be reassessed to account for the impact of modern technology, which has reshaped how we conceive of speech—and may call for readjusting how we regulate it. This consideration is especially important in the context of executive power, where the stakes are necessarily higher.

The crucial point is not that the judiciary may need to react differently with Donald Trump in the office of the President than someone else, but that his presidency has demonstrated that executive speech’s greater power and therefore greater potential for destructive consequences is on a far different scale than other individuals: global and, without exaggeration, possibly world-ending. Recent legal decisions make it clear that the more entwined the Internet has become with our society, the more the
insulation between online and real life has eroded.\textsuperscript{17} In a similar way, when social media amplifies the President’s words, it amplifies both the power and danger of presidential speech along with it. The reality of their potentially dangerous consequences should not be masked by a seemingly innocuous mode of delivery.\textsuperscript{18} As we hear the alarms of nuclear war sounding louder than they have in decades, a medium meant for short, pithy, off-the-cuff thoughts\textsuperscript{19} is now the carrier of speech that could get U.S. soldiers killed without further provocation.\textsuperscript{20} While Donald Trump’s actions may be endemic to his presidency alone, they highlight the risks attendant on presidential speech channeled through social media and raise the question of whether and when executive freedom of speech should be more carefully restricted.

This Note addresses the First Amendment dimensions of executive speech and considers the possible necessity—and ramifications—of developing a new standard for heightened executive speech restrictions that would take into account both the unique power of executive speech and the landscape of social media communication.

The core question is whether executive speech should be held to a higher First Amendment standard because of its greater potential to influence its listeners, because of its increased reach


\textsuperscript{20}{} See Smith & Williams, supra note 4 (“Since the U.S. declared war on our country, we will have every right to make countermeasures, including the right to shoot down the U.S. bombers even when they are not yet inside the airspace border of our country.” (quoting North Korean Foreign Minister Ri Yong-ho)).
through social media, or because of the confluence of the two. Social media’s new place in politics and as part of presidential communications puts stress on our constitutional foundations along two crucial fault lines in First Amendment jurisprudence. First, it evokes the question of whether the executive should be held to a higher, more speech-restrictive standard under the First Amendment because of his or her innately heightened power to influence or incite while speaking in that role. Second, it presents the question of whether that influence has a greater impact through social media that could, in itself, change the equation of whether presidential speech has crossed out of the borders of First Amendment protection. Regardless of who is sitting in the Oval Office, the President’s unique role, coupled with its unique reach through social media, supports reevaluating executive speech under the First Amendment and may justify circumscribing it within stricter boundaries.

II. BACKGROUND

A. First Amendment Roots: Where We’ve Come From

At an elemental level, the First Amendment guarantee that “Congress shall make no law . . . abridging the freedom of speech” 21 affects the President the same way as any other citizen 22. The President can say whatever he or she wants, subject only to the same embattled outer edges of First Amendment protection that apply to the average person.

While a system that seems to value speech—all speech, intrinsically—predominates now, the United States has gone through epochs of far more speech-restrictive and government-protective jurisprudence. 23 Oliver Wendell Holmes’ famous
dissent in *Abrams v. United States* foreshadowed a very different approach to the First Amendment. Although Holmes did not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger of substantive evils that the United States constitutionally may seek to prevent . . . only the present danger of immediate evil or an intent to bring it about . . . warrants Congress in setting a limit to the expression of opinion . . .

While acknowledging that “war opens dangers that do not exist at other times[,] . . . I had conceived[,]” Holmes reflected, “that the United States through many years had shown its repentance for the Sedition Act of 1798.” With it, Holmes seemed to suggest, the United States had also repented of its willingness to stifle dissonant speech simply because it ran counter to the government’s position. The notion Holmes advocated has since taken the field of First Amendment jurisprudence by storm: rather than suppressing speech to stabilize democracy in times of crisis, the “best test of truth is the power of the thought to get itself accepted in the competition of the market[,]” and the best test of our democracy is to weather those conflicting voices and to grow based on the outcome of their debate. Modern First Amendment decisions reflect a desire to put faith in the democratic cacophony of free speech to resolve itself into clarity, and place the burden on the government to allow criticism and prove itself by withstanding dissent.

Law students and legal scholars of today may take the concept of the marketplace for granted, along with its theoretical underpinnings. However, the widespread acceptance of Holmes’ perspective involved a key philosophical shift: regarding free speech as necessary—in fact, vital—for democracy. “The freedom that the First Amendment protects is not . . . an absence

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24 250 U.S. 616 (1919).
25 Id. at 627–28 (Holmes, J., dissenting).
26 Id. at 628, 630. The Sedition Act to which Holmes refers, which restricted and criminalized speech critical of the federal government, was part of the Alien and Sedition Acts, antecedents to the laws at issue in *Abrams*. See *Sullivan*, 376 U.S. at 273 (“The great controversy over the Sedition Act of 1798 . . . first crystallized a national awareness of the central meaning of the First Amendment.”).
27 *Abrams*, 250 U.S. at 628 (“Congress certainly cannot forbid all effort to change the mind of the country.”); see also id. at 630 (criticizing the government’s argument that the common law of seditious libel is left intact under the First Amendment).
28 Id. at 630.
of regulation. It is the presence of self-government." On this view, the First Amendment embodies the role of the people in a representative democracy: the importance of protecting speech is, in part, protecting the ability of the people to hold their leaders accountable. Free speech is also meant to press forward the ideals of freedom, change, and progress. The reason that the Constitution is not a strict enumeration of immutable rights and responsibilities (apart from sheer impracticality) is because the Founders understood that for the democratic experiment to succeed, they needed to build into its system of government the potential for change. The fora of free speech are, theoretically, supposed to drive that change. Ideas gather momentum and support in the marketplace, and, forged by the fires of critical debate, emerge to steer the country toward a different future—on Holmes’ theory, a better one. “[T]he principle of the freedom of speech[,] as it stands in the Constitution . . . is an expression of the basic American political agreement that, in the last resort, the people of the United States shall govern themselves.”

The marketplace philosophy can feel like a devil’s bargain. The host of ideas that march through the open doors of our current First Amendment philosophy is a cavalcade ranging over all imaginable forms of the grotesque, the appalling, the

30 In the pursuit of a strong, functional democracy, we, the people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgment upon the decisions which our agents make upon those issues. And, further, we must share in devising methods by which those decisions can be made wise and effective, or, if need be, supplanted by others which promise greater wisdom and effectiveness. Now it is these activities, in all their diversity, whose freedom fills up the “scope of the First Amendment.” Id. at 255.
31 See id. at 264 (“[T]he Framers could not foresee the specific issues which would arise as their ‘novel idea’ exercised its domination over the governing activities of a rapidly developing nation in a rapidly and fundamentally changing world . . . . [B]oth they and we have been aware that the adoption of the principle of self-government by ‘The People’ of this nation set loose upon us and upon the world at large an idea which is still transforming men’s conceptions of what they are and how they may best be governed.”).
32 See Whitney v. California, 274 U.S. 357, 375 (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . and that this should be a fundamental principle of the American government.”).
33 Abrams, 250 U.S. at 630 (Holmes, J., dissenting) (“[T]he ultimate good desired is better reached by free trade in ideas . . . .”)
hateful, the cruel, and the repulsive. Examples of what must be defended in the name of guarding the dedication to truth and democracy may make one balk at enforcing Holmes’ ideology. In that light, it is important to remember why we need speech. When we question First Amendment standards, we are questioning those rationales and the value of speech to democracy.

B. Brandenburg: Where We Are

The current test for protected speech remains, as it has been since the 1969 decision in Brandenburg v. Ohio, a very speech-protective one. Brandenburg was a member of the Ku Klux Klan who invited a local reporter to film a rally taking place in Hamilton County, Ohio. The film, subsequently broadcast on several local and national networks, showed burning crosses, members of the group carrying weapons, and a speech containing derogatory statements about African-Americans and other groups, advocating excising them from American society, and calling for a march on Washington, D.C. Brandenburg’s speech also threatened “revengeance” against the government if it “continue[d] to suppress the white, Caucasian race.”

Brandenburg was convicted under the Ohio Criminal Syndicalism Act, which prohibited advocating the duty or necessity of using violence, crime, and other unlawful means for political reform, or assembling a group to teach or advocate that doctrine. The Supreme Court reversed the conviction and held the statute unconstitutional: in order to protect the right of free speech, a state is forbidden from “proscribing advocacy of use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” This test reflects a key First Amendment balancing act: finding the point at which

36 See, e.g., Lyrissa B. Lidsky, Incendiary Speech and Social Media, 44 Tex. Tech. L. Rev. 147, 159 (2011) (describing Brandenburg as “a proud pillar of American First Amendment jurisprudence precisely because it sets an extremely high bar to imposing liability in incitement cases” despite the “completely despicable” content of the speech at issue); Marc Rohr, Grand Illusion?, 38 Willamette L. Rev. 1, 3 (2002) (describing Brandenburg as “so extraordinarily speech-protective” that it raises the question of whether it “really means as much as its literal wording seems to imply” and whether courts are truly “prepared to make the commitment to freedom of speech that the [Brandenburg] test appears to require”).
37 Brandenburg, 395 U.S. at 445.
38 Id. at 445–46.
39 Id. at 446.
40 Id. at 444–45.
41 Id. at 447–48.
advocacy of an ideology, so crucial to protest and to change, becomes dangerous enough to justify restriction.\textsuperscript{42}

The \textit{Brandenburg} test still stands today.\textsuperscript{43} For speech to be circumscribed under the First Amendment, it must be “directed to inciting or producing imminent lawless action,” and the gravity of the harm feared must be balanced against the likelihood of the speech actually causing that harm.\textsuperscript{44} Courts weigh the potential dangers that could arise from the speech at issue against the likelihood and imminence of the possible harm.\textsuperscript{45} The \textit{Brandenburg} decision—and truly the track of First Amendment jurisprudence at large—reflects the high priority placed on the right to freedom of speech and its role in our democracy.\textsuperscript{46} It embodies the view that the price of democracy, the price of our constitutional principles, is that speech, whatever its nature and content, will not be suppressed unless it reaches the high threshold of being tied to a concrete and immediate risk.\textsuperscript{47} Unrestricted speech is supposed to feed the diverse dialogue behind our representative democracy, and bring us closer to truth and to a “more capable citizenry and more perfect polity[,]”\textsuperscript{48} but, even when the speech at issue is hateful, destructive, and seems to contribute nothing positive, modern First Amendment jurisprudence will not restrict it on that basis alone.\textsuperscript{49} The reasoning is that if speech that is unpopular in one moment in history is allowed to be suppressed simply because it

\textsuperscript{42} “[W]hen men have realized that time has upset many fighting faiths, they may come to believe . . . that the ultimate good desired is better reached by free trade in ideas . . . . That at any rate is the theory of our Constitution.” Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

\textsuperscript{43} Chris Montgomery, \textit{Can Brandenburg v. Ohio Survive the Internet and the Age of Terrorism: The Secret Weakening of a Venerable Doctrine}, 70 OHIO ST. L.J. 141, 142 (2009).

\textsuperscript{44} \textit{Brandenburg}, 395 U.S. at 447.

\textsuperscript{45} See, e.g., Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1071 (9th Cir. 2002) (“\textit{Brandenburg} . . . makes it clear that the First Amendment protects speech that advocates violence, so long as the speech is not directed to inciting or producing imminent lawless action and is not likely to incite or produce such action.”); id. at 1092 (Kozinski, J., dissenting) (“[U]nder \textit{Brandenburg}, encouragement or even advocacy of violence is protected by the First Amendment . . . .”); Ashcroft v. Free Speech Coal., 535 U.S. 234, 236 (2002) (“[T]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it, absent some showing of a direct connection between the speech and imminent illegal conduct.”) (internal citations omitted).


\textsuperscript{49} See \textit{Brandenburg}, 395 U.S. at 447.
is unpopular, it creates a precedent that may block the way of crucial debate—often the road to crucial change—in the future.\textsuperscript{50}

C. Speech in the Era of Social Media: Where We’re Going

With Brandenburg accompanying us into the modern day, two key questions before the country may call for changing—or adjusting our reading of—that long-standing test as applied to executive speech. First is the question of whether executive speech itself changes the Brandenburg equation because of the President’s greater power to influence people and to incite violence, harm, or “imminent lawless action.”\textsuperscript{51} Second is whether social media’s transformation of the country’s political dialogue calls for a change in how “immediacy” is viewed, and whether the use of social media—particularly by the executive, whose inherent power may already heighten the risks endemic to his or her speech—could justify heightened free speech restrictions for the executive.

III. EXECUTIVE SPEECH

Holding political office comes with both opportunities and costs. On the one hand, what better way to be heard in a representative democracy than to be a representative, and to have the chance to speak for the ideals that you and, presumably, your constituents share. On the other hand, from a First Amendment perspective, being a political figure renders you less protected from the speech of others.\textsuperscript{52}

\textsuperscript{50} Take, for instance, the work of abolitionists and civil rights advocates early in the nation’s history. They certainly represented a minority view, unpopular with many, and had the government been allowed to repress their speech to alleviate the discomfort of the majority at hearing their ideas, vital changes to society might never have been made. See J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 383 (referring to abolitionists in the 1840s and civil rights protesters in the 1950s and 1960s as beneficiaries of the fact that “for most of America’s history, protecting free speech has helped marginalized or unpopular groups to gain political power and influence”); MARGARET A. BLANCHARD, REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA, 282, 416 (1992) (emphasizing the importance of protests and boycotts, “a form of expression protected by the First Amendment,” in creating momentum for the Civil Rights Movement, and noting that “[a]nother group of protesters in the 1830s had launched the highly unpopular campaign to end slavery”).

\textsuperscript{51} See Brandenburg, 395 U.S. at 447.

\textsuperscript{52} See N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1969) (holding that a published advertisement expressing criticism of and grievances against an Alabama elected official was protected by the First Amendment even though it contained erroneous statements of fact because “[t]he interest of the public . . . outweighs the interest of [a public official]” (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (1942))).
A. Executive Immunity

Legally speaking, government actors are generally afforded some special protections. They are insulated from certain forms of liability: for instance, actions taken or decisions made by government officials while acting in their official capacity and within the scope of their duties typically cannot subject them (or the government itself) to tort liability.\(^{53}\) The President in particular is insulated from suits based on actions undertaken in his or her capacity as executive.\(^{54}\) The rationale for these protections—that, to ensure smooth and effective government, the law should prevent political actors from being subjected to a battery of lawsuits for their decisions that could potentially hobble the necessary functions of government\(^{55}\)—is especially significant with respect to the President.\(^{56}\) The intricacies of government involve balancing many high-stakes interests and making choices that often involve sacrifice and compromise.\(^{57}\) The theory of democracy relies upon putting someone in the position to make those choices unencumbered.\(^{58}\)

With respect to the executive in particular, this reasoning takes on special importance. At its core, Article II of the U.S. Constitution empowers the President as a decision-maker, a

\(^{53}\) See, e.g., Cope v. Scott, 45 F.3d 445, 446–48 (D.C. Cir. 1995) (finding no liability in a negligence action against the United States under the Federal Tort Claims Act because the government, when exercising policy judgment in discretionary functions, is shielded from liability).

\(^{54}\) See generally Nixon v. Fitzgerald, 457 U.S. 731 (1982) (“In view of the special nature of the President’s constitutional offices and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the ‘outer perimeter’ of his official responsibility.”).

\(^{55}\) “The reason for the official privilege is said to be that the threat of damage suits would otherwise inhibit the fearless, vigorous, and effective administration of policies of government.” Sullivan, 376 U.S. at 282 (internal quotation marks omitted).

\(^{56}\) See Nixon, 457 U.S. at 751 (“Because of the singular importance of the President’s duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.”).

\(^{57}\) The decisions and discretionary functions of government officials involve balancing different, often-conflicting policy considerations, and weighing the risks and advantages of any given course of action. This aspect of governmental decision-making is what gives rise to immunity for liability in the execution of discretionary functions. The higher a government official is on the chain of decision-making authority, the more heightened the considerations and consequences balanced in their choices—particularly for military leaders, or for the Commander in Chief, whose decisions directly involve risks to the lives of American soldiers. See 63 C.J.S. Municipal Corporations § 886 (2018) (discussing the balancing in decision-making that underlies discretionary immunity for a governmental body); 91 C.J.S. United States § 321 (2018) (providing an overview of the sovereign immunity usually provided to the government and extended to its agents).

