COURTING CENSORSHIP

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Introduction

Has Supreme Court doctrine invited censorship? Not deliberately, of course. Still, it must be asked whether current doctrine has courted censorship—in the same way one might speak of it courting disaster.

The Court has repeatedly declared its devotion to the freedom of speech, so the suggestion that its doctrines have failed to block censorship may seem surprising. The Court's precedents, however, have left room for government suppression, even to the point of seeming to legitimize it.

This Article is especially critical of the state action doctrine best known from *Blum v. Yaretsky*.[1] That doctrine mistakenly elevates coercion as the archetype or model of constitutionally accountable government conduct. Even in suits against government, the *Blum* test normally requires plaintiffs to prove that private action has been coercively converted into government action. In such ways, the *Blum* state action doctrine is not merely erroneous, but has signaled to government that it can get away with censorship as long as it keeps most of it privatized and not overtly coercive.

When it comes to the First Amendment, this Article expresses concern about the doctrinal tendency to confuse "abridging" and "prohibiting." The First Amendment carefully distinguishes the two: It simultaneously bars *abridging*, or reducing, the freedom of speech, and forbids *prohibiting* the free exercise of religion. This isn't to say that much coercion is required for a free exercise violation. But the First Amendment at least reveals that it bars whatever merely diminishes the freedom of speech, without any need to show coercion or other prohibiting. Unfortunately, this important distinction between abridging and prohibiting has been lost, with the result that First Amendment doctrine seems to make coercion necessary for a speech violation. Once again, doctrine mistakenly suggests that government can censor Americans—at least if it avoids the most blatant sorts of coercion.

The Supreme Court needs to repudiate the judicial doctrines that invite censorship. When the censorship-justifying doctrines are put aside, and the First Amendment itself is examined, it becomes clear that the Amendment leaves no room for privatized and less-than-coercive evasions of its freedom of speech. This is not, moreover, an unrealistic ideal. The First Amendment itself contains hints as to how censorship can be barred without standing in the way of lawful executive persuasion.

A. The Problem

The problem that provokes this inquiry is massive government censorship. Federal censorship through the dominant social media platforms (the "Platforms")

[1] 457 U.S. 991 (1982).

has been occurring since at least 2018 and on a vast scale since 2020.[2] It has included the review of billions of posts; it has suppressed millions.[3] It already has affected one presidential election, two cycles of congressional elections, much science and medicine, and cutting-edge social questions.[4] Moreover, it has taken until 2023 for a court to issue an injunction against such government censorship—and even then, against only some of it and against only some of the relevant government officers.[5] Much of the censorship continues.

One might have thought that judicial doctrine would have nipped any such federal suppression in the bud. Yet apparently not. So it is necessary to ask, why not?

The inquiry is especially pressing because the current censorship dwarfs the censorship familiar from the 1798 and 1918 Sedition Acts.[6] Rather than punish merely some authors, publishers, and activists, it has also suppressed vast numbers

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[2] For the beginnings of the federal censorship in 2018, see Brief for Petitioners at 35, Murthy v. Missouri, 144 S. Ct. 7 (2023) (No. 23-411) (acknowledging that the Cybersecurity and Infrastructure Security Agency forwarded state demands for suppression to the Platforms "[d]uring the 2018 and 2020 election cycles"); Michael Shellenberger, Alex Gutentag & Matt Taibbi, *CTIL Files #1: US and UK Military Contractors Created Sweeping Plan for Global Censorship in 2018, New Documents Show*, PUBLIC (Nov. 28, 2023), https://public.substack.com/p/ctil-files-1-us-and-uk-military-contractors (regarding evidence of pre-2020 censorship organized by the Cyber Threat Intelligence League, which included FBI and CISA officials, and which at least by 2019 was in a partnership with CISA).

[3] Missouri v. Biden, 83 F.4th 350, 392 (5th Cir. 2023) (quotation marks omitted) ("suppressing millions of protected free speech postings by American citizens"), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

[4] *See, e.g.*, *id.* at 359 ("For the last few years—at least since the 2020 presidential transition—a group of federal officials has been in regular contact with nearly every major American social-media company about the spread of 'misinformation' on their platforms. In their concern, those officials—hailing from the White House, the CDC, the FBI, and a few other agencies—urged the platforms to remove disfavored content and accounts from their sites. And the platforms seemingly complied. They gave the officials access to an expedited reporting system, downgraded or removed flagged posts, and deplatformed users. The platforms also changed their internal policies to capture more flagged content and sent steady reports on their moderation activities to the officials. That went on through the COVID-19 pandemic, the 2022 congressional election, and continues to this day.").

[5] *Id.* at 397.

[6] Sedition Act, 1 Stat. 596 (1798) (expired 1801); Sedition Act, 40 Stat. 553 (1918) (repealed 1920).

of ordinary Americans. This is censorship at a scale that lies far outside earlier American experience.

Of course, the censorship has been imposed primarily by the Platforms, not government. It therefore may seem misplaced to focus on the government's role. But just because the Platforms are so central in the censorship doesn't mean one can ignore the government's participation. It will be seen that the Platforms depend on government coordination to sustain much of even their private censorship, so government's role is crucial.[7] Moreover, the Constitution limits government, not private parties. Therefore, both the censorship's realities and its interaction with the Constitution demand attention to the part played by government.

The Constitution should have stopped the current censorship scheme in its tracks. It will be seen that the Constitution is framed to prevent officials from even adopting suppressive policies, let alone carrying them out. This is essential because when government controls speech, it can subvert freedom at every level, including elections, rights, and even personal commitments to these constitutional foundations.

Judicial doctrine, however, has left room for censorship. Or perhaps more accurately, judicial doctrine has allowed government to imagine it has room for censorship.

Of course, the constitutional protections for speech have not been entirely erased. The remaining protections, although much worn down, have at least been sufficient (thus far) to support an injunction in *Missouri v. Biden*—now *Murthy v. Missouri*—against the most overt elements of the current censorship regime.[8] So, even current doctrine has some value.