\(^{58}\) See e.g., United States v. Nixon, 418 U.S. 683, 705 n.15 (1974) (“There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy . . . . Most of the Framers acknowledge that without secrecy no constitution of the kind that was developed could have been written.”) (internal citations omitted).
position of trust in which the person in office is supposed to reflect, by their actions and statements as an individual, the interests and ideals of the people.\(^{59}\) The executive must examine and synthesize all of the competing concerns and large-scale decisions facing the country, and, in light of all those factors, make the choice that most represents the will and ideals of the people.\(^{60}\) It is for this reason that the law does not allow private citizens, who may only be able to see a tiny fraction of the larger backdrop against which the decision was made, to attack the executive for those difficult choices.\(^{61}\)

The Supreme Court has held that the President “is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President’s unique office, rooted in the constitutional tradition of the separation of powers and supported by our history.”\(^{62}\) Because the President is “entrusted with supervisory and policy responsibility of utmost discretion and sensitivity[,] . . . diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.”\(^{63}\) The President must be vested with the power to carry out his Article II duties, and “[t]he [P]resident cannot, therefore, be liable to arrest, imprisonment or detention[] while he is in the discharge of his duties of office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.”\(^{64}\)

“The President’s unique status under the Constitution distinguishes him from other executive officials.”\(^{65}\) The legal treatment of executive power recognizes two central constitutional principles of separation of powers. First, that the crux of executive power is based on the importance of vesting in one individual the ability to make crucial, high-stakes decisions

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\(^{59}\) Article II entrusts the president with receiving foreign ambassadors, and appointing United States ambassadors, U.S. Const. art. II, §§ 2–3, meaning that the president and his or her appointees form the public, international face of the country. The president is also required to deliver a report on the “State of the Union” to Congress, conveying to lawmakers the status of the country at large—and, presumably, communicating the interests and needs of the people at large. See id. § 3.

\(^{60}\) In a representative form of government, the leadership is meant to reflect the will of the people, and is accountable to its constituents—thus the avenue of impeachment, by which leaders and public officials can be removed if they are believed to be unfit for their role, is left open. See U.S. Const. art. II § 4. For a discussion of the executive’s difficulties in balancing their own ideologies and their responsibility to their constituents, see Kathy B. Smith, The Representative Role of the President, 11 Presidential Stud. Q. 203 (1981).


\(^{62}\) Id. at 749.

\(^{63}\) Id. at 750–51.

\(^{64}\) Id. at 749 (quoting 3 J. STORY, Commentaries on the Constitution of the United States § 1563, 418–19 (1st ed. 1833)) (internal quotation marks omitted).

\(^{65}\) Id. at 750.
on behalf of the nation that require a speed and decisiveness that neither the legislature nor the judiciary can supply.\textsuperscript{66} As such, in reviewing the actions of past presidents, the other branches have been careful not to throw any administrative roadblocks in the path of the executive that he or she could trip over in a crucial moment.\textsuperscript{67} Second, judicial decisions concerning executive power highlight the Court’s unwillingness to be in the business of policing and second-guessing every executive decision, and for the same reason—separation of powers. The executive must be able to execute its power, while the judiciary is there to define the boundaries of the law when crossed.\textsuperscript{68} Preserving the ability of the executive to act without constant judicial oversight and without fear of reprisal for difficult choices forms the basis for executive immunity.\textsuperscript{69} The judiciary operates on a presumption of regularity\textsuperscript{70} and a presumption of good faith in assessing the official acts of public officials.\textsuperscript{71} This trust in, and deference to, the executive branch allows courts to smooth their own processes, rather than busying themselves with overseeing the minutia of executive activity, another nod to the all-important balance of powers.\textsuperscript{72}

Moving closer to the domain of speech, the President can claim privilege in his or her confidential communications.\textsuperscript{73} While the privilege is far from absolute, the courts balance the

\textsuperscript{66} See Martin Wald, \textit{The Future of the War Powers Resolution}, 36 STAN. L. REV. 1407, 1411 (1984) (“The President is capable of acting with more speed, decisiveness and secrecy than any legislature . . . . There is a constant tension between the goals of flexibility and efficiency, embodied in a head of state, and caution and consensus, embodied in a legislature.”).

\textsuperscript{67} See id. (noting that the War Powers Resolution left intact the emergency exception, allowing the president to respond to an attack without waiting for congressional approval); see also 50 U.S.C. § 1541 (2012).

\textsuperscript{68} “Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.” United States v. Nixon, 418 U.S. 683, 705–06 (1974).

\textsuperscript{69} See Nixon v. Fitzgerald, 457 U.S. 731 at 752–53.

\textsuperscript{70} “It is a presumption of law, that all public officers, and especially such high functionaries [as the President], perform their proper official duties until the contrary is proved.” Phila. & Trenton R.R. Co. v. Stimpson, 39 U.S. 448, 458 (1840); see also United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926) (“[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties.”).

\textsuperscript{71} See, e.g., Jones v. FBI, 41 F.3d 238, 242 (6th Cir. 1994) (“[Government] agency actions and affidavits are normally entitled to presumption of good faith.” (citing U.S. Dep’t of State v. Ray, 502 U.S. 164, 179 (1991))).

\textsuperscript{72} “The Federal Supreme Court has recognized for a very long time that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government.” 16A AM. JUR. 2D Legislative Motivation § 187.

\textsuperscript{73} See United States v. Nixon, 418 U.S. 683 at 708.
necessity of the information and the interest of justice against the recognition that protecting the confidentiality of the President’s words may be uniquely important. Confidentiality of presidential communications also implicates separation of powers. “Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.” Further, the privilege takes note of the high stakes of the President’s role, particularly as Commander-in-Chief: when “there is a reasonable danger that compulsion of [government documents as] evidence will expose military matters which, in the interest of national security, should not be divulged[,] . . . the occasion for the privilege is appropriate and the court should not jeopardize the security which the privilege is meant to protect.”

B. Executive Vulnerability

In the context of free speech, by contrast, the First Amendment traps public officials in the spotlight. Generally, the speech of government actors, including the executive, is treated no differently from that of other citizens—within the confines of Brandenburg, they can say whatever they like. However, their role renders them uniquely vulnerable to the speech of others. Critical and even false speech against public officials is protected. What would be defamation against a private citizen is perfectly allowable against a public official or public

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74 In explaining the heightened protection given to presidential communications, the Supreme Court reasoned that

[the expectation of a President to the confidentiality of his conversations and correspondence . . . has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.

Id.

75 See id. (“The privilege” protecting confidentiality of presidential communications is “inextricably rooted in the separation of powers under the Constitution.”).

76 Id. at 711.

77 United States v. Reynolds, 345 U.S. 1, 10 (1953).

78 See Sharp, supra, note 22.

79 See generally N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1969) (finding that an elected commissioner could not succeed in a libel suit based on published criticisms of his official conduct, even if they contained false statements of fact).
The rationale for disadvantaging political officials in this way is much the same as the rationale for protecting them in other contexts: their fundamental role in the democratic process. To preserve the integrity of a representative democracy, citizens must be able to hold their leaders accountable. The importance of dissent and criticism—pushback on government actions—is considered so central to democracy that First Amendment jurisprudence allows for a wide margin of error and even for intentional falsehood in order to keep a free flow of speech that may call politicians to account for their actions.

Allowing both the press and the citizens to act as a check on the actions of political figures, the Court has said, entails allowing robust criticism of officials both as to their policies and as individuals. Politicians are seen as having essentially assumed this risk by stepping into the political spotlight. As such, the President’s legal standing with respect to the First Amendment is already shaped by his or her role.

C. The Boundaries of Executive Speech

The already-differential treatment of the President under the Constitution, in both positive and negative ways, lends support to the argument that presidential speech might likewise be justifiably restricted to a different degree than that of the

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80 Compare Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (“[W]e have consistently ruled that a public figure may hold a speaker liable for the damage to reputation caused by publication of a defamatory falsehood, but only if the statement was made ‘with knowledge that it was false or with reckless disregard of whether it was false or not.’” (citing Sullivan, 376 U.S. at 279–80)), with Gertz v. Robert Welch, 418 U.S. 323, (1974) (“Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing that required by New York Times.”).

81 See Sullivan, 376 U.S. at 282–83 (“It is as much [the citizen-critic’s] duty to criticize as it is the official’s duty to administer . . . . It would give public servants an unjustified preference over the public they serve [if immune from criticism.]”).

82 The Federalist Papers No. 70 (Alexander Hamilton) (“[T]he two greatest securities [the people] can have for the faithful exercise of any delegated power [are], first, the restraints of public opinion . . . and, secondly, the opportunity of discovering with facility and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it.”).


84 Id.

85 See Gertz, 418 U.S. at 344 (“An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case.”); Sullivan, 376 U.S. at 275 (“[T]he press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law . . . . The right of free public discussion of the stewardship of public officials was thus, in Madison’s view, a fundamental principle of the American form of the government.” (quoting James Madison, Report of 1800 (Jan. 7, 1800), in 4 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 570 (1836))).
average citizen. First Amendment jurisprudence has promoted (or at least tolerated) caution with respect to presidential speech, allowing executives to keep their confidences when national security or other critical interests are at stake, rather than being forced to disclose the inner workings of their decisions as President. This approach contains a recognition of the inherently higher risks involved with presidential actions and communications. By that same token, it hearkens to the reality—as discussed above in the context of North Korea—that presidential communications carry potential danger when spoken that justifies their being kept confidential. As Justice Stewart presciently noted, “the Executive is endowed with enormous power in the two related areas of national defense and international relations. This power, largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age.”

The Court’s First Amendment decisions have been colored by the understanding that the judiciary is not the first line of defense; it is the people and the press. As much as executive speech is privileged to protect its democratic purpose, analogous considerations support the freedom of speech of the citizen-critic of government.

In the absence of governmental checks and balances[,] . . . the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an

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86 One ground supporting the argument for executive privilege is “the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion.” United States v. Nixon, 418 U.S. 683, 705 (1974).
87 Even beyond the potentially dangerous ripple effect that presidential statements can create in foreign affairs, and the high military stakes associated with the role of Commander in Chief, see discussion supra Section I, the “sheer prominence” of the President’s office and the fact that the President is entrusted with “the most sensitive and far-reaching decisions . . . under our constitutional system” also heighten the possible consequences of a President’s words and behavior, on both the domestic and global stage, see Aviva A. Orenstein, Presidential Immunity from Civil Liability: Nixon v. Fitzgerald, 68 CORNELL L. REV. 236, 245 (1983).
89 See Sullivan, 376 U.S. at 269, 275 (“The constitutional safeguard [of the First Amendment] ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” (quoting Roth v. United States, 354 U.S. 476, 484 (1957))); see also Owen M. Fiss, Building a Free Press, 20 YALE J. INT’L L. 187, 191 (1995) (“Democracy is a system of government that ultimately allows the public to decide how it wishes to live; but democracy presupposes that the public is fully informed . . . . A free press is meant to make this supposition a reality.”).
90 Sullivan, 376 U.S. at 282.
enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. 91

In the end,

neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity . . . The impediment that [it] would place in the way of the primary constitutional duty of the Judicial Branch . . . would plainly conflict with the function of the courts under Article III. 92

There is a tacit presumption that the person in the office of the President will modulate his or her speech in a way that reflects his or her heightened capacity to influence and incite. However, if the President is not effectively guarding against the innate power (and corresponding danger) of speaking from that office, the Court may be empowered to inscribe lines around the executive sphere of freedom of speech, boundaries that would recognize that a President’s capacity to incite is far above that of the average citizen. The President’s words are like a match being struck above a line of gasoline that laces its way across the globe, not an unknown masked man trying to start a brushfire in rural Ohio with a pair of sticks.

D. Danger & Likelihood: Responses to Executive Speech

The Brandenburg balance first takes into account the potential dangers that can arise from the speech in question. While no constitutional rule should be designed around the behavior of a single individual or a single speaker, some of the specters raised by the interpretations of President Trump’s speech—and the ripple effect of those words—furnish examples of how executive speech can more readily give rise to very serious potential harms that, both in their scope and severity, would not attach to the words of another speaker.

Several aspects of the President’s role contribute to the greater potential of executive speech to incite action by others. In a number of contexts, presidential speech can literally be regarded as a call to action, possibly crossing the line into making the speech dangerous enough to regulate. First and most obviously, the President is the Commander in Chief of the

91 N.Y. Times Co., 403 U.S. at 728.
military. What happens if a President tweets “Let’s bomb North Korea!”? To be sure, Twitter is not the standard platform for military orders, but technically speaking, that sentence is a command from someone with the authority to issue it. Second, if not an order, presidential permission could be a powerful influence—and a possible defense—to one’s actions. When President Trump referred to suspected Latino gang members as “animals” and encouraged police officers to let them strike their heads on the doors of squad cars, did he give permission to engage in police brutality? Against the backdrop of Trump’s continuing promises to “build a wall” to prevent Latino and Latina people from entering the United States, those words become racially charged, and could generate fear for people of color in America, whether citizens or not. Another example of a potentially coercive use of executive speech was Trump’s Twitter attack on the NFL players who chose to kneel in protest during the national anthem. While a private entity like the NFL can exercise control over the speech of its employees without violating the Constitution, it would be emphatically and quintessentially unconstitutional for the government to stifle an act of protest speech on that basis alone. As such, Trump’s tweet, suggesting that tax laws should be changed to penalize the NFL for allowing the protest, could be seen as an attempt to leverage the threat of presidential power to compel certain

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93 U.S. CONST. art. II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . . .”).
95 Id.
97 Like all provisions of the Constitution, the First Amendment protects the rights of private citizens from infringement by the government, but does not protect against invasions of those rights by corporate entities or other private citizens. See U.S. CONST. amend I; see also, e.g., Denver Area Educ. Telecomm. Consortium v. FCC, 518 U.S. 727, 736 (1996) (“[T]he First Amendment, the terms of which apply to governmental action, ordinarily does not itself throw into constitutional doubt the decisions of private citizens to permit, or to restrict, speech . . . .”).
actions by government agencies, private organizations, and, by extension, citizens.\textsuperscript{99}

A more removed but perhaps more widespread ripple effect: a President’s vindication or tacit acceptance of hate speech or discriminatory attitudes carries a greater risk of leading to the proliferation of hate crimes and violence, because people holding those discriminatory views may believe that they have the President’s stamp of approval to act on their beliefs.\textsuperscript{100} Such speech from the executive may also chill speech on the other side of the line: people who are part of a racial or other minority group might be deterred from speaking for fear of reprisal from the President, or of the violence his or her words seem to be inviting against them by others.\textsuperscript{101} In that light, would Trump’s inflammatory rhetoric with regard to race relations,\textsuperscript{102} LGBT individuals,\textsuperscript{103} or Muslims,\textsuperscript{104} constitute incitement to violence and hate crimes? Bias-motivated crimes are acknowledged to entail different, broader risks than other crimes,\textsuperscript{105} so if certain speech increases their likelihood, restricting it may be more

\textsuperscript{99} See Noah Feldman, \textit{The Guy in the Bully Pulpit Can’t be a Bully}, BLOOMBERG (Oct. 11, 2017, 2:35 PM), https://www.bloomberg.com/view/articles/2017-10-11/trump-s-presidential-bullying-violates-the-first-amendment (arguing that because the IRS answers to the president, this tweet can be seen as an “order [to] the IRS to reconsider or alter the league’s tax status,” constituting a violation of the First Amendment, which “bars presidential bullying that includes a concrete threat to take government action against a private citizen or group in order to coerce speech”).


\textsuperscript{101} “For marginalized communities, the power of expression is impoverished for reasons that have little to do with the First Amendment. Numerous other factors in the public sphere chill their voices but amplify others. . . . [S]ystematic harassment and threats . . . stifle their ability to speak.” K-Sue Park, \textit{The A.C.L.U. Needs To Rethink Free Speech: Commentary}, N.Y. TIMES (Aug. 17, 2017), https://www.nytimes.com/2017/08/17/opinion/aclu-first-amendment-trump-charlottesville.html.


\textsuperscript{104} See Anthony Zurcher, \textit{What Trump Team Has Said About Islam}, BBC NEWS (Feb. 7, 2017), http://www.bbc.com/news/world-us-canada-38886496 (presenting a measured analysis of statements by Trump and his advisors about Muslims, but quoting Professor Khaled Baydoun as asserting that “[s]capegoating Islam and vilifying Muslims was far more than merely campaign messaging; for Donald Trump it was a winning strategy”).

\textsuperscript{105} Wisconsin v. Mitchell, 508 U.S. 476, 487–88 (1993) (upholding a statute singling out bias-motivated crimes for greater penalties in part because such crimes are “more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest”).
readily justified. To be restricted, speech must be “directed to inciting or producing imminent lawless action.” President Trump’s statements may not have been infused with that intent, but that did not prevent them from having an effect, and Brandenburg turns on effects.

E. Immediacy: When the Harm Becomes Real

The Brandenburg metrics of immediacy and likelihood of imminent lawless action seem to indicate that the decision leaned in part on the Court’s sense that the words of the speakers in Brandenburg were unlikely to have an effect or reach a large audience, or, at the very least, not imminently. The likelihood of a harm occurring in response to someone’s speech is a function of two things: how many people are listening and how likely they are to act on the speaker’s words. The presidency inherently increases the count on both of these variables. The greater weight and influence of executive speech may, in itself, tip the risk analysis of Brandenburg toward subjecting presidential speech to heightened restrictions because the likelihood of lawless action occurring as a direct result is higher. Unlike Brandenburg, who had few listeners, and even fewer inclined to give credence to his views, all eyes are on whoever holds the office of President, so he or she has a much larger audience and a much larger possible response. Before the Charlottesville riot, David Duke, former leader of the KKK, referred to

106 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (emphasizing that speech should not be restricted on the basis of ideas alone, even those promoting possible violence, so long as they fall short of creating an imminent and likely risk of lawless action in response to the speech). Indeed,

[T]he mere abstract teaching of . . . the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial . . . evidence of a call to violence now or in the future which is sufficiently strong . . . .


108 See Brandenburg, 395 U.S. at 449.

109 Id.


111 Originally called the “Unite the Right” rally by its organizers, white nationalists from around the United States flooded the streets of Charlottesville, Virginia, on August 11–12, 2017, protesting the removal of a statue of Robert E. Lee. The violent demonstrations and clashes with counter-protesters led to the death of one left-wing counter-protester and left more than twenty others injured when a member of one of the white supremacist groups drove a speeding car through the crowd. See Richard
Donald Trump directly when he said that he and the hundreds of “alt-right”\textsuperscript{112} protesters with him had taken Trump at his word that “he’s going to take our country back” and were there to vindicate the promises made during Trump’s campaign.\textsuperscript{113} Listeners may give more weight to a President’s words, so whatever risk of harm those words create, the sheer number of listeners provided by the vast reach of the Internet, increases the likelihood of lawless action in response.\textsuperscript{114} These factors argue for moving the line of what constitutes “immediacy” further back from the cliff’s edge, rather than risking escalation when the results may be on a much larger scale than with another speaker.

The best reason to hesitate in restricting the speech of the President is that, at the heart of the executive’s role, he or she is supposed to speak for the people. The United States is a representative democracy,\textsuperscript{115} and electing a representative is the democratic act of consolidating the voices of many into one person, entrusted to represent our interests when, as individuals, we would be too diffuse to speak for ourselves. The President is, for four years,\textsuperscript{116} the figurehead and spokesperson of the people.\textsuperscript{117} In that light, censoring the speech of the President seems deeply antithetical to our democratic ideals. If we believe in the democratic and electoral system, then our President is a reflection of us, however imperfect, and we have empowered the


\textsuperscript{113} Manchester, supra note 100.

\textsuperscript{114} The impact of the Internet and social media generally, as well as their role in the precipitation and organization of the Charlottesville rally, is discussed more extensively infra Section IV.


\textsuperscript{116} U.S. CONST. art. II § 1.

\textsuperscript{117} “When a head of state arrives in a foreign country the red carpet is extended to the individual who represents his state in his person.” Smith, supra note 60, at 206.
person in that role to speak on our behalf.118 When presidential speech creates the kind of dangers, at home or abroad, that would be cause to restrict the speech of an ordinary citizen in order to prevent harm, we are left with the strange conundrum of needing to silence someone who is meant to be our voice.

If one should guard against the absolute corruption of absolute power, what about democratic power? Democratically elected officials are only entrusted with power because they are meant to represent the citizens, not because the citizens abdicate their own voice and give the officials unrestricted license to act as they choose.119 “[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”120 That perspective may empower the Court, with an eye on the First Amendment goal of bettering our democracy, to constrain executive speech when it is detrimental to its own source.

IV. SOCIAL MEDIA IN THE POLITICAL ARENA

The advent of social media has transposed much of our cultural and political dialogue into the form of online commentary and discussion.121 During his presidency, Trump has stated that social media is his preferred mode of communication with the American people, and that he is speaking in his official capacity as President over Twitter.122 Through the megaphone of social media, the risks and ramifications of presidential speech are likewise magnified.123 In that respect, First Amendment jurisprudence is met with a

118 See id. at 205 (“The standard by which a representative should be judged in a democratic state . . . is ‘whether he has promoted the objective interests of those he represents’ . . . . A good representative may not always follow the opinions of his constituents. When he chooses to depart from [them] he has a burden to explain his actions [to the people].”).
119 THE FEDERALIST NO. 62 (James Madison) (“It is a misfortune incident to republican government . . . that those who administer it may forget their obligations to their constituents, and prove unfaithful to their important trust.”).
121 See Hayley Eastman, Communication Changes with Technology, Social Media, DAILY UNIVERSE (July 7, 2013), http://universe.byu.edu/2013/07/07/1communication-changes-with-technology-social-media/.
123 The intersection of many attributes of social media creates this effect. Posts are delivered instantaneously, and, depending on the number of followers, to a large number of people. From there, they can proliferate equally quickly as they are shared between users and across social media platforms, fanning out across the world to a huge number of people in a matter of hours or days, with little to no filtering or editing.
question it has not confronted before: whether executive speech over social media should be held to the same standards as that of other users, or whether, in combination with the power and influence of the speaker, it requires a higher standard.

A. Fitting Social Media Into the First Amendment

Speech on social media is by and large treated the same way as other speech.\textsuperscript{124} Legally speaking, it has been brought into the fold of the First Amendment relatively quickly: digital speech is speech, protected in the same way and to the same extent as spoken or printed words.\textsuperscript{125} “While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.”\textsuperscript{126} The courts have already begun to address the increasing role of social media in politics\textsuperscript{127} and are taking steps to ensure that political speech cannot be stifled by politicians simply because it is easier to block someone on Facebook than silence them in a town meeting.\textsuperscript{128} Indeed, far from insulating politicians’ conduct, a public official who, in her official capacity, blocked a constituent from an online forum because she took offense at his claim of unethical government conduct was held to have “committed a cardinal sin under the First Amendment.”\textsuperscript{129} As a young physician currently suing\textsuperscript{130} Donald Trump for blocking him on Twitter insightfully warns:

\begin{footnotesize}
\begin{enumerate}
\item[Reno v. ACLU, 521 U.S. 844, 870 (1997)] (“[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet].”).
\item[Id.]
\item[Packingham v. North Carolina, 137 S. Ct 1730, 1735 (2017) (holding that a statute restricting registered sex offenders’ access to certain social media websites was unconstitutional under the First Amendment, and noting that it was one of the first cases that the Court had taken to “address the relationship between the First Amendment and the modern Internet”).]
\item[Id. at 1735 (noting that governors in all fifty states and almost every member of Congress have set up Twitter accounts for the purpose of engaging with their constituencies); see also David Kravets, Politicians’ Social Media Pages Can Be 1st Amendment Forums, Judge Says, ARSTECHNICA (July 28, 2017, 1:18 PM), https://arstechnica.com/tech-policy/2017/07/politician-dinged-for-blocking-critical-constituent-from-facebook-page/.
\item[See Davison v. Loudon Cty. Bd. of Supervisors, 227 F. Supp. 3d 605 (E.D. Va. 2017).]
\item[Davison v. Loudon Cty. Bd. of Supervisors, 267 F. Supp. 3d 702, 718 (E.D. Va. 2017).]
\end{enumerate}
\end{footnotesize}
While America’s founding fathers may not have envisioned something like Twitter, they certainly knew the importance of free speech to a democracy. They would have been outraged if the president could ban an American citizen from reading his announcements in a newspaper or book. We have now extended [free speech] rights to both television and radio. If Twitter is somehow exempt, so too will be many new and emerging technologies. Blocking private citizens from reading a president’s communications threatens our democracy, our freedoms, and our future.\footnote{Eugene Gu, Why I’m Suing President Trump for Blocking Me on Twitter, FORTUNE (July 12, 2017), http://fortune.com/2017/07/12/donald-trump-twitter-lawsuit-sued-block-unconstitutional/}\

Thus far, the law has not considered whether the boundaries of free speech should be redrawn to account for how the advent of social media has altered our speech, in everything from day-to-day relationships to our national political dialogue. Instead, it is trying to fit social media within the metric of our existing First Amendment jurisprudence, where, in reality, it may no longer fit. While “the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary when a new and different medium for communication appears[,]”\footnote{Brown v. Entm’t. Merchs. Ass’n, 564 U.S. 786, 790 (2011) (internal quotation marks omitted).} in “considering the application of unchanging constitutional principles to new and rapidly evolving technology, . . . [w]e should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar.”\footnote{Id. at 806 (Alito, J., concurring).} “Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.”\footnote{Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).} The question is whether social media like Twitter are different enough—and have changed speech enough—to change where we draw the lines of the First Amendment.

B. Executive Speech Amplified: Presidential Voices in New Media

Trump’s use of social media to “circumvent traditional media and talk directly to the people”\footnote{Gu, supra note 131.} may seem like an enticing notion and, in fact, it is not unprecedented. During the Great Depression, for instance, Franklin D. Roosevelt’s fireside chats were an important step taken by a President to

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communicate directly and personally with the public—and, carried over radio, they were a “revolutionary experiment with a nascent media platform[,]” as Twitter is today. There is a “long tradition of presidents going around the so-called filter of the press . . . and get[ting] directly to the American people . . . Presidents want to get their message out, unfiltered by the press.”

Traced from the fireside chats to Reagan’s primetime news conferences to Obama’s highly produced videos released on social media, Trump’s use of Twitter can be seen “as an extension of what other presidents have done,” a natural development for the presidency in the social media age.

President Obama’s use of Twitter during his presidency exemplified the niche one might have expected social media to fill in the Oval Office. The first President to take office with social media truly on the rise, Obama adopted it as a notable part of his online presence, and “his tech savvy was heralded as a bright light for democracy.” Using it to make announcements or to express sentiments of sympathy or solidarity, “[t]he tweets he post[ed] to @POTUS never seem[ed] impulsive; they seem[ed] made for posterity.” Obama did not use social media to cast aspersions on dissenters or political opponents, let alone address world leaders in ways that could be read as goading them toward nuclear war. “Even his jokes [were] calculated to be minimally offensive and maximally educational.”

However, with many of Trump’s tweets a far cry from the carefully composed presidential addresses of Roosevelt and other successive presidents, the question is whether and how

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137 Adrienne LaFrance, Donald Trump is Testing Twitter’s Harassment Policy, ATLANTIC (July 2, 2017), https://www.theatlantic.com/politics/archive/2017/07/the-president-of-the-united-states-is-testing-twitter-harassment-policy/532497/ (suggesting that perhaps the Twitter platform itself should take steps to police Donald Trump’s invectives on Twitter).

138 Keith, supra note 122.

139 See id. (noting that one example of President Obama’s forays into the social media world was a video on a popular comedian’s show that was meant to “sell the Affordable Care Act to young people”).

140 Id.


142 Id.

143 Id.

144 Id.

145 See Bridie Pearson-Jones, Donald Trump Has Been on a Very Long, Very Incoherent Twitter Rant, INDEPENDENT, https://www.indy100.com/article/donald-trump-crashed-twitter-loving-viral-potus-fake-news-theresa-may-angela-merkel-7760336; see also Matt Flegenheimer, What’s a ‘Covfefe’? Trump Tweet Unites a Bewildered Nation,
to regulate the presidential use of new media.\textsuperscript{146} Roosevelt \textquotedblleft used his fireside chats to explain policy without having reporters condense and interpret his message . . . \textemdash and to \textemdash reassure the public, directly.\textsuperscript{147} Trump's communication over Twitter has the opposite effect: rather than using a platform to communicate more expansively with the American people, Twitter, with its miniscule character limit,\textsuperscript{148} invites oversimplification if not distortion.\textsuperscript{149} People want to hear from their President, to \textquotedblleft take his measure and that's not something that's suitable for Twitter. Announcements are, but explaining the guts of policy isn't.\textsuperscript{150}

Although many presidents had friction with the media,\textsuperscript{151} it should raise eyebrows for a president to revel in circumventing the media,\textsuperscript{152} given their important historical role in acting as a check on politicians,\textsuperscript{153} both by keeping the citizenry informed so that representative reinforcement can act as a pressure on sitting government officials, and by being the source of information if the government commits a wrong.\textsuperscript{154} "[T]he principle of elected

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\textsuperscript{146} Under Trump, \textquotedblleft what was once a hopeful place for global connection and resistance has become a site for coordinating harassment campaigns, connecting with white supremacists and accelerating unverified and sometimes dangerous rumors." See Hess, supra note 141.


\textsuperscript{150} Keith, supra note 122 (quoting Martha Joynt Kumar, Professor of Political Science, Towson University).


\textsuperscript{152} Matt Kwong, \textit{Trump's Strategy of Bypassing the Media Raises 'Danger Signs,'} CBC NEWS (Nov. 23, 2016, 5:00 PM), http://www.cbc.ca/news/world/trump-media-strategy-1.3863148.

\textsuperscript{153} Mills v. Alabama, 384 U.S. 214, 219 (1966) ("Suppression of the right of the press to praise or criticize governmental agents and to clamor and contend for or against change . . . muzzles one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free.").

\textsuperscript{154} See N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring) ("The press was protected [by the First Amendment] so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."); see generally Clay Calvert & Mirelis Torres, \textit{Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet}, 13 VAND. J. ENT. & TECH. L. 323 (2011) (discussing the \textquotedblleft watchdog\textquotedblright role of
officials being accountable to the public through the press is one that’s fundamental to our democracy.”

“The social media platforms that were once heralded as democratic tools could also be used to undermine democratic norms[,]” compromising citizens’ ability to effectively question the government, and distorting the representative relationship between the President and the people.

C. Reach & Risks: Presidential Social Media Presence

“An unprecedented feature of Donald Trump’s successful campaign for president was his personal use of Twitter.” As President, his tweets seem to have been making front-page news since day one, and the stakes have been rising as he discusses increasingly serious matters via tweet. The Department of Justice addressed some of the uncertainty around Trump’s modus operandi with a perhaps more unsettling conclusion: Trump’s tweets are “official statements of the President of the United States.” The D.O.J. treating the tweets as official statements indicates that, in a legal context, they could be relied on, and sharply underlines what is at stake when the executive speaks over social media.


Keith, supra note 122 (quoting Brendan Nyhan, Professor of Gov’t, Dartmouth College); see also Fiss, supra note 89.

Hess, supra note 141.

Keith, supra note 122.


For a discussion of President Trump’s interchanges with North Korea, see discussion supra section 1.

Lorelai Laird, DOJ Says Trump’s Tweets are Official Presidential Statements, ABA J. (Nov. 14, 2017, 2:49 PM) http://www.abajournal.com/news/article/government_says_trumps_tweets_are_official_presidential_statements/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email. In the pending case of James Madison Project v. Department of Justice, seeking the release of documents related to Trump’s alleged ties to Russia, the Department of Justice attorneys filed a response to the judge in which they stated that “the government is treating the statements upon which the Plaintiffs rely as official statements of the President of the United States.” Id.

Among the starkest examples to date are those that border on threats that could precipitate nuclear war with North Korea. See note 3 and accompanying text; see also Donald J. Trump (@realDonaldTrump), TWITTER, (Sept. 3, 2017, 4:46 AM), https://twitter.com/realdonaldtrump/status/904309527381716992 (implying that violence is the “one thing” North Korea understands and would be the only recourse).
A prominent example is the series of tweets in which Trump said that transgender individuals would no longer be allowed to serve in the U.S. military.\footnote{Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 5:55 AM), https://twitter.com/realdonaldtrump/status/890193981585444864; Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 6:04 AM), https://twitter.com/realdonaldtrump/status/890196164313833472; Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 6:08 AM), https://twitter.com/realdonaldtrump/status/890197095151546369.} Did those statements constitute an Executive Order? A directive from the Commander in Chief? The response from the rest of the government was telling: the Pentagon would not change its policies for transgender troops until given more details from the White House, and military officials would not take any steps with respect to transgender people in the military until the tweets were clarified or codified\footnote{Bryan Bender & Jacqueline Klimas, Pentagon Takes No Steps to Enforce Trump's Transgender Ban, POLITICO (July 27, 2017, 11:28 AM), https://www.politico.com/story/2017/07/27/trump-transgender-military-ban-no-modification-241029 (pointing to a statement from the Joint Chiefs of Staff that there would be “‘no modification’ to the military’s transgender policy, until the White House drafts a formal request for a policy change”).}—they expressly refused to take orders from a tweet.\footnote{Id.}

Notwithstanding its now-formalized status,\footnote{After a more official directive from President Trump, the “transgender military ban” began working its way through federal courts and has currently been blocked by preliminary injunction in a D.C. Circuit district court. See Doe v. Trump, 275 F. Supp. 3d 167, 207 (D.D.C. 2017).} the fact that the initial revelation of this “policy” took place over Twitter with little advance warning to or consultation with military officials\footnote{Travis J. Tritten, Top Army General Says He Learned of Trump Transgender Ban Through News Reports, WASH. EXAMINER (July 27, 2017, 2:30 PM), http://www.washingtongexaminer.com/top-army-general-says-he-learned-of-trump-transgender-ban-through-news-reports/article/2629893.} shows what a fine—and potentially dangerous—line a president walks when communicating through Twitter. As with the possibility of declaring war, the stakes are high when major policy decisions are fired off without warning on social media, and certain declarations, taken at face value, could have immediate and chaotic effects. The intuition that the consequences of statements made over social media are not as serious\footnote{See John Suler, The Online Disinhibition Effect, 7 CYBERPSYCHOLOGY & BEHAV., 321, 322 (2004) (noting that the anonymity and invisibility of online interactions contributes to the belief that online actions are disconnected real life ramifications).} does not align with the gravity of presidential speech, nor with its heightened ability to impact American lives—now with 140 characters and the press of a button.\footnote{Twitter’s original 140-character limit was doubled to 280 on—perhaps pointedly—Election Day, 2017. See Molina, supra note 148.} The question of how social media speech by an executive will be handled by the courts has already seen the light of day.
during Trump’s presidency. The so-called “travel bans” or “Muslim bans” were a series of executive orders that halted citizens of seven predominantly Muslim countries from entering the United States. The various incarnations of the “travel ban” met with protests across the country, and took a fast track to the courtroom in the form of injunctions on behalf of U.S. citizens with relatives trapped, as it were, on the other side of the barricade. The circuit courts demonstrated a willingness to acknowledge social media in their legal evaluations of presidential speech and actions. En banc arguments before the Fourth Circuit focused on whether or not extrinsic statements by the President during both his campaign and his presidency—including those made over Twitter—could be considered in analyzing the motivations behind the Executive Order.