Existing doctrine, however, is not good enough. Under current judicial interpretations of the Constitution, it has taken half a decade just to get an initial injunction against the censorship. And the government evidently thought, and still thinks, that the suppression that it has orchestrated is not unconstitutional under prevailing doctrine. While purportedly protecting the freedom of speech, the Constitution

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[7] *See infra* Section II.F.

[8] *Missouri*, 83 F.4th at 397.

has been interpreted in ways that open up pathways for evasion, very nearly authorizing what the First Amendment forbids.[9]

B. This Article's Analysis

Part I examines federal power, arguing that judicial doctrine has eroded the Constitution's structural protections for speech. Commerce Clause doctrine seems to authorize federal regulation of speech—something the Clause once seemed to preclude. In the shadow of this legislative power over speech, the executive uses administrative and even sub-administrative processes to regulate speech, thus allowing it to circumvent both the front-end legislative protection and back-end judicial protection afforded by the Constitution. That is, government no longer must get the prior approval of the nation's elected representative legislature or the subsequent judgment of an independent judge and jury. Doctrine has thus dismantled the substantive and procedural protections that once provided structural safeguards for speech, leaving the federal government relatively free to impose censorship.

Part II shifts to rights, showing how *Blum v. Yaretsky* and allied cases have weakened the freedom of speech by subjecting it to an artificially narrow conception of state action—what this Article more accurately treats as government action. *Blum* elevates coercion as the prototypical way to violate rights and treats privately effectuated censorship as unconstitutional only if, paradoxically, the private action amounts to public action.[10] The doctrine in *Blum* thereby leaves the impression that government can censor Americans through private entities as long as it is not too coercive. Indeed, the doctrine seems to suggest that, without traceable coercion, the censored lack standing to challenge their oppression.

In fact, as seen in Part III, the First Amendment more capaciously forbids any abridging, or reducing, of the freedom of speech—thus protecting that freedom without obviously opening up paths for evasion. If judicial doctrine and academic scholarship had lingered even briefly on the First Amendment's words, they would have recognized that although the Amendment bars "prohibiting" the free exercise

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[9] This is not the first time I have pointed out the danger of doctrines that seem to make censorship constitutional. *See* Philip A. Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 277–81 (2005). Note that this Article typically uses the term "freedom of speech" as a shorthand for both the freedom of speech and the freedom of the press.

[10] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).

of religion, it forbids "abridging" the freedom of speech. This distinction is crucial because government can work through private parties to abridge, or diminish, the freedom of speech without coercing anyone or otherwise prohibiting that freedom—in particular, without coercively transforming the private action into government action. The distinction thus shows that in speech suits against government, plaintiffs shouldn't have to jump through *Blum*'s hoops.

First Amendment doctrine, however, confuses abridging and prohibiting. It thus aligns the Amendment with *Blum*'s coercion-oriented vision of state action and, like that state action doctrine, invites government to assume it can get away with censorship as along as it is not too coercive.

Incidentally, it will also be seen in Part III that any law abridging the freedom of speech is rendered void *ab initio* by the First Amendment. Being barred from the outset, such a law is unconstitutional even if it has not yet caused any suppressive effect. *Blum* is therefore mistaken in requiring plaintiffs claiming unconstitutionality to show suppressive effects.

Although the Constitution's text may often seem to impede practicable approaches to contemporary problems, the First Amendment's text valuably suggests (as will be seen in Section III.D) how courts can apply the First Amendment's bar against government censorship without preventing lawful and useful government persuasion. The Amendment bars government from abridging the *freedom* of speech, thereby apparently leaving room for government to reduce speech—as long as it doesn't go so far as to diminish the freedom of speech. The Amendment, moreover, applies to *law* and, by extension, to executive policy (on the theory that policy must be authorized by law); it thus does not bar government action that doesn't amount to a law or policy. In such ways, the Amendment itself allows the government to engage in much persuasion about speech—for example, to ask a newspaper to consider dropping a particular story lest it damage national security. A seemingly intractable difficulty finds at least the beginnings of a sensible solution in the Amendment's text.

Part IV considers the Supreme Court's doctrine on government speech. Although the First Amendment guarantees the freedom of speech as a limit on gov-

ernment power, judicial doctrine seems to justify the executive in claiming a freedom of speech to suppress speech—indeed, without any First Amendment limitation.[11]

Part V turns to qualified immunity. Instead of questioning the doctrine as a whole, this Article focuses on the categorical nature of its protection for officials who do not violate any "clearly established" right—that is, who act within a sphere of plausible ambiguity.[12] The doctrine is categorical in the sense that within the range of ambiguity, it relieves all officials from paying damages for their unconstitutional actions—without considering the sort of power they were exercising or the opportunity they had to consult government lawyers. Such blanket or unqualified immunity, as long as there is some ambiguity, leads officials to believe they can get away with censorship.

Part VI notes the sobering dangers of the current censorship—for the human mind, for elections, for science, and for the collapsing distinction between government and society. Finally, Part VII contrasts two visions of constitutional law—one that is optimistic about human nature and another that is more pessimistic. The one is a constitution of hope, the other a constitution of fear. The U.S. Constitution combined optimism—in its broad grants of power—and pessimism in its limits on power, including its rights. Censorship is so serious a danger that it needs to be stopped in its tracks. Judicial doctrine therefore should have been more attentive to how the Constitution's limits on power are framed in response to fears about human nature, not hope.

Along the way, this Article more broadly questions some fundamentals of twentieth-century constitutional jurisprudence. The Article challenges the need for any generic state action doctrine that is independent of the particular rights at stake. It also contests the coercion model—the archetypical measure of forbidden government severity—that runs through Supreme Court doctrine on state action, constitutional rights, and even governmental structure. Under the influence of these

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[11] Although *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963), suggests there is some First Amendment limit on at least threatening government speech, the government reads the precedents to draw a sharp distinction between speech and coercion, and concludes that it is "entitled" to speak "free from First Amendment scrutiny" and that when it speaks, "the Free Speech Clause has no application." Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 23, 28, 29 (citing Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009)).