“In context[,]” the Fourth Circuit decision declared, the Executive Order “drips with religious intolerance, animus, and discrimination.” The context to which the court referred included negative statements about Muslims that Trump made during his campaign, on his campaign website, in news interviews—and over Twitter. Trump also explained that if he could not point overtly to Muslims, he would refer to the targets of his revised Executive Order as “territories” instead.

During oral arguments, members of the court seemed affronted by the idea that they were judicially obligated to turn a blind eye to Trump’s tweets because the Executive Order was arguably neutral on its face—especially since Trump had

See Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (2017), vacated, 138 S.Ct.353 (2017). Because the provisions of the Executive Order had expired by their own terms, the Supreme Court gave instructions to dismiss the challenge as moot, but “express[ed] no view on the merits.” Trump v. Int’l Refugee Assistance Project, 138 S. Ct. 353 (Mem.) (2017); Washington v. Trump, 858 F.3d 1168 (9th Cir. 2017); 772, Hawaii v. Trump, 859 F.3d 741, 772 n.14 (2017) (citing to Trump’s tweets and discussing whether they are “official statements”), vacated, Hawaii v. Trump, 874 F.3d 1112 (mem.) (9th Cir. 2017) (dismissing the case as moot following a Supreme Court order and opinion).

169 See Int’l Refugee Assistance Project v. Trump, 857 F.3d 554, 572 (2017), vacated, 138 S.Ct.353 (2017). Because the provisions of the Executive Order had expired by their own terms, the Supreme Court gave instructions to dismiss the challenge as moot, but “express[ed] no view on the merits.” Trump v. Int’l Refugee Assistance Project, 138 S. Ct. 353 (Mem.) (2017); Washington v. Trump, 858 F.3d 1168 (9th Cir. 2017); Hawaii v. Trump, 859 F.3d 741, 772 n.14 (2017) (citing to Trump’s tweets and discussing whether they are “official statements”), vacated, Hawaii v. Trump, 874 F.3d 1112 (mem.) (9th Cir. 2017) (dismissing the case as moot following a Supreme Court order and opinion).


172 Id.


174 Int’l Refugee Assistance Project, 857 F.3d at 572.

175 Id. at 575–76.

176 Id. at 576.
essential confessed on Twitter that it was fueled by identical anti-Muslim sentiments. The court found the Order unconstitutional, a violation of the Establishment Clause of the First Amendment. Although there is a high bar for challenging “the political branches’ power over immigration . . . [it] is not tantamount to a constitutional blank check”: the challenged government action must be “facially legitimate and bona fide”—that is, it must have a valid reason on its face, and be issued “in good faith.” In finding that President Trump’s Executive Order was unconstitutionally discriminatory, the court needed to look no further than—and did not hesitate to look at—Trump’s Twitter feed.

D. Imminence & Immediacy: The Impact of Social Media under Brandenburg

These constitutional clashes have brought executive speech over social media to the center of our national stage. The key First Amendment question invoked is whether the ubiquity of social media coupled with the innate power of executive speech changes how executive speech should be viewed under Brandenburg. The Brandenburg test tries to balance the variable of whether the harm feared is really imminent against whether there is a concrete likelihood that it will occur, rather than restricting speech based on speculation as to what may or may not happen in the future as a result of the speech. On both the metrics of immediacy and likelihood of harm, executive speech, with social media as its carrier, may well cross the threshold into being dangerous enough to regulate.

Because Twitter is a private entity, and because of its origins as a platform for unencumbered, pithy expressions of personal opinion, it lacks some of the filters through which

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178 Because the issue before the court was whether to grant a preliminary injunction, it framed its argument in terms of the likelihood of the plaintiffs’ success on the merits and dubbed the Executive Order “likely unconstitutional” in violation of the Establishment Clause, stating strongly that “EO-2 cannot be divorced from the cohesive narrative linking it to the animus that inspired it.” Int’l Refugee Assistance Project, 857 F.3d at 601, 603.
179 Int’l Refugee Assistance Project, 857 F.3d at 590.
180 See id. at 601, 612 (Wynn, J., concurring) (“Invidious discrimination that is shrouded in layers of legality is no less an insult to our Constitution than naked invidious discrimination . . . . [W]e again encounter the affront of invidious discrimination—this time layered under the guise of a President’s claim of unfettered . . . authority to control immigration . . . .”).
181 See id. at 575–76, 594.
information has travelled in the past—media such as newspapers, television, or radio, where there is an opportunity for at least a screening of the views to be aired, and for a reflective choice to be made in giving something airtime. On top of the innate immediacy of instant access to a speaker’s words, social media reaches citizens wherever they are, whatever they are doing, giving speech greater potential to incite. On one level, this observation is simply a numbers game: if the speech can reach everyone and there is anyone who needs no more than the words to be incited to action, the harm will occur. This reality conflicts with the intuitive concept of imminence as a present tense, interpersonal dynamic. A barrage of messages from the President to the people, if not checked or carefully thought through, creates a unique danger: if there is no opportunity to temper or clarify those words, or to stem their almost-instantaneous spread, that speech, imbued with the weight of executive authority, could lead to action far more quickly and easily than the words of another speaker, or of a President of the past. With any inflammatory remarks poised to light a fire because of the presidential role, the reach of media platforms like Twitter—and the Internet generally—make any potential harm a more immediate concern. If, anywhere in the darkest corners of the internet, people need only to be galvanized by a destructive call to action, then words that seem to carry the endorsement of a person in authority may create the sense that


185 See Brandenburg, 395 U.S. at 447; see also Liam Stack, Brooklyn Man Arrested, Accused of Supporting Islamic State, N.Y. TIMES (Nov. 21, 2016), https://www.nytimes.com/2016/11/21/nyregion/brooklyn-man-arrested-isis.html (describing how a Brooklyn man, charged with trying to provide material support to terrorists, worked to engage with ISIS and ISIL over social media and hoped “to stage an attack in Times Square similar to the one that killed 86 people in Nice, France”).

186 “Trump overwhelms the [news] media with boatloads of what was once a rare commodity: access. He creates impressions faster than journalists can check them. By the time they turn up the facts, the news cycle has moved on to his next missive.” Hess, supra note 141.


188 See discussion supra Sections III.D–E.
their views have momentum—and their actions have permission.189 Even if the innate incendiary power of executive speech itself does not cross the line into being dangerous enough to regulate more stringently under the First Amendment, the addition of social media may push it over the edge—the equivalent of giving a powerful speaker a sound truck that broadcasts worldwide, at all hours, and reaches everyone.190

“[The] Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct[, and] the government may not prohibit speech because it increases the chance an unlawful act will be committed at some indefinite future time . . . Without a significantly stronger, more direct connection, the Government may not prohibit speech . . . .”191 The necessity of this link poses problems for analyzing online speech under the First Amendment. Over the Internet, there may be a time lag or a huge leap of distance between the inciter and the person they incite, making the required connection seem weaker or harder to prove. However, given the realities of digital communication, perhaps temporal and physical proximity should no longer be regarded as the only ways that a cause can be connected to its effect with sufficient “imminence.”192 The argument that speech diffused over the Internet, its potential impact is unknown, cannot have a clear enough causal link to hold the speaker accountable for the actions of the listener does not hold water as well for the executive, who has more influence than an ordinary, unknown user.

That said, it is important not to conflate the question of immediacy of harm193 with the fact that social media has simply made the risk of harm more uncertain. Because social media communications ostensibly reach anyone with an Internet connection, it makes the ability to predict potential harm perhaps millions of times more difficult. Instead of a speaker standing on

189 See, e.g., Manchester, supra note 100 (discussing David Duke’s comments surrounding the Charlottesville rally, in which he stated that Donald Trump’s election “represents a turning point” and that the KKK “are determined to take our country back, we’re going to fulfill the promises of Donald Trump.”).
190 The medium through which speech is delivered—not just the speech itself—can be the basis for the restriction of First Amendment rights. See Kovacs v. Cooper, 336 U.S. 77 (1949) (holding that otherwise permissible speech was not protected by the First Amendment when it was broadcast from a sound truck using sound amplifying devices that created a loud and disruptive noise as it travelled down city streets).
191 See Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) (holding that, under the First Amendment, virtual child pornography could not be restricted solely on the ground that it would encourage illegal conduct on the part of those who consume it because the connection between the two is too remote).
193 Id.
a street corner,\textsuperscript{194} or circulating leaflets to passersby,\textsuperscript{195} where the imminence of lawless action can be felt in the air or read in the faces of the crowd, the immediacy of harm may not be so easy to see coming in the age of social media. For any one of the people listening, the speech could be the catalyst to action. The Internet audience is a darkened theatre house, where the size and location of the crowd is unknown, and it is harder to know whether they will react, or how violently, until they do.

It would be a drastic step to redefine imminence to include not only what is actually and obviously impending, but to encompass anything that is feared because its likelihood is an unknown variable. However, social media may push society toward this more cautious model over time out of necessity, precisely because of the risks attached to that uncertainty, which become more obscure as the Internet becomes more expansive. As more of our lives are conducted in the digital world,\textsuperscript{196} the law will have to stretch its definition of culpability into that arena rather than letting actions that take place online be insulated because they seem, arguably, abstracted from their results in the physical world.

\textit{E. Power & the Potential for Violence: Reassessing the Likelihood of Harm}

This crucial question of where to draw the lines of free speech online may need to come to the forefront more quickly with respect to the President. When it comes to executive speech, the argument for preemptive restriction and greater caution is more compelling. The President’s ability to influence or incite is more apparent, and, consequently, the potential harm more likely if he or she invites violence.\textsuperscript{197} The presidency is a position of trust—on the premise that we the people bestow on one individual the ability to make choices for us and speak for us as a country.\textsuperscript{198} We are more likely to follow people we trust, more

\textsuperscript{196} As the use of Internet technology has become more accessible, more portable, and more pervasive, it has become a bigger part of how Americans conduct their daily lives; it is being used for a fast-increasing and diverse range of tasks—from sending work emails and depositing checks to hailing cabs and seeking romantic partners. See Lee Rainie & John B. Horrigan, \textit{Getting Serious Online: As Americans Gain Experience, They Pursue More Serious Activities}, PEW RESEARCH CTR. (Mar. 3, 2002), http://www.pewinternet.org/2002/03/03/getting-serious-online-as-americans-gain-experience-they-pursue-more-serious-activities/; Lee Rainie & Andrew Perrin, \textit{10 Facts About Smartphones as the iPhone Turns 10}, PEW RESEARCH CTR. (June 28, 2017), http://www.pewresearch.org/fact-tank/2017/06/28/10-facts-about-smartphones/.
\textsuperscript{197} See, e.g., discussion supra Section III.D.
\textsuperscript{198} See \textit{THE FEDERALIST NO. 68} (Alexander Hamilton) (“[T]he sense of the people should operate in the choice of the person to whom so important a trust [i]s to be confided.”).
likely to listen to them, and more likely to act based on their example.\textsuperscript{199} The extent to which social media is woven into society compounds executive speech’s greater potential to incite imminent lawless action. Unlike the defendants in \textit{Brandenburg}, whose views were broadcast on a limited network of Ohio news platforms,\textsuperscript{200} speakers on social media today can have an audience of millions in a matter of minutes, and their words stay plastered on the wall of a Twitter message board, giving readers plenty of time to join the mob of supporters. The \textit{Brandenburg} decision may have been partly rooted in the Court’s sensibility that a dozen men in a field in rural Ohio had little potential to impel others to action\textsuperscript{201}—not forgetting that the speech in \textit{Brandenburg} included a direct invitation to a KKK march on Washington, D.C., “four hundred thousand strong.”\textsuperscript{202} However, social media places us in a different age. Social media entails an intrinsically greater reach—if Brandenburg had been speaking today on Twitter, that march\textsuperscript{203} might have actually occurred. While a chorus of Twitter likes, even thousands of them, seems harmless in the digital world, it would be a mistake to think that those expressions are far away from the edge where they spill over into real-world actions—especially since they already have.

On August 12, 2017, every First Amendment professor’s most sobering hypothetical went marching through the streets of Charlottesville, Virginia.\textsuperscript{204} The heavily armed white nationalist, KKK, neo-Nazi protest that cost the life of a counter-protester\textsuperscript{205} would not have happened without the organizational forces of the Internet and social media to actualize a call for action that summoned people from all corners of the Internet, from all parts

\textsuperscript{199} Joanneke van der Toorn et al., \textit{More Than Fair: Outcome Dependence, System Justification, and the Perceived Legitimacy of Authority Figures}, 47 J. EXPERIMENTAL SOC. PSYCHOL. 127, 137 (2011) (demonstrating how perceived legitimacy of an authority figure—defined as trust and confidence in authority—can not only be a product of dependence on that authority, but can also lead to a stronger feeling of obligation to defer to that person and their requests).


\textsuperscript{201} See discussion supra Section III.E; \textit{Brandenburg}, 395 U.S. at 447–48.

\textsuperscript{202} \textit{Brandenburg}, 395 U.S. at 446.

\textsuperscript{203} See, e.g., supra note 111 and accompanying text; infra note 206 and accompanying text.

\textsuperscript{204} See supra note 111 and accompanying text; infra note 206 and accompanying text.

\textsuperscript{205} See supra note 111 and accompanying text; infra note 206 and accompanying text.
of the country.\textsuperscript{206} Today, a small, isolated group of speakers\textsuperscript{207} can reach and organize a vast number of people with ease, and far more readily prompt them to engage in far more lawless actions than gathering in protest.\textsuperscript{208} Giving that same reach to someone with the arsenal of the presidency behind their words tips the scales precipitously if they were to espouse the same kind of ideas. Coupling the reality of social media communication with the credence often given to presidential speech, there is a greater risk that a President’s comments reviling certain racial or ethnic groups,\textsuperscript{209} certain sexual orientations,\textsuperscript{210} or simply political opponents\textsuperscript{211} could incite, or even be seen to compel, violent or lawless action by his listeners. Or, to use the unintentionally ominous Twitter terminology, his “followers.”\textsuperscript{212}

The conversation between the President and the country is a unique dynamic. Since the advent of the Internet, the law has mostly confronted a small smattering of frightening stories, where lone individuals inspired or instructed by what they saw

\textsuperscript{206} The “Unite The Right” rally that became the Charlottesville riot was orchestrated by various “alt-right” websites and their affiliated clubs, with some attendees having traveled hundreds, and even thousands, of miles to Charlottesville, Virginia. See Maura Judkis, \textit{Charlottesville White Nationalist Demonstrator Loses Job at Libertarian Hot Dog Shop}, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/news/food/wp/2017/08/14/charlottesville-white-nationalist-demonstrator-fired-from-libertarian-hot-dog-shop/?utm_term=.35976a54f7b7 (describing how a man from Berkeley, California was fired for his participation in the white nationalist rally in Charlottesville).

\textsuperscript{207} See, e.g., \textit{Brandenburg}, 395 U.S. at 445.

\textsuperscript{208} In light of the fact that the Charlottesville rally was brought about and facilitated through online groups, Judkis supra note 206, this would not be the time to forget the horrible, racially-motivated murders and lynchings that the KKK—in attendance at Charlottesville—organized in the past, for which they gained their notoriety, see \textit{Ku Klux Klan: America’s First Terrorists Exposed} 210 (Patrick O’Donnell ed., 2006).


\textsuperscript{210} See supra notes 162–66 and accompanying text (discussing the treatment of transgender military personnel).

\textsuperscript{211} Aaron Rupar, \textit{How Donald Trump Insulted His Way to the Top of the GOP}, \textit{ThinkProgress} (May 4, 2016, 6:14 PM), https://thinkprogress.org/how-donald-trump-insulted-his-way-to-the-top-of-the-gop-b5ab95b676ec/.

\textsuperscript{212} See Following FAQs, \textit{Twitter}, https://support.twitter.com/articles/14019 (last visited May 5, 2018).
online have committed violent crimes. In those instances, the connection to the original speaker seemed too oblique, and the actions of the listener too disassociated from the speaker’s intention to justify ascribing liability for the result. However, the President of the United States is a uniquely powerful and highly visible speaker. Running the full voltage of presidential influence through Twitter is about as likely as one could imagine to transmute Internet speech into real world action. Donald Trump has the ear of the nation, and his speech over Twitter is intended to foster agreement with his ideas and sentiments. There is an innately greater risk that people—be they foreign leaders, U.S. military officials, or everyday citizens—will act based on his words as an authority figure. As such, presidential speech carries a greater risk of incitement, and social media facilitates that potential for harm by extending the reach of that speech to a greater number of people.