[12] Anderson v. Creighton, 483 U.S. 635 (1987).

misguided meta-doctrines on state action and coercion, judges and scholars have done much doctrinal damage. Most centrally, in embracing overarching generalities about state action and coercion, judicial doctrine has failed to recognize the First Amendment's distinction between "abridging" and "prohibiting." In such ways, doctrine has endangered freedom of speech and all that depends on it.

The courts, of course, never intended to abandon our constitutional protections; nor did they intend to subject us to censorship. Their doctrines, however, have courted this disaster. Painful as it is to contemplate, judicial doctrine has long been framed in ways that create opportunities for censorship.

Unfortunately, it is doubtful whether the Supreme Court will, or even can, recalibrate these doctrines in time to end the censorship. The Constitution's crucial protections for speech have been altered by twentieth-century doctrine in ways that permit evasion, and the government has taken full advantage of the invitation. It has institutionalized censorship mechanisms that are likely to survive any judicial injunction or other interference. It is therefore not clear how the judiciary can undo the enduring damage.

I. Dismantling the Structural Protections for Speech

Before turning to rights, this Article must consider power. The United States began as a government of limited legislative powers and limited processes or pathways for pursuing them. Twentieth-century judicial doctrine, however, has enlarged federal power beyond those substantive and process limits, with profound costs for speech.

When judicial doctrine on the Commerce Clause lets Congress regulate speech, it permits statutory intrusions on the freedom of speech. But that's not all, because in the shadow of this legislative power over speech, the executive enjoys leverage over speech-oriented businesses. In particular, it can deploy administrative and even sub-administrative processes to censor speech. This combination of expanded substantive legislative power and even sub-administrative process is lethal for the freedom of speech.

A. Commerce Clause Power over Speech

An initial risk to speech comes from the expansion of Congress's commerce power to include control over communication, information, and other speech. By

this means, government has also acquired regulatory power[13] over speech. Of course, Congress has not enacted a law requiring the Platforms to suppress the speech of Americans. But in the shadow of congressional regulation, especially regulation of speech, the federal government enjoys dangerous administrative and even sub-administrative authority over speech.

Already in debates over religion, Thomas Jefferson philosophically excluded opinion from civil jurisdiction. In his 1786 Act for Establishing Religious Freedom, he wrote that "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy," and that "it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order."[14] Writing in 1802 to the Danbury Baptist Association, he summarized that "the legislative powers of government reach actions only, and not opinions."[15]

More concretely, the Constitution did not grant Congress legislative power over speech. Its initial and broadest protection for speech was thus its limited enumeration of legislative powers. Although the Constitution gave Congress the power to establish post offices and post roads, it provided no power over speech or the press. On this basis, Federalists argued that it was safe to ratify the Constitution without a bill of rights—in particular, without a speech guarantee.[16]

Admittedly, the Constitution vests Congress with the power to regulate commerce among the states. Commerce, however, was not understood to include

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[13] By "regulatory," this Article means not simply a law or policy that constrains, but more broadly, one that serves as a mode of regulation. For example, a condition on a grant ostensibly does not constrain, but some conditions can be regulatory in the sense that they function as a mode of regulation. For this point and examples, see PHILIP HAMBURGER, PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM 11, 61–71 (2021). From this point of view, even the coordination described *infra* in Section II.F is regulatory.

[14] An Act for Establishing Religious Freedom, 1785 Va. Laws, *in* 12 THE STATUTES AT LARGE 85 (W. Hening ed. 1823).

[15] Letter from Thomas Jefferson to the Danbury Baptists (Jan. 1, 1802) (on file with Library of Congress), https://www.loc.gov/loc/lcib/9806/danpre.html.

[16] HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 65 (1981). For the free speech version of the argument, see, for example, the argument of James Wilson in the next paragraph.

speech.[17] And the power to regulate commerce only confirmed that the Constitution gave Congress no such regulatory power over speech or the press. James Wilson—who had been second only to James Madison in the framing convention—explained this implication in what may have been the most widely circulated speech in the ratification debates.[18] If "a power similar to that which has been granted for the regulation of commerce, had been granted to regulate literary publications, it would have been . . . necessary to stipulate that the liberty of the press should be preserved inviolate."[19] But the Constitution gave Congress no such power to regulate publications. Thus, "the proposed system possesses no influence whatever upon the press."[20] Not establishing a power over the press, the Constitution could be ratified without securing freedom for the press.

Of course, Wilson was being optimistic. Even powers that do not concern speech can marginally include some authority over speech, and all powers can be stretched. We therefore should be grateful that the First Amendment soon provided extra protection. But the absence of any congressional power over speech or the press was the most basic protection for them.[21] And this subject-matter limit on

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[17] For the original understanding of commerce as barter and the buying and selling of goods, including their transportation, see United States v. Lopez, 514 U.S. 549, 585–86 (1995) (Thomas, J., concurring); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

[18] "Wilson's speech circulated from Portland, Me., to Augusta, Ga. By 29 December, it was reprinted in thirty-four newspapers in twenty-seven towns." 13 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION AND THE BILL OF RIGHTS 337 (1981) (introduction to James Wilson, Speech at a Public Meeting in Philadelphia (Oct. 6, 1787)). The speech also was published separately as a broadside and in the *American Museum*. *Id.* at 338. Federalists, moreover, "incorporate[d] his arguments into their own writings." *Id.*

[19] *Id.* at 340.

[20] *Id.*

[21] *See, e.g.*, TUNIS WORTMAN, A TREATISE CONCERNING POLITICAL ENQUIRY, AND THE LIBERTY OF THE PRESS 221 (1800) ("Adverting then to the whole those constitutional provisions separately and collectively, from which of them shall it be contended, that Congress can claim with propriety the right of interposing its authority for the purpose of restricting the liberty of political investigation, or even for the suppression of libels?"); GEORGE HAY, AN ESSAY ON THE LIBERTY OF THE PRESS 9 (1799) ("Congress possesses no power unless it be expressly given, or necessary to carry a given

legislative power was much broader than the freedom of speech or the press; it was an absence of regulatory or other legislative power over our use of words.

The freedom of the press, and apparently of speech, included at least a freedom from prior administrative licensing (a singularly dangerous method of control),[22] and at a theoretical level, it was understood as a freedom to use words noninjuriously,[23] thus leaving room for legal actions or prosecutions for at least some verbal injuries.[24] In contrast, the absence of federal power over speech, the press, or communication generally left the federal government out of the business of regulating such things. Although this point was sorely tested by the 1798 Sedition Act, it remained a standard argument against the constitutionality of that statute.[25]

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power into effect . . . . The power of prescribing a punishment for libels is not expressly given, nor necessary to carry a given power into effect . . . . Therefore so much of the Sedition Bill as prescribes a punishment for libels, is not warranted by the Federal Constitution.").

[22] 4 WILLIAM BLACKSTONE, COMMENTARIES *151 ("The liberty of the press . . . consists in laying no *previous* restraints upon publications"). Speech was not easily subjected to prior licensing, except in the theater. In response to the 1737 English statute requiring licensing of plays, there were objections that the statute violated the liberty of the press. *See* VINCENT J. LIESENFELD, THE LICENSING ACT OF 1737, at 146 (1984) (quoting Lord Chesterfield that the bill would tend "towards a Restraint on the Liberty of the Press, which will be a long Stride towards the Destruction of Liberty itself"). *See also id.* at 153 (quoting the "Craftsman" newspaper on liberty of the press). Although such objections were phrased in terms of the familiar locution about the freedom of the press, not the freedom of speech, it is clear that, at least as a practical matter, the freedom of speech was threatened by licensing and this provoked protest. For the opposite usage, in which written words were defended in terms of the freedom of *speech*, see, for example, DANIEL DEFOE, THE HISTORY OF THE KENTISH PETITION 15 (1701) (arguing that petitioners to the House of Commons enjoyed the same "Freedom of Speech" as members of the House).

[23] Whereas the freedom from prior licensing of words was a clear-cut limit on a dangerous process for restricting speech, the freedom from after-the-fact constraints depended on what was being prohibited. As summarized in 1784, there was, in natural law theory, "a right to think, speak, and act freely, without compulsion or restraint; and to use our faculties and property as we please, provided that none are thereby injured, nor the obligations of morality infringed"—the qualification being an implication of the natural law limits on natural liberty. Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 944 (1993).

[24] During the drafting of what would eventually become the First Amendment, the Senate rejected a motion to modify the freedom of speech and the press by adding "in as ample a manner as hath at any time been secured by the common law." CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 38 n.9 (Helen E. Veit et al. eds., 1991). This confirms that the clause was expected to guarantee a broader degree of freedom.

[25] *See supra* note 22.

The regulation of speech was thus expected to be decentralized. Although states might adopt oppressive regulations of speech, Americans would at least be spared the more serious danger of centralized control.[26]In twentieth-century constitutional theory, the decentralization of power has often been defended as leaving room for states to act as regulatory laboratories.[27] From a less optimistic perspective, the lack of federal power to regulate speech disperses the risk of censorship to

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[26] Because of the history of state interference with commerce and of state racial discrimination, it has long been assumed that state law is the primary threat to liberty, not federal law. From this point of view, both civil rights statutes and judicial doctrine have focused on state oppression. But at least on questions of speech, centralized suppression is distinctively more dangerous than dispersed state suppression.

This point about the relative risks of state and federal censorship has implications for how the Supreme Court should read its precedents. The Court developed much of its speech doctrine in cases applying the First Amendment to the states. Whether or not the Fourteenth Amendment really incorporated the Bill of Rights against the states, such incorporation has meant that the First Amendment's protection against federal censorship has been interpreted largely in precedents about state threats to speech. But if the risk of censorship by states is much less serious than that of centralized censorship on a national scale, it cannot be assumed that the precedents developed in response to the lesser threat are adequate or complete for purposes of the greater threat.

This is especially worrisome because incorporation has created pressures to reduce the extent of the freedom of speech. The incorporation of the Bill of Rights against the states collides with the historical evidence and even the Fourteenth Amendment's text. *See* Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 144 (2011). But incorporation isn't going away soon, and in the meantime, it creates a more-is-less problem for speech. The wider the access to a right—or, put another way, the broader its application—the greater the likelihood of pressure to narrow its substance. *See* Philip Hamburger, *More Is Less,* 90 VA. L. REV. 835 (2004). In this instance, by extending the application of the First Amendment's speech guarantee to the states, incorporation creates pressures to moderate or reduce the freedom to leave room for the full range of lawful state speech regulation.

This effect of incorporation is especially stark for freedom of speech because, more dramatically than most subjects, speech clearly was not meant to be within federal power. Thus, before incorporation, there was only occasional pressure to narrow the federal freedom of speech to accommodate regulation. Afterward, however, such pressures have been persistent and intense, and because the freedom of speech is now the sole remaining protection against federal assaults on speech, the pressure to temper the freedom of speech at the state level comes with high costs at the federal level.

[27] In originating this metaphor, Justice Brandeis wrote that a "single courageous state" could "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 331 (1932). He thus was more aware of the need to disperse risk than many of those who echo his line.

the states. A state usually cannot suppress much speech beyond its jurisdiction and therefore cannot successfully introduce national censorship. More generally, the decentralization of speech regulation protects Americans from the temptation for censorious elements in society to try to capture national power over speech in one fell swoop. In contrast, when the Supreme Court expands the commerce power without excepting speech, it enables a uniform national system of censorship, from which there is no easy escape.

Of course, speech can be *commerce* in contemporary parlance. But that's not how commerce was understood at the founding.[28] On the contrary, as noted earlier in this section, the Constitution was ratified on James Wilson's prominent and express assurance that literary productions were not subject to any power like that over commerce. So, whatever the current definition of *commerce*, the expansion of the regulation of commerce to include the regulation of speech levels the Constitution's broadest and most basic protection for the freedom of speech.[29]

In defense of congressional regulation of speech, one might protest that the congressional power to regulate commerce among the states includes an authority to regulate the channels and instrumentalities of commerce. These avenues and mechanisms have included the telegraph, telephone, radio, television, and now the internet. But this argument does not clearly reach speech because conduits and mechanisms are not the same as what is sent through them. Thus, although the Commerce Clause has long been understood to authorize congressional regulation of the channels and instrumentalities of commerce, it doesn't follow that the commerce power includes any authority over speech or the press—even when traveling through commercial channels and instrumentalities.