It is true that social media is increasingly becoming a normal part of political campaigns and has been added to the regular repertoire of means by which politicians speak to their constituents. That trend will surely continue, and a Twitter

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214 See discussion supra Section IV.D.
215 The New York Times quoted Trump as saying that “his millions of followers on various social media sites had given him ‘such power’ that it helped him win the election,” and noted his assertion that as President he would “still use such tactics to galvanize his supporters, just as he did during his bid for the White House.” Julie Hirshfield Davis, Donald Trump Appears to Soften Stance on Immigration, but Not on Abortion, N.Y. TIMES (Nov. 13, 2016), https://www.nytimes.com/2016/11/14/us/politics/donald-trump-twitter-white-house.html. During the interview Trump also “boasted that since his election, he had built up his social media following by tens of thousands of people.” Id.
216 See, e.g., supra notes 4, 6, 20 and accompanying text (discussing the reactions of North Korean leadership to seemingly threatening tweets from President Trump).
217 See, e.g., supra notes 163–64 and accompanying text (discussing the reactions of military officials to the “transgender ban”).
218 See, e.g., Manchester, supra note 100 and accompanying text (discussing the reactions and actions of David Duke and other white supremacists following Donald Trump’s campaign and election); Willingham, infra note 225 and accompanying text (discussing same).
219 People are generally more likely to obey the instructions of an authority figure. See generally STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW (1974).
220 See Packingham v. North Carolina, 137 S. Ct. 1730 (2017); see also Kravets, supra, note 127.
account or Facebook page will probably be a regular part of future presidents’ official presence going forward. Because social media will likely play a role in presidential speech in the future, the Court should be wary of preventing it from naturally filling that space. There is value in a President’s ability to reach as wide an audience as possible, including people who do not have televisions or cannot be home in time for the broadcast of a presidential address, and social media provides that accessibility. There is also value in the President keeping up with technology and engaging with people where they usually congregate to speak these days: online. However, with “Twitter town halls” replacing “some typical presidential press interactions,” perhaps there is a risk that “Twitter provides the veneer of populist connection without the hassle of accountability” and the President “can easily make himself available to anonymous fans instead of the scrutiny of the press.” While use of social media by the executive may have unique democratic benefits, its misuse also poses unique dangers. Leaving room for the President to utilize social media as a means of speaking to the people is not mutually exclusive with drawing lines that circumscribe the possible dangers native to his or her speech when amplified through that medium.

V. CONCLUSION

It may be that we are heading toward an era in which Executive Orders issued over Twitter are par for the course. But it is important for First Amendment jurisprudence to adjust for the ways in which social media is different from what it has encountered before, and for the ways in which executive speech through that medium may be treading on very thin ice. Trump’s actions have thrown into sharp relief the possible dangers of executive speech conducted through social media. Twitter may seem like a communication utopia for democratic discussion, and, in fact, Twitter is ostensibly grounded in such principles. That level of freedom, however, is not appropriate for the President, whose most careless words have power—to change, trigger, influence, incite. Presidential statements condoning violence carry a greater likelihood of causing violence. For

221 See Reno v. ACLU, 521 U.S. 844, 870 (1997); see also Social Media Fact Sheet, PEW RESEARCH CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/social-media/.

222 Hess, supra note 141.

223 Id.

224 Twitter for Good, TWITTER, https://about.twitter.com/en_us/values/twitter-for-good.html (“We believe the open exchange of information can have a positive impact on the world.”).
example, even Trump’s failure to speak strongly against racism and hate speech bolstered groups in the “alt-right.”225 The stakes of presidential speech are too high for it to be treated casually, even over Twitter.

Although Donald Trump’s presidency has provided some dramatic illustrations, it is the attributes of the executive office itself that make executive speech innately more dangerous. It should, therefore, be subject—at least potentially—to heightened First Amendment restrictions. If a President is inattentive to the native risks and responsibilities of his or her position, the law should draw the outer boundaries of executive freedom of speech at a point where the harm the speech has the power to create can be prevented, even if that means stopping short of the liberties accorded to an ordinary citizen. That line should be drawn cautiously, but will inevitably encroach further into the President’s sphere of personal liberty than an average person, whose speech has neither the same reach nor gravity.

The added dimension of social media should also alter how the requirements of Brandenburg are assessed for presidential speech. First Amendment jurisprudence may naturally evolve in a more restrictive direction in reaction to the burgeoning of internet communication, following the trellis along which technology is growing, and surely the President’s speech would be included in any such changes. However, the impact of social media on presidential speech deserves special—and perhaps swifter—attention. Wholesale destruction of the Brandenburg principles226 may not be called for, but the dynamics of modern communication make it clear that “immediacy” and “likelihood” do not mean what they meant in 1969.227 New media carry communication faster and further than before, and the distance from words in the palm of one’s hand to a clenched fist may be shorter than it seems. Previously, one might interact in person with a speaker with whom they disagreed, or spend weeks composing a letter to the editor of their local newspaper to respond. Now, people can fire back a comment almost instantaneously, with no built-in time for reflection. Further, with each individual moving within a personalized sphere of

225 Because Trump’s response to the Charlottesville riot did not “rebuke white nationalism by name[,] Nazi, alt-right and white supremacist groups . . . were emboldened by the condemnation, which they saw as a defense, or even as a tacit approval.” A.J. Willingham, Trump Made Two Statements on Charlottesville. Here’s How White Nationalists Heard Them CNN (Aug. 15, 2017, 7:16 AM), http://www.cnn.com/2017/08/14/politics/charlottesville-nazi-trump-statement-trnd/index.html.


227 See Kobil, supra note 110.
information, people may be less likely to constructively engage ideas with which they do not agree. The terrain of executive speech through social media, likewise, is more treacherous in the digital age. When it comes to assessing the danger of a potential speaker’s words, the executive role and its social media mode of transmission both counsel for a more restrictive speech standard.

Preserving a true, indiscriminate marketplace of ideas by protecting the right of free speech to the greatest possible extent—regardless of its content, repugnance, or cruelty—is a noble goal, and standing on principle is certainly a proud legal tradition. However, the purpose behind flooding the marketplace with speech is distorted by social media. It re-routes speech exclusively into the channels where people want to hear it: where it already fits their ideals, or perhaps justifies actions they already wanted to take. In this way, the social media age is not in sync with the thought processes and intentions that guided past free speech decisions. The Internet throws open great horizons of possibility for sharing ideas and for global communication that seem to align with the hope of constructive discussion. However, while the law is busy trying to fit social media within historical concepts of speech regulation, it is not acknowledging that some of the variables have changed.

Great risks are taken and sacrifices made in the name of democracy, especially in the realm of free speech. It mirrors one of the classic compromises—and difficult choices—made by the judicial

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228 “Social media . . . encapsulates users in filter bubbles . . . which are the result of the careful curation of social media feeds that enable users to be surrounded by like-minded people and information that is congruent with their existing beliefs.” Nicole A. Cooke, Posttruth, Truthiness, and Alternative Facts: Information Behavior and Critical Information Consumption for a New Age, 87 LIBR. Q. 221, 215 (July 2017) (discussing the roles of Internet communication and confirmation bias in creating “a posttruth era”).

229 Maeve Duggan & Aaron Smith, The Political Environment on Social Media, PEW RESEARCH CTR. (Oct. 25, 2016), http://www.pewinternet.org/2016/10/25/political-engagement-and-social-media/ (analyzing how the nature of political discourse on social media may be more negative and less constructive).

229 Alexander Stille, Adding Up the Costs of Cyberdemocracy, N.Y. TIMES (June 2, 2001), https://www.nytimes.com/2001/06/02/arts/adding-up-the-costs-of-cyberdemocracy.html (“[P]olarization is just one of the negative political effects of the Internet, which allows people to filter out unwanted information, tailor their own news and congregate at specialized Web sites that closely reflect their own views.”).

231 Id. (“In its first years, the Internet was seen euphorically as one of history’s greatest engines of democracy, a kind of national town hall meeting in which everyone got to speak.”).

232 Legal decisions operate by analogy, but while the Court wrestles with such questions as what type of forum the Internet should be considered and whether true threats can travel over Facebook, it is perhaps missing an elemental disjuncture between the existing laws and the emerging problems those laws are struggling to address. See Lidsky, supra note 36, at 155 (“Existing First Amendment doctrine are not well tailored to address the harms of incendiary social media speech . . . and perhaps they should not be.”).
system: waiting for bodies to pile up on the courthouse steps before we reassess whether we properly gauged the risks of our chosen philosophy.

While Donald Trump’s presidency is bringing to light manifold potential dangers of uninhibited presidential speech, it raises broader questions that do not apply only to him, and will not go away in the future. His words have taken us to the treacherous outer reaches of free speech where, perhaps, we should already have been reconsidering whether baseline First Amendment boundaries really fit the modern executive. If the President is the representative of the people, the embodiment of how we think and act, then the judiciary is our conscience. The separation of powers between the President and the Court\textsuperscript{233} emphasizes respect for the challenges of executive office, deference to the President as speaker for the people, and trust that he or she will “faithfully execute”\textsuperscript{234} the duties of office. One key part of our trust as a nation, however, stays with the Supreme Court: the reliance on its function as a check on the President, and the belief that it will speak if the President crosses the line and leverages the power of his or her speech in a way that creates violence, or does violence to our principles. To be true to the principles of the Constitution and of the First Amendment, it is necessary to adapt to the times, but it is also necessary to keep in mind the balance within the government—and the dialogue between the government and the people—that we are trying to preserve in the face of a new and changing world.

\textsuperscript{233} 16A A. M. JUR. 2D, Constitutional Law § 272.
\textsuperscript{234} U.S. CONST. art. II § 1.
“PLAY IN THE JOINTS” AND A PLAYGROUND: BUILDING A NEW TEST POST-TRINITY LUTHERAN

Jonathan Zator*

I. INTRODUCTION

The Religion Clauses face renewed scrutiny following the “marquee church-state case”\(^1\) of 2017 and one of the year’s “most important rulings.”\(^2\) In *Trinity Lutheran Church of Columbia, Inc. v. Comer*,\(^3\) the United States Supreme Court applied the “play in the joints” doctrine to a church playground.\(^4\) For the first time in history, the Supreme Court held “that the Constitution requires the government to provide public funds directly to a church.”\(^5\) Historically, the Court has reasoned that “there is ‘play in the joints’ between what the Establishment Clause permits and what the Free Exercise Clause compels.”\(^6\) Now, applying the “strictest scrutiny,”\(^7\) the Court found that Missouri violated the Free Exercise Clause when it denied Trinity Lutheran public funding for playground resurfacing solely because of the organization’s religious status.\(^8\) There is room for “playing” between the two Religion Clauses, but now one side outweighs the other. The seesaw is off-balance.

This Note discusses the *Trinity Lutheran* decision, responds to its criticism, and proposes a new test for similar cases undoubtedly on the horizon. Part II provides information on the Religion Clauses and *Trinity Lutheran’s* facts. Part III summarizes the Court’s opinion and holding. Part IV details criticism from concurring Justices, dissenting Justices, and legal scholars. To answer the criticisms, Part V proposes a new “play in the joints” test, called the “Seesaw Test,” for courts to use when the government denies a public benefit based on religion. The test would likely be renamed in the future, but this name will be used for this Note. The Seesaw Test has two parts to decide for a religious party or the government. First, the court should

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4 *Id.* at 2019. For brevity, in-text this case will be referred to as *Trinity Lutheran*.

5 *Id.* at 2027 (Sotomayor, J., dissenting); *see also id.* at 2024–25.

6 *Id.* at 2019.

7 *Id.* at 2021–22.

8 *Id.* at 2024–25.
balance both sides’ arguments to decide whether the public benefit was denied because of past or present religious status or because of future religious use. Second, the weight either shifts against the government or the religious party. If the denial was based on religious status, then the government must show excessive entanglement or endorsement. However, if the denial was based on religious use, then the religious party must show minimal entanglement and incidental endorsement. When this situation arises, the Seesaw Test requires an analysis of both the Free Exercise and Establishment Clauses. This evaluation is in contrast with what the Court did in 

Trinity Lutheran when it effectively ignored any Establishment Clause analysis. Part VI applies the Seesaw Test to demonstrate its functionality with the 

Trinity Lutheran decision and various other issues.

II. BACKGROUND INFORMATION AND FACTS OF TRINITY LUTHERAN

A. The Religion Clauses, “Play in the Joints,” and Blaine Provisions

A foundational knowledge of the Religion Clauses is necessary to understand 

Trinity Lutheran, its criticism, and the “Seesaw Test.” The First Amendment has two religion clauses: the Establishment Clause and the Free Exercise Clause. The narrow original understanding is that the Clauses were intended to “prevent religious persecution” and the instatement of a federally established religion. The people wanted to allow “the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, [to] sit down at the common table of the national councils without any inquisition into their faith, or mode of worship.” Also, the people wanted “the whole power

9 See id. at 2019; see also id. at 2028 (Sotomayor, J., dissenting) (noting the Court’s “silence” on this issue).
10 U.S. Const. amend. I. The Establishment Clause states: “Congress shall make no law respecting an establishment of religion.” Id. The Free Exercise Clause states: “Congress shall make no law . . . prohibiting the free exercise [of religion].” Id.
Madison’s original proposal for an amendment on religion stated: “[T]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext infringed.” 1 Annals of Congress 434 (1789) (Joseph Gales, ed., 1834); Madison’s Notes for the Bill of Rights, Library of Cong., https://www.loc.gov/exhibits/religion/rel06.html (last visited Apr. 1, 2018) (quoting James Madison’s notes at the First Congress).
over the subject of religion . . . left exclusively to the state governments, to be acted upon according to [the state’s] own sense of justice, and the state constitutions.”13 Contrast this with the broader view that the Clauses were meant to erect “a wall of separation between church and state”14 at both the state and federal levels.15 In the 1940s, the Court extended the Religion Clauses to the states,16 but “the Court remains sharply split on how to interpret both clauses.”17

In Everson v. Board of Education of the Township of Ewing,18 the Supreme Court held that the Establishment Clause bars the government from passing laws that “aid one religion,” “prefer one religion over another,” or “aid all religions.”19 Today, courts utilize three different tests to determine whether government action violates the Establishment Clause. First, there is the “coercion test,” which asks whether government action directs individuals to engage in a formal religious exercise.20 However, some Justices have criticized this test for making the

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13 Id. at 702–03.
15 See infra note 19 and accompanying text.
17 CONAN, supra note 11, at 1074.
19 Id. at 15. “Establishment Clause jurisprudence since, whatever its twists and turns, maintains this view.” CONAN, supra note 11, at 1073 n.11. In more specific detail, the Court held:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”

Everson, 330 U.S. at 15–16 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)).
Establishment Clause a “virtual nullity.” Second, there is the “endorsement test,” which looks to the context of each case to see if any reasonable observer would deem government to be endorsing religion. Scholars and Justices also criticize the endorsement test for being “too amorphous to provide adequate guidance.” Third, there is the Lemon test, which “remain[s] the primary standard of Establishment Clause validity” and has been used in recent Establishment Clause decisions. The Lemon test’s three prongs declare that (1) a law must have a “secular . . . purpose”; (2) “its principal or primary effect must be one that neither advances nor inhibits religion”; and (3) it “must not foster an excessive government entanglement with religion.” The first prong, a secular purpose, frequently passes the Lemon test, and there is little disagreement among justices and scholars on this.

21 CONAN, supra note 11, at 1076–77 (quoting Lee, 505 U.S. at 621 (Souter, J., concurring)); see also Cty. of Allegheny v. ACLU, 492 U.S. 573, 623 (1989) (O’Connor, J., concurring in part and concurring in the judgment). Logically, coercing non-adherents to “support or participate in any religion or its exercise,” Cty. of Allegheny, 492 U.S. at 659–660 (Kennedy, J., concurring in the judgment in part and dissenting in part), forces those individuals to forgo their Free Exercise right. Compelling (i.e., coercing) support for religious establishments inherently violates a citizen’s ability to freely exercise their religion.

22 Cty. of Allegheny, 492 U.S. at 597.


24 CONAN, supra note 11, at 1076. The “coercion test”—whether government action directs formal religious exercise as to encourage or influence participation of those who object religiously to said exercise, Lee, 505 U.S. at 592–93—is criticized for making the Establishment Clause irrelevant, CONAN, supra note 11, at 1076–77. The “endorsement test,” which looks into context to see if any reasonable observer would deem government to be endorsing religion, Cty. of Allegheny, 492 U.S. at 597, is criticized for being “too amorphous to provide adequate guidance,” CONAN, supra note 11, at 1077.

25 CONAN, supra note 11, at 1076 n.29 (“Agostini v. Felton, 521 U.S. 203 (1997) (upholding under the Lemon tests the provision of remedial educational services by public school teachers to sectarian elementary and secondary schoolchildren on the premises of the sectarian schools); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (holding unconstitutional under the Lemon tests, as well as under the coercion and endorsement tests, a school district policy permitting high school students to decide by majority vote whether to have a student offer a prayer over the public address system prior to home football games); Mitchell v. Helms, 530 U.S. 793 (2000) (upholding under the Lemon tests a federally funded program providing instructional materials and equipment to public and private elementary and secondary schools, including sectarian schools).

prong. The second and third prongs, primary effect and excessive entanglement, have “proven much more divisive.” Ultimately, “shoehorning” all Establishment Clause cases into any one test may be inappropriate, and instead, “different contexts may call for different approaches.”

In Free Exercise cases, by contrast, the Court uses different levels of scrutiny to review government actions that interfere with religion. In most of these cases, “formal neutrality” is the common standard. Stated in Employment Division, Oregon Department of Human Resources v. Smith, “the right of free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).’” However, the Supreme Court has been “inconsistent” when distinguishing between “belief” and “conduct.” In recent years, some “religiously

27 CONAN, supra note 11, at 1083. “There are adequate legitimate, non-sectarian bases for legislation to assist nonpublic, religious schools: preservation of a healthy and safe educational environment for all school children, promotion of pluralism and diversity among public and nonpublic schools, and prevention of overburdening of the public-school system that would accompany the financial failure of private schools.” Id.; see also Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653–54 (1980); 444 U.S. at 665 (Blackmun, J., dissenting); Wolman v. Walter, 433 U.S. 229, 240 (1977) (plurality opinion); Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973); 413 U.S. at 805 (Burger, J., dissenting); 413 U.S. at 812–13 (Rehnquist, J., dissenting); 413 U.S. at 813 (White, J., dissenting).
28 Bd. of Educ. v. Grumet, 512 U.S. 687, 719 (1994) (O’Connor, J., concurring in part and concurring in the judgment); see also CONAN, supra note 11, at 1077.
29 CONAN, supra note 11, at 1083.
30 CONAN, supra note 11, at 1077; see also Grumet, 512 U.S. at 719 (O’Connor, J., concurring in part and concurring in the judgment).
32 CONAN, supra note 11, at 1077. For the purposes of this Note, only two standards are relevant.
33 Id. “Academics as well as the Justices grapple with the extent to which religious practices as well as beliefs are protected by the Free Exercise Clause.” Id. at 1120 n.257.
36 CONAN, supra note 11, at 1120. The Court “has consistently affirmed that the Free Exercise Clause protects religious beliefs, [but] protection for religiously motivated conduct has waxed and waned over the years.” Id. at 1123.
motivated conduct” has been protected from “generally applicable prohibitions.” One reason for this is because intentional government discrimination against a single religion triggers strict scrutiny.38 Everson held that the government “cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.”39 Specifically, if a government action targets individuals, people, or groups for “special disabilities” because of “religious status,”40 then the law must be narrowly tailored to serve a compelling interest. Overall, religious observers must be protected “against unequal treatment.”41

There is a balancing act between the opposing Religion Clauses. Casting one clause in “absolute terms,” and expanding it “to a logical extreme,” would kick the second off of the seesaw.42 The Court has avoided this absurdity.43 In Walz v. Tax Commission of the City of New York,44 the Court explicitly stated that “there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without [governmental] sponsorship and without interference.”45 More specifically, in practice, there are some required “free-exercise-mandated accommodations” that do not violate the

37 CONAN, supra note 11, at 1120–21. Most examples involve unemployment benefits. See generally Frazee v. Ill. Dept. of Emp’t Sec., 489 U.S. 829 (1989) (requiring unemployment benefits for a person with sincere religious beliefs who did not belong to a particular church or sect and who did not claim that refusal to work on Sunday was based upon teaching of an established religious body); Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 107 (1987) (requiring unemployment benefits when job loss resulted from change in religious beliefs after employment); Thomas v. Review Bd. of Ind. Emp’t Sec. Div., 450 U.S. 707 (1981) (requiring unemployment benefits for religious refusal to participate in arms production); Sherbert v. Verner, 374 U.S. 398 (1963) (requiring unemployment benefits to individuals who, for religious reasons, refused to work on Saturdays). Another historically notable example concerns children’s education. See Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that an Amish parent is not required to send their children to complete compulsive education).


40 See Church of Lukumi Babalu Aye, Inc., 508 U.S. at 533.

41 See id. at 542.


45 Id. at 669 (emphasis added); see also Cutter, 544 U.S. at 713; Locke, 540 U.S. at 718.
Establishment Clause\textsuperscript{46} and some optional religious accommodations that do not create an establishment of religion.\textsuperscript{47} This is the “play in the joints” doctrine.\textsuperscript{48} In principle, this concept has been well accepted by the Court,\textsuperscript{49} but the Court has “struggled to find a neutral course between the two Religion Clauses.”\textsuperscript{50} Cases decided after \textit{Walz} fleshed out just how much the government can play in the joints without getting hurt.\textsuperscript{51} In short, “equal treatment is not establishment,”\textsuperscript{52} but the government must not go “too far” when promoting Free Exercise,\textsuperscript{53} and must not “aid one religion,” “prefer one religion over another,” or “aid all religions.”\textsuperscript{54}

In 1876, Senator James G. Blaine proposed an amendment to the United States Constitution, which failed in the Senate,\textsuperscript{55} but “would have prohibited states from directing public funds or lands to the use or control of ‘religious sects or denominations.’”\textsuperscript{56} Accordingly, scholars call these provisions “Blaine Amendments” or “Baby Blaines.”\textsuperscript{57} Today, nearly forty

\begin{footnotesize}
\begin{enumerate}
\item CONAN, supra note 11, at 1121. “This Court has long recognized that government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.” Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 144–45 (1987). For examples, see supra note 37 and accompanying text.
\item CONAN, supra note 11, at 1121; see also, e.g., \textit{Walz}, 397 U.S. at 669 (holding that grants of tax exemption to religious organizations do not violate the Establishment Clause); \textit{Cutter}, 544 U.S. at 713 (holding that, under the Religious Land Use and Institutionalized Persons Act (RLUIPA), facilities that accept federal funds cannot deny prisoners accommodations that are necessary to engage in activities for the practice of their own religious beliefs).
\item Although the Court does not specifically call “play in the joints” a doctrine, for the purposes of this Note, “play in the joints” will be referred to either as a doctrine or “the Doctrine.”
\item See e.g., \textit{Walz}, 397 U.S. at 669 (emphasis added); see also \textit{Cutter}, 544 U.S. at 713; \textit{Locke}, 540 U.S. at 718.
\item \textit{Walz}, 397 U.S. at 668.
\item See \textit{Cutter}, 544 U.S. at 713 (holding that the government can give accommodations to prisoners to practice religious beliefs); \textit{Locke}, 540 U.S. at 715 (upholding a publicly funded scholarship program which excluded students pursuing a “degree in devotional theology”).
\item Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).
\item Id.
\item Garnett & Blais, supra note 1, at 108.
\end{enumerate}
\end{footnotesize}
states (including Missouri) have constitutional provisions prohibiting or limiting public funding of religious institutions and activities. Modern Blaine Provisions are considered to reflect "anti-Catholicism, nativism, and nationalism of the 19th and early 20th centuries" and "there is ample evidence" that rampant anti-Catholicism motivated many Blaine Provisions.

B. Facts and Procedural History of Trinity Lutheran

The Missouri Department of Natural Resources offers state grants to public and private schools, nonprofit daycare centers, and other nonprofit entities. The grant money is used to purchase rubber playground surfaces made from recycled tires. Due to scarce resources, the Department awards a limited number of grants on a competitive basis after scoring several criteria.

The Trinity Lutheran Church Child Learning Center, initially established as a nonprofit organization in 1980, merged with Trinity Lutheran Church in 1985 and operates under its supervision on church property. The Center admits children from any religion.

In 2012, the Center decided to participate in Missouri’s Scrap Tire Program to replace a significant portion of its playground floor with a rubber surface. After describing the
playground and the safety hazards posed by its current surface, the Center detailed the anticipated benefits of the proposed project.\textsuperscript{68} The Center ranked fifth out of forty-four in the 2012 Scrap Tire Program and was poised to receive a grant.\textsuperscript{69}

Despite its high score, “the Center was deemed categorically ineligible to receive a grant.”\textsuperscript{70} The Department had “a strict and express policy of denying grants to any applicant owned or controlled by a church, sect, or other religious entity.”\textsuperscript{71} The Department believed that the Missouri Constitution compelled the policy.\textsuperscript{72} Article I, Section 7 of the Missouri Constitution provides:

That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.\textsuperscript{73}

A rejection letter explained that “the Department could not provide financial assistance directly to a church.”\textsuperscript{74} Because Trinity Lutheran Church operated the Center, the Center could not receive a grant.\textsuperscript{75}

Trinity Lutheran sued the Director of the Department.\textsuperscript{76} The Church alleged that the Department’s failure to approve the

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\textsuperscript{68} The benefits included “increasing access to the playground for all children, including those with disabilities, by providing a surface compliant with the Americans with Disabilities Act of 1990; providing a safe, long-lasting, and resilient surface under the play areas; and improving Missouri’s environment by putting recycled tires to positive use.” \textit{Id.} at 2018. “The Center also noted that the benefits of a new surface would extend beyond its students to the local community, whose children often use the playground during non-school hours.” \textit{Id.}

\textsuperscript{69} \textit{Id.} “The Department ultimately awarded 14 grants as part of the 2012 program. Because the Center was operated by Trinity Lutheran Church, it did not receive a grant.” \textit{Id.}

\textsuperscript{70} \textit{Id.}

\textsuperscript{71} \textit{Id.} at 2017.

\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textsc{Mo. Const.} art. I, § 7. This language is similar to Blaine provisions throughout the United States. \textit{See also} \textsc{Trinity Lutheran}, 137 S. Ct. at 2037–38 (Sotomayor, J., dissenting) (citing thirty-eight states with a similar provision).

\textsuperscript{74} \textsc{Trinity Lutheran}, 137 S. Ct. at 2018.

\textsuperscript{75} \textit{Id.}

\textsuperscript{76} \textit{Id.}
Center’s application violated the Free Exercise Clause. Trinity Lutheran sought to prohibit the Department from discriminating against the Church on that basis in any future grant applications. The Department filed a motion to dismiss in district court. Deciding against Trinity Lutheran, the district court granted the motion and, on appeal, the Eighth Circuit affirmed.

III. THE DECISION

The Supreme Court reversed the Eighth Circuit’s decision and declared that Trinity Lutheran could receive the grant. Chief Justice Roberts, writing for the majority, noted that the First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” However, because the parties agreed that the Establishment Clause did not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program, the Court reasoned that there was no need to address the Establishment Clause in its opinion.

Rather, the Court focused its analysis entirely on the Free Exercise Clause. The Court recognized that “there is ‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.” The Court outlined the rigorous protection provided under the Free Exercise Clause.

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77 Id.
78 Id.
79 Id.
80 Id. at 2018–19. The Eighth Circuit recognized that it was “rather clear” that Missouri could award a scrap tire grant to Trinity Lutheran without running afoul of the Establishment Clause. Id. However, the Free Exercise Clause did not compel the state to ignore the anti-establishment principle in its state Constitution. Id. The court viewed a grant to a religious institution as a “hallmark[] of an established religion” and held that religious status could be used to deny an application. Id. Judge Gruender dissented and distinguished Locke narrowly because it concerned the issue of funding for religious clergy training and “did not leave states with unfettered discretion to exclude the religious from generally available public benefits.” Id. An equally divided court denied a rehearing en banc. Id.
81 Id. at 2019.
82 U.S. CONST. amend. I.
83 Trinity Lutheran, 137 S. Ct. at 2019.
84 Id.
85 Id. (citing Locke v. Davey, 540 U.S. 712, 718 (2004)). The origin of the “play in the joints” phrase comes from Walz v. Tax Comm’n of N.Y., 397 U.S. 664, 669 (1970). In Walz, the Court discussed First Amendment protections and pointed out that the two guarantees are often in conflict. Id. Further, the Court held that it “will not tolerate either governmentally established religion or governmental interference with religion” and that “there is room for play in the joints . . . which will permit religious exercise to exist without sponsorship.” Id. at 669.
86 Trinity Lutheran, 137 S. Ct. at 2019–21.
Laws are subjected to the strictest scrutiny when they target religious observers for unequal treatment and special disabilities based on their religious status. Only a state interest of the highest order can justify denying a publically available benefit, solely on account of religious identity, because it imposes a penalty on the free exercise of religion. Conditioning the availability of benefits upon a recipient’s willingness to surrender his or her religious status effectively penalizes the free exercise of constitutional liberties. The Court acknowledged that it had rejected free exercise challenges when “the laws in question have been neutral and generally applicable without regard to religion.” However, the Court distinguished these laws from “those that single out the religious for disfavored treatment,” such as the Department’s policy.

After reviewing general free exercise precedent, the Court focused a large portion of its opinion on distinguishing *Trinity Lutheran* from *Locke v. Davey*. In *Locke*, the Court allowed a state to deny theology students access to a generally available college scholarship program. As an example of “play in the joints,” the state could have allowed theology students in its program while not violating the Establishment Clause. However, despite targeting theology students for exclusion, the decision “not to fund” religious training did not offend the Free Exercise Clause. The plaintiff in *Locke* “was not denied a scholarship

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87 *Id.* at 2024 (quoting Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533, 542 (1993) (internal quotation marks omitted)).
88 *Id.* at 2019 (citing McDaniel v. Paty, 435 U.S. 618, 628, (1978) (plurality opinion)).
89 *Id.* at 2021.
90 *Id.* at 2020 (noting that in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 449(1988), the Court held that individuals were not being “coerced by the Government’s action into violating their religious beliefs” and the Government action did not “penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens”); see also *id.* (noting that in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) the Court held that the Free Exercise Clause did not entitle the church members to not follow general criminal laws on account of their religion).
91 *Id.* at 2020–21 (citing Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) (striking down facially neutral ordinances that outlawed certain forms of animal slaughter because, despite their facial neutrality, the ordinances had a discriminatory purpose to prohibit sacrificial rituals related to a specific religion but disagreeable to other locals)).
94 *Id.* at 720–21.
95 *Id.* (explaining that “[t]raining someone to lead a congregation is an essentially religious endeavor”). Further, refusing to fund religious training was “far milder” than other historical restrictions on religious practices that offend the Free Exercise Clause. *Id.* (distinguishing Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (law designed to restrict the ritual of a single minority religious group); McDaniel v. Paty, 435 U.S. 618 (1978) (law barring ministers from serving as
because of who he was; he was denied a scholarship because of what he proposed to do—use the funds to prepare for the ministry." 96

By contrast, in *Trinity Lutheran*, the funds would be used to resurface a church-owned playground that is open to the public. 97 The Court held that excluding an otherwise qualified church from a government grant program—on the basis of religious status—violated the Free Exercise Clause. 98 The majority declared that “Trinity Lutheran was denied a grant simply because of what it is—a church” 99 and, applying strict scrutiny, the Court found that “Missouri’s policy preference for skating as far as possible from religious establishment concerns” was not a compelling interest. 100 Only a state interest “of the highest order” would be acceptable, and the Free Exercise Clause bars seeking greater separation of church and state beyond the already existing Establishment Clause. 101 The Court quipped that the consequences of the State’s discriminatory policy may have resulted in only, “in all likelihood, a few extra scraped knees,” 102 but excluding Trinity Lutheran “from a public benefit for which it is otherwise qualified, solely because it is a church, is odious to our Constitution . . . and cannot stand.” 103

Despite a seven-two decision for Trinity Lutheran Church, Footnote Three 104 fractured the Justices. 105 It provides: “This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.” 106 Footnote Three is meant to “carefully limit[] the reach” of *Trinity Lutheran*, but the Justices disagreed on its importance and influence. 107

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96 *Trinity Lutheran*, 137 S. Ct. at 2023.
97 Id. at 2017–19.
98 Id. at 2023–25.
99 Id. at 2023.
100 Id. at 2024.
101 Id.
102 Id. at 2024–25 (comparing this to chains, torture, or denial of political office on account of religion).
103 Id. at 2025.
104 “Footnote Three” is significant to this Note and will be capitalized.
106 Id. at 2024 n.3 (plurality opinion).
107 See id. at 2025 (Thomas, J., concurring in part); see id. at 2025 (Gorsuch, J., concurring in part); see also Laycock, supra note 55, at 135. Recall that only four
IV. THE FRACTURING FOOTNOTE, SCATHING DISSERT, AND SCHOLARLY CRITICISM

A. The Concurrences

Three Justices concurred with the majority opinion but disagreed on the reach of Footnote Three. Justices Thomas and Gorsuch joined in each other’s concurrences and advocated for a significantly broader holding.108 They agreed that whether a grant recipient puts the money to religious use is irrelevant and predicted that “a line barring religious use of money would be unstable.”109 Justice Thomas took issue with the Court endorsing Locke for even a “mild kind” of discrimination against religion.110 Justice Gorsuch leveled two criticisms at the majority opinion.111 First, he argued that the majority erred because “the Court leaves open the possibility” that any “useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use.”112 He argued that there was effectively no line between status and use.113 Further, the difference was irrelevant because the First Amendment allows for free exercise of religion, which includes both status and use.114 Second, Justice Gorsuch worried that Footnote Three might lead some to read that the Court’s ruling applied only to cases involving a playground “or only those with some association with children’s safety or health, or perhaps some other social good we find sufficiently worthy.”115 He believes that Footnote Three is “entirely correct,”116 but that the general principles, in this case, do and should apply to other instances of discrimination against religious exercise.117 Justice Thomas agreed with Justice

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108 See Trinity Lutheran, 137 S. Ct. at 2025–26 (Thomas, J., concurring in part); id. at 2025 (Gorsuch, J., concurring in part); see also Laycock, supra note 55, at 135.
109 Laycock, supra note 55, at 136; see also Trinity Lutheran, 137 S. Ct. at 2025 (Thomas, J., concurring in part); 137 S. Ct. at 2025 (Gorsuch, J., concurring in part).
110 See Trinity Lutheran, 137 S. Ct. at 2025 (Thomas, J., concurring in part).
111 Nevertheless, Justice Thomas joined the majority because the Court “appropriately construe[d] Locke narrowly.” Id. (Thomas, J., concurring in part).
112 Id. at 2025 (Gorsuch, J., concurring in part).
113 Id.
114 Id. at 2026.
115 Id.
116 This is likely based on the principle that judicial decisions are theoretically limited to the facts of the case at bar.
117 Trinity Lutheran, 137 S. Ct. at 2025 (Gorsuch, J., concurring in part).
Gorsuch’s criticism of Footnote Three, and both Justices unmistakably desired a broader holding.