Put in terms of social media, this Article does not dispute that the Platforms are interstate—even national and transnational. Nor does it dispute that they are channels and instrumentalities of commerce, or that their commerce is generally subject to congressional regulation under the Commerce Clause. All of these propositions

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[28] *See supra* note 17 about the early American meaning of the word *commerce* in the Commerce Clause.

[29] Readers may be concerned about the need for federal regulation of child pornography and solicitation, etc. But the argument here does not preclude the regulation of offenses in which speech is used to commit the crime. Moreover, as I have argued before, words are the core of speech, and there are reasons to reconsider aspects of the expansion of speech to include images, perhaps especially moving images. *See* Hamburger, *New Censorship, supra* note 9, at 286–87.

are obviously true. Instead, the argument is merely that speech was not included in *commerce*—so that Clause is a poor excuse for regulating speech, whether the Platforms' speech or that published on their websites.

The Supreme Court, however, has taken so broad a view of Congress' power to regulate commerce as to include the legislative regulation of communications, thereby obliterating the Constitution's most fundamental speech protection.[30] Speech is thus vulnerable to federal regulation.

The results can be seen, for example, in the Federal Communications Act's regulation of not only the airwaves but also the speech broadcast thereby.[31] More recently, the Communications Decency Act of 1996 privatizes censorship. Section 230(c)(2)(A) immunizes interactive computer services from liability when they restrict a list of congressionally disfavored types of "objectionable" material, "whether or not such material is constitutionally protected"—thereby privileging powerful private companies to suppress speech.[32] It is public reward for privatized censorship—a government inducement to get dominant communications carriers to tamp down speech along congressionally chosen lines.[33] Section 230(c)(2)(A) thus violates the First Amendment.[34] More central for the argument here, this constitutional breach might have been avoided in the first place or promptly held void

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[30] This power, for example, was simply assumed in *Gonzalez v. Google LLC*, 598 U.S. 617 (2023).

[31] 45 U.S.C. § 315 (regarding equal broadcasting time for candidates for public office).

[32] 47 U.S.C. § 230(c)(2)(A).

[33] Section 230's words "otherwise objectionable" have been interpreted in different ways, often as entirely permissive, and from that point of view, it may be a mistake to speak of congressionally chosen lines of censorship. *See* Adam Candeub & Eugene Volokh, *Interpreting 47 U.S.C. § 230(c)(2)*, J. FREE SPEECH L. 175 (2021) (discussing this "catch-all" perspective and the cases interpreting it). On the other hand, the words probably should be understood as an extension of the previously listed categories of excludable material. *See id.* at 178 (applying the interpretative canon of *ejusdem generis* and legislative history to mean "it doesn't include what is objectionable on 'the basis of its political or religious content'"); Philip Hamburger, *The Constitution Can Crack Section 230*, WALL ST. J. (Jan. 29, 2021, 2:00 PM) (interpreting "otherwise objectionable" in accord with the other listed categories to mean, at most, objectionable content, not objectionable viewpoint). However the word "objectionable" is interpreted, it runs into constitutional difficulties, either for being overbroad or for being vague.

[34] Scot A. Reader, *The Censorship Constraint and Rulemaker State Action: Are Section 230's Immunity Provisions Unconstitutional Content Based Regulations?*, 125 W. VA. L. REV. 591 (2023); Hamburger, *Constitution Can Crack*, supra note 33.

if it were understood that Congress's commerce power does not include a power over speech.

These and other congressional regulations of speech are crucial for this Article because, in the shadow of congressional regulation, executive and agency officials exercise administrative and sub-administrative power over speech. Speech-oriented organizations, such as the Platforms, are especially vulnerable to congressional federal speech regulation. They therefore are also particularly vulnerable to the derivative administrative and sub-administrative regulation of speech, including censorship.

Although the Supreme Court will not soon return to the eighteenth-century understanding of *commerce*, the courts could back away from the constitutional damage by recognizing that, under cases such as *United States v. Lopez*, regulations of speech are not direct regulations of commerce and so cannot be justified on account of their substantial effect on commerce among the states.[35] By this means, the courts could reduce the danger to speech without resuscitating the original meaning of *commerce* or overturning the precedents expanding its meaning. One way or another, the courts need to disavow any Commerce Clause power over speech. Until then, Americans will continue to be vulnerable not only to overt congressional regulation of speech but also to the sort of administrative and sub-administrative suppression that can be imposed in the shadow of that regulation.

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[35] United States v. Lopez, 514 U.S. 549, 557 (1995). Of course, there can be difficulties in discerning the line between regulations of speech and regulations of the channels and instrumentalities of commerce through which speech is communicated. Line drawing problems, however, are familiar and unavoidable, and the cost of not wrestling with them is very high, perhaps especially here. Section 230(c)(2)(A) could be understood as a federal regulation of state regulation of speech, including liability under state law, and thereby could be distinguished from a congressional regulation of speech. Congress, however, has no power to regulate state regulation, except indirectly by regulating substantive matters, such as, in this instance, speech and liability for it.

If Congress in Section 230 were merely regulating the Platforms and other interactive computer services, it would be acting within its commerce power. But Section 230(c)(2)(A), by its terms, liberates the platforms and others from liability for their speech restrictions on specified types of material. Rather than regulate the interactive service providers, it privileges them from state regulation. Moreover, it privileges them to invite their privatized regulation of the speech of their users. Being thus a regulation of speech—indeed, the speech of users—it is difficult to view it as a direct regulation of commerce.

B. Administrative Evasion of Legislative and Judicial Processes

When speech is suppressed in the shadow of federal legislative power over speech, the mechanisms are often administrative. This is especially dangerous because administrative processes evade the Constitution's legislative and judicial processes.