Justice Breyer concurred only in the judgment and, contrasted with Justices Thomas and Gorsuch, hinted that there can be a limit to Free Exercise in this case. Initially, he emphasized the Court’s ruling in *Everson v. Board of Education*, where the Court declared that depriving parochial schools of such “general government services as ordinary police and fire protection . . . is obviously not the purpose of the First Amendment.” Justice Breyer equated Missouri’s Scrap Tire program with the general government services in *Everson* that provide a “public benefit” and should not be denied. However, Justice Breyer hinted that Establishment Clause concerns may arise if there is an “administrative or other reason to treat churches differently.” Ultimately, in this case, he thought Free Exercise was violated and the Court “need not go further” when the sole reason for different treatment is faith.

**B. The Dissent**

Justice Sotomayor, joined by Justice Ginsburg, wrote a spirited dissent. Justice Sotomayor argued that the Court “slights both our precedents and our history, and its reasoning weakens this country’s longstanding commitment to a separation of church and state beneficial to both.” She further claimed that “[t]he Court today profoundly changes that relationship by holding, for the first time, that the Constitution requires the government to provide public funds directly to a church.”

On Establishment Clause grounds, Justice Sotomayor strongly opposed the majority and criticized the Court for ignoring the Establishment Clause portion of the analysis. She provided additional facts, left out of the majority opinion, regarding the religious purpose of the Church, Center, and playground. Justice Sotomayor emphasized precedent that the

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118 See Laycock, supra note 55, at 136.
119 See *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring in part); *id.* at 2025–26 (Gorsuch, J., concurring in part).
120 *Id.* at 2026–27 (Breyer, J., concurring).
121 *Trinity Lutheran*, 137 S. Ct. at 2026 (Gorsuch, J., concurring).
122 *Id.* at 2026–27.
123 *Id.* at 2027.
124 *Id.* at 2027.
125 *Id.* at 2027–28. Specifically, she provided:
government may not directly fund religious exercise, a rule that is clearest when “funds flow directly from the public treasury to a house of worship.”131 Unlike other cases involving the funding of religious institutions, Trinity Lutheran did not “and cannot” give assurances that they would not use the money for religious activities.132 The State now will give “direct subsidies of religious indoctrination, with all the attendant concerns that led to the Establishment Clause.”133 Lastly, Justice Sotomayor believed that this opinion would unconstitutionally lead to the government showing preference to religious groups with “a belief system that allows them to compete for public dollars” and favors “those well-organized and well-funded enough to do so successfully.”134

Justice Sotomayor also vehemently challenged the Court’s reasoning under the Free Exercise Clause.135 She supported the “play in the joints” doctrine136 but urged deference

Founded in 1922, Trinity Lutheran Church (Church) operates . . . for the express purpose of carrying out the commission of . . . Jesus Christ as directed to His church on earth. . . . The Church uses preaching, teaching, worship, witness, service, and fellowship according to the Word of God to carry out its mission to make disciples. . . . The Church’s religious beliefs include its desire to associate[ ]e with the [Trinity Church Child] Learning Center. . . . Located on Church property, the Learning Center provides daycare and preschool for about 90 children ages two to kindergarten. . . . The Learning Center serves as a ministry of the Church and incorporates daily religion and developmentally appropriate activities into . . . [its] program. . . . In this way, [t]hrough the Learning Center, the Church teaches a Christian world view to children of members of the Church, as well as children of non-member residents of the area. . . . These activities represent the Church’s sincere religious belief . . . to use [the Learning Center] to teach the Gospel to children of its members, as well to bring the Gospel message to non-members.

Id. (internal quotation marks and citations omitted) (alterations original).

131 Id. at 2028–29; see also Tilton v. Richardson, 403 U.S. 672 (1971) (holding that subsidizing the construction of facilities used for non-secular purposes would advance religion, but the government may give money to religious universities if the aid is of “nonideological character” and is a one-time grant that did not require constant government surveillance).

132 Id.; see also, e.g., Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 875–76 (1995) (Souter, J., dissenting) (chronicling cases).

133 Trinity Lutheran, 137 S. Ct. at 2031.

134 Id.

135 Id. at 2031–32.

136 Id.
to the states as to how to apply it. 137 She reasoned that the states initially funded houses of worship but over time restricted the practice. 138 Justice Sotomayor made numerous historical and originalist arguments for allowing states to choose how to navigate the “play in the joints.” 139 Returning to Locke, Justice Sotomayor emphasized that the reasoning for the decision in that case was primarily based on “historic and substantial state interest” supporting a state’s decision to not give funds directly to a church. 140 She noted that “[a]lmost all of the [s]tates that ratified the Religion Clauses” had that rule, and thirty-eight states today have provisions similar to Missouri’s Article I, Section 7. 141 She considered separation of church and state to be a compelling interest. 142 Justice Sotomayor agreed with Justice Breyer’s concurrence in principle, 143 but disagreed that this case did not involve a true generally available public benefit because it only “selective[ly] benefits a few recipients a year.” 144 For that reason, she believed the comparison to Everson was “inapt.” 145

Justice Sotomayor concluded that the Court “blinds itself to the outcome . . . history requires and leads us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.” 146

C. Summary of Scholarly Criticism

Many scholars have commented on the Trinity Lutheran decision. Some hail the decision for expanding religious freedoms 147 and that “religious conservatives are happy” with the outcome. 148 However, some commentators disagree with Trinity Lutheran and decry the decision for wearing down the wall

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137 See id. at 2032–33. This is in line with the original intent. See supra notes 12–13 and accompanying text.
138 Trinity Lutheran, 137 S. Ct. at 2032–35 (Sotomayor, J., dissenting) (“The course of this history shows that those who lived under the laws and practices that formed religious establishments made a considered decision that civil government should not fund ministers and their houses of worship.”).
139 See id.
140 Id. at 2035–36 (quoting Locke v. Davey, 540 U.S. 712, 725 (2004)) (emphasis added).
141 Id. at 2037.
142 Id. at 2040–41.
143 The principle being that denying a “generally available benefit” solely on account of religious status requires strict scrutiny. Id. at 2040.
144 Id.
145 Id.
146 Id. at 2041.
147 E.g., Garnett & Blais, supra note 1, at 105; id. at 121 (calling the decision “long overdue”).
between church and state. One scholar calls *Trinity Lutheran* “deeply disturbing” and a “dramatic change in the law.” Another criticizes the Court for not addressing the Establishment Clause in any substantive manner. An additional writer predicts that the vague status/use distinction will be important in government programs that officially discriminate against religious entities.

Almost all commentators mention Footnote Three, and some specifically note its oddity. One writer believes that Footnote Three was needed to secure Justice Breyer’s vote. Another scholar has little faith in Footnote Three’s ability to limit the *Trinity Lutheran* holding. Some agree with Justice Sotomayor’s point that, despite Footnote Three’s limiting language, *Trinity Lutheran* eroded federalism by shifting state decision-making on religion to the Supreme Court. Another scholar highlights that Footnote Three reserved deciding two main issues. One issue is whether funding religious schools entails “religious use of funding,” and the other is the general

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149 See e.g., Chemerinsky, supra note 2, at 360–61.
150 Id. at 358.
152 See Garnett & Blais supra note 1, at 105.
153 E.g., Laycock, supra note 55, at 160 (“But of course the holding is not limited to playground resurfacing.”); Gillian E. Metzger, Foreword, 1930s Redux: The Administrative State Under Siege, 131 HARV. L. REV. 1, 29 (2017) (calling it “an oddly specific limit”).
154 Metzger, supra note 153, at 29.
156 See Mitchell, supra note 148, at 1101; Metzger, supra note 153, at 29 (arguing that *Trinity Lutheran* continues a “siege” on the administrative state); see also supra notes 135–45 and accompanying text (discussing Justice Sotomayor’s view).
157 Laycock, supra note 55, at 157–58.
constitutio[nality of discriminating against religion.\footnote{159} Future Court decisions will need to address these issues.

\section*{V. Creating a New Test}

\subsection*{A. Reflecting on Criticism}

The \textit{Trinity Lutheran} decision has generated much criticism and disagreement.\footnote{160} After \textit{Trinity Lutheran}, at a minimum, the government is able to “limit the extent government funds can be put to religious use” but “cannot discriminate based on one’s religious status.”\footnote{161} Also, discriminating on religious status would unconstitutionally “put the recipient of a government benefit to the choice between maintaining that status or receiving a government benefit.”\footnote{162} Justices and commentators in Section IV widely accept these two principles,\footnote{163} but the primary problems lay with the \textit{Trinity Lutheran} decision and how it should be limited.\footnote{164} The three main flashpoints from the case are disregarding the Establishment Clause and federal deference to the states,\footnote{165} the utility and limits of Footnote Three,\footnote{166} and distinguishing status against use.\footnote{167}

\footnote{AGGREGATE (July 4, 2017), https://law.stanford.edu/2017/07/04/trinity-lutheran-church-v-comer-decision-what-does-it-mean-for-school-vouchers/ (‘[S]chool voucher advocates and opponents alike view this case as a marker for whether the Supreme Court will require states to allow parents and children to use publicly funded school vouchers for religious schools.’). On the other hand, some feel the principles in \textit{Trinity Lutheran} should be extended to allow funding for religious schools. \textit{See, e.g.}, Laycock, \textit{supra} note 55, at 162–63. Further, \textit{Locke} may eventually be overruled or narrowly confined to the facts of that case. \textit{Id.} at 169 (describing \textit{Locke} as applicable only to barring funding for training of religious clergy at universities).}

\footnote{159 Laycock, \textit{supra} note 55, at 164–68; \textit{see also} Erin Hawley, \textit{Symposium: Putting Some Limits on the “Play in the Joints,” SCOTUSBLOG} (Jun. 26, 2017, 5:28 PM), http://www.scotusblog.com/2017/06/symposium-putting-limits-play-joints/ (describing Blaine provisions as being on “shaky footing” and in jeopardy). Specifically, Blaine provisions may appear facially neutral, but if they have a “bad motive,” they should be struck down. Laycock, \textit{supra} note 55, at 166–68. Another scholar argues that Blaine provisions were inherently made with animus, but wants them struck down on narrower non-discrimination grounds, like in \textit{Trinity Lutheran}. Garnett & Blais, \textit{supra} note 1, at 105, 125–27.}

\footnote{160 \textit{See discussion supra} Section III.}

\footnote{161 \textit{CONAN}, \textit{supra} note 11, at 1123 (emphasis added).}

\footnote{162 \textit{Id.} (emphasis added).}

\footnote{163 \textit{See discussion supra} Section III. With the exceptions of Justices Thomas and Gorsuch, who textually believe that the government cannot limit religious use of a generally available public benefit. \textit{See} Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2025 (2017) (Thomas, J., concurring in part); \textit{see id.} at 2025–26 (Gorsuch, J., concurring in part).}

\footnote{164 \textit{See id.}}

\footnote{165 \textit{See discussion supra} Section III.B (summarizing Justice Sotomayor’s dissent).}

\footnote{166 \textit{See discussion supra} Section III.A (summarizing Justice Gorsuch, Justice Thomas, and scholars’ criticism of Footnote Three).}

\footnote{167 \textit{See supra} notes 111–13, 118, 152, and accompanying text (summarizing Justice Gorsuch, Justice Thomas, and one scholar’s discussion of the status/use distinction).}
First, *Trinity Lutheran* reduced the Establishment Clause to mere ink on paper. Because the parties agreed that there is no Establishment issue, the Court washed its hands of the Clause.\textsuperscript{168} This is fundamentally wrong.\textsuperscript{169} “Constitutional questions are decided by [the Supreme] Court, not the parties’ concessions.”\textsuperscript{170} The Court shirked its emphatic “province and duty . . . to say what the law is,”\textsuperscript{171} “If two laws conflict with each other,”\textsuperscript{172} such as the Establishment Clause and Free Exercise Clause,\textsuperscript{173} “the courts must decide on the operation of each.”\textsuperscript{174} Justice Sotomayor was correct that the “Court’s silence on this front signals either its misunderstanding of the facts of this case or a startling departure from our precedents.”\textsuperscript{175} Likewise, Justice Breyer rightfully acknowledged that the Establishment Clause limits the reach of this decision.\textsuperscript{176} Additionally, the original intent of the Religion Clauses left the issue of religion to the states.\textsuperscript{177} For this reason, the Court should give deference to the states for how to handle the “play in the joints” between the Establishment and Free Exercise Clauses, as the Court has historically done.\textsuperscript{178}

Second, Footnote Three was a disservice to judicial opinion writing. It unnecessarily fractured the Court into five different opinions\textsuperscript{179} and failed its objective of limiting the

\begin{footnotes}
\footnote{168}{*Trinity Lutheran*, 137 S. Ct. at 2019.}
\footnote{169}{See Griffin, *supra* note 151.}
\footnote{170}{*Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting).}
\footnote{171}{*Marbury v. Madison*, 5 U.S. 137, 177 (1803).}
\footnote{172}{Id.}
\footnote{173}{See cases cited *supra* note 43 and accompanying text (discussing extending the Clauses to their extremes).}
\footnote{174}{*Marbury*, 5 U.S. at 177.}
\footnote{175}{*Trinity Lutheran*, 137 S. Ct. at 2028 (Sotomayor, J., dissenting).}
\footnote{176}{Id. at 2027 (Breyer, J., concurring in the judgment) (stating “there [is not] any administrative or other reason to treat” *Trinity Lutheran* different from the schools in *Everson*). Although, unlike Justice Sotomayor, he correctly allowed funding for the Center’s playground resurfacing. Compare *Trinity Lutheran*, 137 S. Ct. at 2026–27 (explaining that the applicability of *Everson* and that the Scrap Tire Program is a generally available public benefit), *with Trinity Lutheran*, 137 S. Ct. at 2040 (Sotomayor, J., dissenting) (disagreeing with Justice Breyer’s characterization). Justice Sotomayor’s reasoning fails because inherently, any generally available benefit is a selectively available benefit, and vice versa. Any public benefit has scarce resources and requires some selective decision-making. For example, police officers prioritize what streets to patrol and how many officers need to respond to an emergency. Separately, Justice Sotomayor’s church-state separation concerns are valid, but she does not give enough weight, in this case, to the penalty against Free Exercise. *See Trinity Lutheran*, 137 S. Ct. at 2027–41 (Sotomayor, J., dissenting).}
\footnote{177}{See *supra* notes 11–17 and accompanying text.}
\footnote{178}{See *supra* notes 129–42 and accompanying text (Justice Sotomayor outlining precedents and history). The Court has recognized states’ “historical and substantial state interest” in a separation of church and state. *Locke v. Davey*, 540 U.S. 712, 725 (2004).}
\footnote{179}{See discussion *supra* Section III (discussing Footnote Three).}
\end{footnotes}
As Justice Breyer noted in his concurrence, “administrative or other reasons” (i.e. Establishment Clause problems) would allow for treating religious parties differently. The Court should have addressed this issue instead of causing embarrassing scholarly criticism and a scathing dissent. Footnote Three is a farce.

Third, finding the line between religious status and religious use will be critical in future cases. The status-use distinction is critical because, despite Justices Thomas’s and Gorsuch’s belief that the difference is irrelevant, at least six other Justices will prefer to use this line-drawing in cases where a public benefit is denied to a religious party. Overall, the Court needs to address these three problems in future cases where the government denies a public benefit based on religion.

B. The “Seesaw Test”

The Seesaw Test is my proposal for a new “play in the joints” test, suitable for instances where the government seeks to deny a public benefit to a religious party. Given that Trinity Lutheran inspired the balancing, or seesawing, nature of this test, naming it after the playground equipment is appropriate. The Seesaw Test resolves the criticisms described in detail above. This test is needed because “shoehorning” all Free Exercise and Establishment Clause cases into one test is inappropriate, and instead, “different contexts . . . call for different approaches.”

The reason is that “shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test.” This is what the Trinity Lutheran Court did that led to the criticism summarized.