Almost all liberty traditionally enjoyed front- and back-end process protections—both legislative process up-front and judicial process afterward. Before government could confine or oblige persons, it ordinarily had to secure a law from the people's representatives. After a person allegedly violated a law, the government could not punish or even demand testimony until it brought a proceeding in a court with an independent judge and jury.[36]

This meant that the obligation of law ordinarily could not intrude on any liberty without legislative consent at the front and the independent judgment at the back. The former protection was political, the latter was entirely independent of politics. Yet there was communal participation at both ends, beginning with elections and concluding with a jury verdict.

This was true not only for liberty as a whole but also for particular rights, such as the freedoms of speech and religion. They could be regulated only by legislatures formed by elected representatives, not by unelected bureaucrats. And any such statutory regulation could be applied only through the courts with independent judges. So, constitutional rights as well as other liberty had the protection of both the political and judicial gauntlets.

Nowadays, it is commonly assumed that rights, liberty, and justice are at risk from communal, majoritarian decisions. There is some truth to this, but as James Madison explained in *Federalist* number 10, representative lawmaking in an extended republic could (not always, but frequently) be an obstacle to unjust and oppressive regulation.[37] Similarly, Alexander Hamilton observed in *Federalist* number 78 that the application of regulation through the courts with independent judges and juries could (at least sometimes) impede injustice and oppression.[38] Indeed, it was understood already in England that the freedom of the press depended on the

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[36] *See* Philip Hamburger, *The Administrative Evasion of Procedural Rights*, 11 N.Y.U. J.L. & LIBERTY 915, 937–43 (2018).

[37] THE FEDERALIST NO. 10 (James Madison) 63–65 (Jacob E. Cooke ed., 1961).

[38] THE FEDERALIST NO. 78 (Alexander Hamilton) 528.

right to a jury.[39] As prominently explained by Junius, a jury was "the only legal and constitutional check upon the licence [i.e., licentiousness] of the press."[40]

The advent of administrative power, however, means that Americans can be regulated and judged outside these protective legislative and judicial processes. Although all liberty is at risk, the danger is especially serious for constitutional rights.

Whereas congressional statutes, made by elected lawmakers, once were necessary to regulate speech, now administrative rules suffice. It's troubling enough that Congress felt it had the power to enact Sections 170 and 501(c)(3) of the Internal Revenue Code, reciting conditions regulating the political speech of churches and other idealistic organizations.[41] On top of this, Congress lets the Internal Revenue Service make additional rules on the subject. Unlike the underlying congressional enactments, such rules are not directly made with the representative accountability to an expanded republic that Madison thought crucial.[42] IRS officials also make determinations adjudicating enforcement of the statute and rules, thus evading the application of law through judicial power. These determinations often amount to prior administrative licensing of speakers,[43] and they sometimes have punished or constrained organizations with disfavored views.[44]

And it's not just the IRS that uses administrative processes to regulate and adjudicate speech outside of Congress and the courts. The Federal Communications

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[39] The English government had evaded jury rights in cases of seditious libel by reciting the words of the libel in indictments or informations, thus letting the judges decide for themselves whether the words were libelous. Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 736–38 (1985). In response, there were demands to restore the right of juries to decide the whole question, and eventually that was guaranteed in Fox's 1792 Libel Act. *Id.* at 738; Libel Act 1792, 32 Geo. 3. c. 60 (Eng.) (guaranteeing that a jury could decide the whole question of guilt, not just the facts).

[40] THE LETTERS OF JUNIUS 303 (John Cannon ed., 1978). He also wrote: "Let it be impressed upon your minds, let it be instilled into your children, that the liberty of the press is the *Palladium* of all the civil, political, and religious rights of an Englishman, and that the right of juries to return a general verdict, in all cases whatsoever, is an essential part of our constitution." *Id.* at xxi.

[41] 26 U.S.C. §§ 170, 501(c)(3).

[42] THE FEDERALIST NO. 10 (JAMES MADISON) 63–65.

[43] PHILIP HAMBURGER, LIBERAL SUPPRESSION: SECTION 501(C)(3) AND THE TAXATION OF SPEECH 216–17 (2018).

[44] *See id.* at 222; for the IRS treatment of Tea Party organizations, see, for example, NorCal Tea Party Patriots v. IRS, No. 1:13-cv-341 (S.D. Ohio Nov. 4, 2016).

Commission and the Securities and Exchange Commission, for example, have exploited their authorizing statutes to administratively suppress speech. Presidents Franklin D. Roosevelt and John F. Kennedy had the FCC pressure and even suppress radio stations based on their viewpoints.[45] The SEC leverages its statutory authority over speech to extract further limits, such as its gag rule.[46]

In sum, the Constitution established structural protections for speech: It avoided a federal legislative power to regulate speech, and it required the government to work through both Congress' legislative process and the courts' judicial process. Now, however, judicial doctrine permits administrative speech regulation. What's more, it leaves room for administrative enforcement, which means that federal officials can work in the shadow of statutory and administrative speech regulation to extort or otherwise pursue further speech regulation. And the administrative substitutes for the Constitution's legislative and judicial processes have become a standard pathway for suppression—such as biased IRS determinations and the SEC gag rule—that would never have passed political or constitutional muster if pursued through Congress and regular judicial proceedings.[47]

C. Sub-Administrative Evasion of Legislative Authorization and Judicial Review

Alas, it gets worse—and this is where the rubber hits the road. The administrative elaboration and enforcement of statutory regulation is at least somewhat formal. In contrast, executive officials can also act informally in the shadow of congressional and administrative power—this being what could be called *sub-administrative power*. Although formal administrative processes are at least somewhat accountable through prior congressional authorization and subsequent judicial review, sub-administrative mechanisms largely escape such protections. They there-

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[45] For suppression of dissenting radio stations, see BETTY HOUCHIN WINFIELD, FDR AND THE NEWS MEDIA 110 (1994) (under FDR); Paul Matzko, *The Sordid History of the Fairness Doctrine*, REASON (Jan. 30, 2021, 7:00 AM), https://reason.com/2021/01/30/the-sordid-history-of-the-fairness-doctrine/ (under FDR and JFK).

[46] 17 C.F.R. § 202.5(e).

[47] The gag rule tends to be enforced as a condition of settlement. Institutional Review Boards offer another example of what government can get away with through administrative regulation of speech. *See* Philip Hamburger, *IRB Licensing*, *in* WHO'S AFRAID OF ACADEMIC FREEDOM 153 (Akeel Bilgrami & Jonathan R. Cole eds., 2016); Hamburger, *New Censorship*, *supra* note 9, at 271; Philip Hamburger, *Getting Permission*, 101 NW. U. L. REV. 405 (2007).

fore are ideal for extorting or otherwise inducing compliance with highly suppressive regulatory policies, such as the federal censorship effectuated through the Platforms.

When political or constitutional limits prevent Congress or agencies from regulating, the executive nowadays simply uses sub-administrative means to obtain its regulatory ends. Most familiarly, it uses the threat of regulatory hassle to extort what it wants. For example, it threatens investigations, site visits, and other regulatory harassment to secure compliance with policies that go beyond what is required by statute or even by administrative rule.[48] Ranging from a nudge, to a shove, to a shiv, such extortion not merely evades both the constitutional and the administrative versions of legislative and judicial avenues,[49] but even runs down to a subterranean level that generally is neither authorized by Congress nor reviewed by courts.

Unfortunately, the problem is not just extortion-like regulatory pressure; it also includes less coercive informal regulatory mechanisms, such as illicit inducements and other apparently voluntary arrangements.[50] These more cooperative means of carrying out otherwise unattainable policies are just as dangerous as the more obviously extortionate mechanisms but even less likely to be repudiated by the courts. And both types of sub-administrative power have been used to establish the current censorship regime.[51]

We therefore are witnessing a new era in American governance. Just as rulemaking by Congress and adjudication by the courts were largely displaced by administrative rulemaking and adjudication, now that relatively formal administrative pathway is giving way to a sub-administrative process that is even less constrained.

Although sub-administrative power is worrisome enough on its own, it is central here because it helps government get away with punishing opinion. For example, in *NRA v. Vullo*, the head of the New York State Department of Financial Services took aim at the opinions of the National Rifle Association. All she had to do

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[48] Philip Hamburger, *Our Unruly Administrative Law*, 16 N.Y.U. J.L. & LIBERTY 483, 499–504 (2023); PHILIP HAMBURGER, ADMINISTRATIVE HARMS 20–27 (2023), https://www.hoover.org/sites/default/files/research/docs/Hamburger_WebReadyPDF.pdf.

[49] HAMBURGER, ADMINISTRATIVE HARMS, *supra* note 48, at 28.

[50] HAMBURGER, PURCHASING SUBMISSION, *supra* note 13.

[51] *See infra* Section II.F.

was hint at regulatory hassle for banks and insurers if they continued to provide the NRA with their services.[52] They understood the message and complied, but the Second Circuit was none the wiser.[53]

Of particular interest here, sub-administrative mechanisms have played a major role in enabling the federal government to obtain censorship through social media platforms. By such means, the executive branch has pressured or induced the Platforms to suppress speech without leaving much of a regulatory footprint. Rather than crudely adopt rules or even conditions requiring censorship—the sort of administrative tools courts might have understood—the executive has used hinted threats and subtle pressures. It has suggested that it might seek adjustments to Section 230, that it might investigate antitrust violations, or that it might not negotiate a release from European data transfer restrictions[54]—unless the Platforms ramped up their censorship in line with government expectations.[55] Against this background threat, the FBI, Homeland Security, the Surgeon General, and others got

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[52] NRA v. Vullo, 49 F.4th 700, 716 (2d Cir. 2022), *cert. granted*, 144 S. Ct. 375 (2023). The suggestion of regulatory hassle came in the form of guidance letters encouraging the regulated entities to "continue evaluating and managing their risks, including reputational risks, that may arise from their dealings with the NRA or similar gun promotion organizations, if any, as well as continued assessment of compliance with their own codes of social responsibility." *Id.* at 709.

Although the court thought it significant that the letters "did not refer to any ongoing investigations or enforcement actions," *id.*, the implications were clear enough to anyone in the financial industry. As put by one finance professional, "[b]anks increasingly must consider political issues as part of their risk management decisionmaking process," which requires "more proactive and broader considerations of reputation risk as part of risk models and calculations." *Id.*

The court discounted this conclusion by quoting a New York banker that the guidance "felt somewhat politically motivated" and "[i]t's hard to know what the rules are if I don't know what the rules are." *Id.* But the overbreadth and ambiguity of "reputational risk" and the guidance about it already are free speech concerns, and in this instance the threat of regulatory hassle was clear enough. The court, however, concluded that "Vullo's words in the Guidance Letters . . . cannot reasonably be construed as being unconstitutionally threatening or coercive." *Id.* at 716.

[53] *Id.*

[54] *See infra* Section II.F.

[55] In *Missouri v. Biden*, the Fifth Circuit observed:

> The Plaintiffs allege that the "Defendants [ ] coerced, threatened, and pressured social media platforms"—via "threats of adverse government action" like increased regulation, antitrust enforcement, and changes to Section 230—to make those censorship decisions.

the Platforms to suppress vast amounts of speech. The judicial doctrine eliminating the limits on legislative power has thus laid a foundation for the sub-administrative pursuit of censorship.

Most pervasively, the executive has offered coordination for the Platforms' censorship. Censorship among multiple Platforms requires coordination—whether to be effective in suppressing opinions or just to avoid losing users.[56] So the executive works with the Platforms to aid them in voluntarily censoring opinions for which the government and the companies equally feel disgust. Relying on the Platforms to do the dirty work of censorship, the government provides coordination of a sort that the Platforms cannot accomplish on their own without violating antitrust laws.[57] Although the government itself sometimes provides the coordination, it usually gives itself plausible deniability by subsidizing a host of nonprofits and private firms to supply lists of disfavored postings or to grade speech outlets for the danger of their "misinformation."[58]

Predictably, these sub-administrative mechanisms—ranging from hinted threats to voluntary coordination—have baffled many judges. Remember, these sub-administrative modes of suppression are not congressional statutes or even administrative rules or determinations, and their application does not run through a

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> That campaign, per the Plaintiffs, was multi-faceted—the officials "publicly threaten[ed] [the] companies" while they privately piled on "unrelenting pressure" via "demands for greater censorship." And they succeeded—the platforms censored disfavored content.