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180 See discussion supra Section III.C (discussing scholars ignoring the impact of the footnote and speculating on how the opinion can be applied to other forms of discrimination against religion).
181 See Trinity Lutheran, 137 S. Ct. at 2027 (Breyer, J., concurring in the judgment).
182 See supra Section III.C (discussing scholars raising issues about Blaine provisions and school funding).
183 Laycock, supra note 55, at 136; see also Trinity Lutheran, 137 S. Ct. at 2025 (Thomas, J., concurring in part); 137 S. Ct. at 2025–26 (Gorsuch, J., concurring in part).
184 See Trinity Lutheran, 137 S. Ct. at 2017–25 (opinion of the Court); id. at 2026–41 (opinions of Breyer, J., concurring and Sotomayor, J., dissenting).
186 See CONAN, supra note 11, at 1077; see also Grumet, 512 U.S. at 719 (1994) (O’Connor, J., concurring in part and concurring in the judgment).
187 Grumet, 512 U.S. at 719 (1994) (O’Connor, J., concurring in part and concurring in the judgment) (“[I]t is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them.”).
188 See Trinity Lutheran, 137 S. Ct. at 2022.
in Section VA. Shoehorning a strict scrutiny test for when a party is denied a public benefit based on religion deforms strict scrutiny because it does not adequately address the historic, traditional, and substantial state interest of avoiding an establishment of religion.\footnote{189 See generally id. at 2028–40 (Sotomayor, J., dissenting).} In the area of “special concern” of denying funds to religious parties, the Seesaw Test provides clear guidance for lawmakers, remains within the holding of \textit{Trinity Lutheran} by distinguishing between status and use, and addresses the concerns of the scholarly criticism and concurring and dissenting Justices.

The Seesaw Test has two parts. First, the Court should balance both sides to decide whether the public benefit was denied because of \textit{past or present} religious status or \textit{future} religious use.\footnote{190 This is meant to address the initial “play in the joints” issue and the balancing of the Free Exercise and Establishment Clauses on the fulcrum of status and use. This may also be considered the Free Exercise step.} Second, the weight shifts either against the government or the religious party. If the denial was based on \textit{religious status}, then the \textit{government} must show excessive entanglement or endorsement.\footnote{191 Effectively, the government needs to show that there are traditional endorsement and \textit{Lemon} entanglement problems. This gives the government a fair chance to argue that denying based on status is necessary to avoid Establishment problems.} However, if the denial was based on \textit{religious use}, then the \textit{religious party} must show minimal entanglement and incidental endorsement.\footnote{192 Effectively, the religious party needs to show that there are not traditional endorsement or \textit{Lemon} entanglement problems. This gives the religious party a fair chance to argue that the religious use does not cause Establishment problems.}

In short, part one is a balancing test between the two parties, and part two is a form of intermediate scrutiny against the losing party. A two-part test using modified intermediate scrutiny provides for more clarity and consensus than shoehorning this issue into an overbroad strict scrutiny analysis.\footnote{193 See supra note 105 and accompanying text (discussing fracturing). For example, applying rational basis to the situation in \textit{O'Brien} would not adequately consider free speech, and strict scrutiny in \textit{Central Hudson} would not adequately consider the state’s power to regulate commerce.} Some balancing will allow for deference to state interests, while modified intermediate scrutiny is a desirable middle ground between the strict scrutiny both Religion clauses demand.

In situations where the government denies a public benefit to a religious party, modified intermediate scrutiny is needed to remain consistent with other analogous constitutional conflicts. When the government has an express power delegated from the people, but using the power infringes a reserved constitutional right, then the resulting test occasionally is a
middle-ground variant of intermediate scrutiny. For example, in *United States v. O'Brien*, the Court created a modified intermediate scrutiny test to balance whether laws regulating conduct, which fall under minimal rationality, interfere with free speech, which triggers strict scrutiny. Also, in *Central Hudson Gas and Electric Corp. v. New York Public Service Commission*, the Court walked back the strict scrutiny standard from *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* Instead, the *Central Hudson* test balances whether laws regulating advertising, which is commercial activity under rational basis analysis, violates free speech, which calls for strict scrutiny. Here, the Court can walk back the *Trinity Lutheran* strict scrutiny standard as it did in *Central Hudson* after the *Virginia Board* decision. Similar to the conflicts in *O'Brien* and *Central Hudson*, the Establishment Clause gives the government the power and prerogative to prevent an establishment of religion, but is countered by not being able to infringe against Free Exercise rights. Thus, modified intermediate scrutiny, recognizing states’ substantial interest, is a proper test for when the government denies a public benefit to a religious party.

Multiple sections and terms within the Seesaw Test need explanation. Part one addresses the Free Exercise implication. First, a “denied public benefit” in this test involves no distinction between “generally available” and “selective” benefits. Contrary to Sotomayor’s attack on Breyer, all government benefits use scarce resources, and deciding how to use scarce resources always involves prioritization and selection. For

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194 For examples of modified intermediate scrutiny tests, see *Central Hudson Gas & Elec. Corp. v. N.Y. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (The four steps are: (1) Is the expression protected by the First Amendment, concerning a lawful activity, and not misleading? (2) Is the asserted governmental interest substantial? (3) Does the regulation directly advance the governmental interest asserted? (4) Is the regulation more extensive than is necessary to serve that interest? There must be a “reasonable fit” between the government’s ends and the means for achieving those ends.); *United States v. O’Brien*, 391 U.S. 367 (1968) (The law in question must be within the constitutional power of the government to enact; further an important or substantial government interest; that interest must be unrelated to the suppression of speech; and prohibit no more speech than is essential to further that interest.).


196 *Id.* at 376–77.


198 425 U.S. 748, 761 (1976) (“It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another.”).

199 See *Central Hudson*, 447 U.S. at 561–63 (1980) (undoing the strict scrutiny standard from *Virginia Board*).


201 *Id.*
example, police protection services prioritize and select how to distribute their “generally available” benefits. Thus, all benefits are selective and any distinction between “generally available benefits” and “selective benefits” is meaningless in the grand scheme of Free Exercise rights.

Second, “lines must be drawn,” and the first line the 
Trinity Lutheran Court chose was status and use. When the Court distinguished Locke, the crux of its reasoning had two segments. One, the religious party in Locke was not denied a public benefit because of who he “was”; he was denied the benefit because of what he “proposed to do—use” the benefit “to prepare for” a future religious objective. Two, the Department denied Trinity Lutheran’s application because “of what [Trinity Lutheran] is—a church.” “Was” and “is” imply the past and present. “Do” implies the future. If the focus for denial is based on the past or present criteria, then it is likely based on status. Alternatively, if the decision depends on future criteria, then it is likely based on use. The timing distinction gives a useful guideline for the Justices when considering the unique circumstances of each case. Temporally framing the status/use line solves Justices Gorsuch and Thomas’ primary concern that no workable distinction can be made between status/use.

Part two of the Seesaw Test addresses the Establishment Clause, which was entirely left out of the 
Trinity Lutheran majority opinion. This part ensures that there is some accounting for both Religion Clauses and allows for the states to retain some control over the “play in the joints.” There are many terms of art in part two that will use the following

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203 A distinction must be made between status and use to remain within the holdings of 
204 Id.
205 Id. (emphasis added).
206 See id. at 2025 (Thomas, J., concurring with Gorsuch, J.); id. at 2025–26 (Gorsuch, J., concurring in part) (“[T]he Court leaves open the possibility a useful distinction might be drawn between laws that discriminate on the basis of religious status and religious use. Respectfully, I harbor doubts about the stability of such a line. Does a religious man say grace before dinner? Or does a man begin his meal in a religious manner? Is it a religious group that built the playground? Or did a group build the playground so it might be used to advance a religious mission? The distinction blurs in much the same way the line between acts and omissions can blur when stared at too long, leaving us to ask (for example) whether the man who drowns by awaiting the incoming tide does so by act (coming upon the sea) or omission (allowing the sea to come upon him). Often enough the same facts can be described both ways.”) (internal citations omitted).
207 Id., 137 S. Ct. at 2029–30 (Sotomayor, J., dissenting).
208 See id. at 2032–38 (Sotomayor, J., dissenting) (discussing moving decision-making over religion away from the states).
definitions. “Excessive entanglement” entails an “[i]mpermissible merging, involvement, or intermixing of the spheres of government and religion whereby state and church functions are blurred or caused to overlap.”\(^{209}\) This can include government intrusion “into an organization’s religious administration, authority, concerns, or rights;”\(^ {210}\) complicated administrative involvement;\(^ {211}\) or potential disagreement regarding religious matters between religious parties and government agents.\(^ {212}\) Essentially, entanglement is the concern of “repeated governmental intrusion into the inner workings of a religious institution.”\(^ {213}\) “Endorsement” is when government appears to “favor, prefer, or promote” a particular religion “over other beliefs.”\(^ {214}\)

“Minimal entanglement” and “incidental endorsement” are essentially antonyms I created\(^ {215}\) for excessive entanglement and endorsement. Minimal entanglement is a one-time isolated interaction between the state and religion and implies that there is no excessive entanglement. Incidental endorsement is favoring a particular belief system no more than the government would favor another similarly situated belief system. This allows for the government to, as it historically has done,\(^ {216}\) favor organized religions with a belief system that allows for receipt of government benefits.\(^ {217}\)

VI. REVIEWING THE “SEESAW TEST”

A. Riding the Seesaw

Playing with the Seesaw Test highlights two major aspects of it. Part one is quick, formalistic, and text-based. Part two is slow, functionalist, and fact-based.

\(^{209}\) Excessive Entanglement, BLACK’S LAW DICTIONARY (10th ed. 2014); see also Walz v. Tax Comm’n, 397 U.S. 664, 675 (1970) (Ask “whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.”).

\(^{210}\) Excessive Entanglement, supra note 209.

\(^{211}\) See Lemon v. Kurtzman, 403 U.S. 602, 613–19 (1971); Walz, 397 U.S. at 675 (including whether impermissible “official and continuing surveillance” is required).

\(^{212}\) Walz, 397 U.S. at 674–75


\(^{215}\) To my knowledge, these terms are novel creations.

\(^{216}\) See, e.g., Walz, 397 U.S. at 664 (allowing for tax-exempt status to organizations with belief systems that allow for taxation).

\(^{217}\) Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2031 (Sotomayor, J., dissenting) (discussing the problem of the government showing a preference for such belief systems over systems that do not).
Part one will often be quickly dispatched because a textual provision, responsible for the government denying a public benefit to a religious party, will either allow for some aid to religion, or bar all such aid. Blanket bans on aiding religion paint with too broad a brush. Consistent with *Trinity Lutheran*, if the statute, provision, or administrative policy does not allow any money to go to religions, then it inherently discriminates based on religious status. Although there is no entitlement to government public benefits for exercising a right, once a public benefit is made available, the government cannot deny it solely because of religious status. Additional language or actions will also be indicative of whether the discrimination focuses on past or present information versus future intent to use the aid. For example, an application for aid could not have a check-box saying, “I am/I was part of ‘X’ religious organization.” On the other hand, the form could inquire into future intent for using the aid. An example is a government program allowing for aid to renovate historic landmarks while requiring disclosure of whether the funds will be used to renovate a church. This draws from *Locke*, which stands for the principle that the government is allowed to deny aid to a theology student, not for his past or present religious beliefs, but because of his intent to use the money for a future religious purpose.

Under part two, the type and nature of the public benefit denied to the religious party will require an individualized fact-specific inquiry. The form and duration of aid will be the main factor in whether, if the denial was based on status, there will be excessive entanglement or endorsement, or whether, if the denial was based on future use, there will be only minimal entanglement and incidental endorsement. One-time cash transfers will not lead to entanglement because such transfers do not require long-term continuous surveillance or involvement into the affairs of a religion. Further, provided there are no special “plus” factors given to favor religious entities, a reasonable person would not consider the transfer an endorsement. The purpose for the aid may also be used to argue

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218 See *Trinity Lutheran*, 137 S. Ct. at 2025 (holding that barring aid solely on account of religion is unconstitutional).


220 *Trinity Lutheran*, 137 S. Ct. at 2025.

221 See *id.* at 2029 (Sotomayor, J., dissenting) (conceding that funding may “[come] with assurances that public funds would not be used for religious activity, despite the religious nature of the institution”).

that, although the aid is for religious use, the reason for the aid would show minimal endorsement. Some examples are disaster-relief funds for rebuilding a destroyed church, fire/police protection services, and playground-resurfacing.

The specific example of school-vouchers fully illustrates both parts of the Seesaw Test. Under part one, the court should balance both sides to decide whether the public benefit was denied because of past or present religious status or future religious use. The language outlining how the school-vouchers may be used will be critical. If the language bars using them for any religious school or denies the voucher because of the person’s religious status, then that is overbroad and results in the “status” analysis. However, if the language allows the voucher to be used for religious schools and does not deny giving the voucher to religious people, then that would likely move to the “use” analysis. Under part two, the weight either shifts against the government or the religious party. If the denial was based on religious status, then the government must show excessive entanglement or endorsement. However, if the denial was based on religious use, then the religious party must show minimal entanglement and incidental endorsement. For school-vouchers this will require significant inquiry into the available schools, pervasiveness of religion in those schools, and intent of the student or student’s parents. When denied based on status, the government needs to show that excessive entanglement and endorsement of religious education will occur. When denied based on use, the religious student or parents needs to show that their use of the voucher will only cause incidental endorsement or minimal entanglement. Ultimately, the result will depend on the unique situation of the government, schools, and religious parties.

**B. How States Should Play on the Seesaw**

The primary beneficiaries of the Seesaw Test will be the states. In light of *Trinity Lutheran*, the Blaine Provisions of most states will need to be amended. As courts do not generally write our laws, the onus will fall on state legislatures to make these changes in response to *Trinity Lutheran*. Any Blaine Provisions that entirely deny generally available public benefits

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223 *Trinity Lutheran*, 137 S. Ct. at 2026–27 (Breyer, J., concurring).

224 *Id.* at 2024–25.

225 See *id.* at 2037 n.10 (Sotomayor, J., dissenting) (compiling a list of other states with Blaine provisions).
to religious groups are in severe jeopardy.\footnote{See Hawley, supra note 159.} Blaine Provisions that are adjusted to follow the Seesaw Test will most likely remain valid because they will not deny funding solely because of “religious status.”\footnote{Trinity Lutheran, 137 S. Ct. at 2024.} The cost of not changing the provisions will be expensive litigation for the states and loss of religious freedom for the people.

Blaine Provisions must change because most of them are overbroad in not distinguishing between religious status and use. If they are not amended, they will fail under the Seesaw Test for discriminating against religions solely because of status. Likewise, they will follow the result in Trinity Lutheran where Missouri’s Blaine Provision was overbroad.\footnote{Id. at 2025 (striking Article I, Section 7 of the Missouri Constitution).} Missouri wrongly denied government financial aid of any kind to a religious party.\footnote{Id.} As a model provision, the following modified Missouri provision will pass the Seesaw Test, Trinity Lutheran, and judicial scrutiny:

That no money shall ever be taken from the public treasury, directly or indirectly, for future religious use by any church, sect or denomination of religion, or any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship. A party’s past or present religious status shall not be used as criterion for denying aid or benefits.\footnote{This is a modified version of Mo. Const. art. I, § 7. The original language is similar to Blaine provisions throughout the United States. See Trinity Lutheran, 137 S. Ct. at 2037–38 n.11 (Sotomayor, J., dissenting) (citing thirty-eight states with a similar provision).}

The two simple edits, indicated in italics, adjust the provision to follow the language of Trinity Lutheran and highlight the temporal difference between status and use. The original language strikes a good balance between Free Exercise (language barring discrimination) and Establishment (barring all funds to religion), but the provision needs to include a status/use distinction and emphasize that status cannot be used for denying benefits. This change will help states avoid litigation costs, continue avoiding establishment issues, and allow for some aid to religious parties.
C. Weaknesses of the Seesaw Test

A seesaw is a fun playground toy, but it has its disadvantages. It cannot be moved and only serves a singular purpose; the Seesaw Test has similar weaknesses. Unlike the pure Lemon, endorsement, coercion, or strict scrutiny tests, the Seesaw Test can only be used for one type of case: when the government denies public benefits to a religious party. The other tests are far broader and can be used in a multitude of contexts. However, the Seesaw Test is tailored for a specific purpose, and it will serve that purpose better than if the courts try to shoehorn cases like Trinity Lutheran into the other tests. Also, the test is inapplicable in cases where the government wants to aid or otherwise accommodate religion. In those cases, the courts should not use the Seesaw Test and can return to Lemon, endorsement, coercion, or strict scrutiny for guidance. The Seesaw Test is not a multi-tool; it is a shield for protecting religious parties from state discrimination while blocking an establishment of religion.

VII. CONCLUSION

In light of the Supreme Court’s decision in Trinity Lutheran, the Seesaw Test is the best option moving forward. The Court in Trinity Lutheran failed to consider the Establishment Clause, give deference to the states, create an unfractured Court opinion, or give adequate clarity on the difference between status and use. The Seesaw Test defers to the states and gives guidance to lawmakers on distinguishing status and use while fully considering the Establishment Clause implications, which will lead to more unified opinions. States should adapt their laws and policies to pass the Seesaw Test because it embraces the holding of Trinity Lutheran and will help states avoid expensive litigation as they try to defend overbroad Blaine Provisions and other anti-religious practices. This test allows the government to find its own “‘play in the joints’ between what the Establishment Clause permits and the Free Exercise Clause compels.” The courts should never ignore the Establishment Clause where the government denies a public benefit to a religious party. On a seesaw, children learn the ideas of balance and weight. When finding “play in the joints” here, only the Seesaw Test can balance the weight of the Religion Clauses.


233 See discussion supra Section III (noting fractured opinions under the current test).

234 Trinity Lutheran, 137 S. Ct. at 2019.