83 F.4th at 381. On this foundation, the Court concluded:

> We find that the White House, acting in concert with the Surgeon General's office, likely (1) coerced the platforms to make their moderation decisions by way of intimidating messages and threats of adverse consequences, and (2) significantly encouraged the platforms' decisions by commandeering their decision-making processes, both in violation of the First Amendment.

Id. at 381–82.

[56] *See infra* Section II.F.

[57] *See id.*

[58] *See id.*

court or even an administrative law judge. They usually are not congressionally authorized, and because they typically fall below what courts consider coercive or final agency action, they tend to escape judicial review.[59]

Admittedly, the censoring officials sometimes refer to their congressional authorization and therefore might seem to be congressionally accountable; but, at the same time, the officials assume they can safely interpret their authority without fear of Congress or the courts. The Cybersecurity and Infrastructure Security Agency (CISA), for example, interpreted its authorization to counter foreign disinformation to include domestic disinformation.[60] CISA also interpreted its authority to protect "critical infrastructure" to include "cognitive infrastructure."[61] Officials can afford to interpret so freely because of judicial doctrine. While their sub-administrative suppression looks like little more than government speech[62] and

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[59] For final agency action, see 5 U.S.C. § 704; Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (citations and quotation marks omitted) ("As a general matter, . . . for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.").

[60] STAFF OF H. COMM. ON THE JUDICIARY & SELECT SUBCOMM. ON THE WEAPONIZATION OF THE FED. GOV'T, 117TH CONG., THE WEAPONIZATION OF CISA: HOW A "CYBERSECURITY" AGENCY COLLUDED WITH BIG TECH AND "DISINFORMATION" PARTNERS TO CENSOR AMERICANS 12 (June 26, 2023), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/cisa-staff-report6-26-23.pdf ("Originally created to protect critical infrastructure such as dams and pipelines from foreign malign actors, CISA has ventured well beyond its founding mandate and began targeting constitutionally protected domestic speech for censorship on social media platforms."); INTERIM STAFF OF H. COMM. ON THE JUDICIARY & SELECT SUBCOMM. ON THE WEAPONIZATION OF THE FEDERAL GOVERNMENT, 117TH CONG., THE WEAPONIZATION OF "DISINFORMATION" PSEUDO-EXPERTS AND BUREAUCRATS: HOW THE FEDERAL GOVERNMENT PARTNERED WITH UNIVERSITIES TO CENSOR AMERICANS' POLITICAL SPEECH 31–34 (Nov. 6, 2023), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/EIP_Jira-Ticket-Staff-Report-11-7-23-Clean.pdf.

[61] Maggie Miller, *Cyber Agency Beefing up Disinformation, Misinformation Team*, THE HILL (Nov. 10, 2021, 2:52 PM), https://thehill.com/policy/cybersecurity/580990-cyber-agency-beefing-up-disinformation-misinformation-team/.

[62] *See infra* Part IV.

doesn't seem to involve coercive or binding action,[63] let alone final agency action,[64] doctrine leaves the impression that prior congressional authorization is unnecessary and subsequent judicial review is improbable. Even if their suppression is discovered and successfully challenged in court, it by then may have already had the desired effect.

After-the-fact accountability through judicial review is equally limited. For example, although agency guidance is regularly used for under-the-counter regulation, and although it's well understood that noncompliance can come with regulatory hassle, judicial doctrine tends to treat guidance as nonbinding and thus not coercive or final agency action.[65] And of course when sub-administrative regulation comes through even less formal communications—such as press releases, texts, and private conversations[66]—it falls even further below the judicial expectations of coercion and final agency action. As for government-orchestrated coordination of private censorship, it seems utterly remote from most judges' stylized ideal of coercive government action. So, when judges encounter these sorts of threats to freedom of speech—whether conveyed through guidance or lesser communications or mere coordination—they are puzzled as to whether anything legally significant has occurred.[67]

Officials therefore can now sub-administratively suppress speech largely at their discretion. They often rely on voluntary cooperation and coordination and add government pressure only at the margins when cooperation is not enough. And because little of this subterranean regulation amounts to binding regulation, overt coercion, or final agency action, the executive can get away with censorship with little concern about judicial repercussions.[68]

Administrative and especially sub-administrative power have facilitated the substitution of wholesale suppression for the old retail suppression. Traditionally, the federal government could not actually suppress speech, but could only punish

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[63] *See, e.g.*, NRA v. Vullo, 49 F.4th 700, 707 (2d Cir. 2022) (finding no coercion), *cert. granted*, 144 S. Ct. 375 (2023).

[64] *See* discussion of final agency action in *supra* note 59.

[65] *See* Bennett v. Spear, 520 U.S. 154, 177–78 (1997).

[66] *See Vullo*, 49 F.4th at 716 (regarding a press release and meeting).

[67] *See, e.g.*, *id.* at 707, 716 (finding no coercion or threat in Vullo's guidance on regulatory risk).

[68] For final agency action, *see supra* note 59.

the speaker. And it had to charge him with seditious libel or some other offense and prove to a judge and jury that his words violated the law. This was retail adjudication, and it was essential for the protection of speech and other rights.[69]

Nowadays, however, as already noted, government can press for administrative licensing of speech or, worse, can use informal mechanisms such as sub-administrative threats, raised eyebrows, and offers of coordination to get the dominant Platforms to suppress their users' speech. Although the government doesn't have to prove anything against anyone, it can make vast amounts of speech just disappear. In such ways, retail punishment of individuals through seditious libel prosecutions has been abandoned for wholesale suppression of opinion.

Blackstone defended seditious libel prosecutions on the ground that they did not suppress speech, but only punished the speaker: "Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."[70] The current censorship, in contrast, actually suppresses disfavored sentiment. It thus violates even Blackstone's constricted vision of the freedom of the press.

In shifting from retail prosecutions to wholesale suppression, the government places the onus of going to court on the censored. Whereas the censored once merely had to defend themselves when prosecuted, they now need to go to court to stop the censorship. Of course, when government censorship is effectuated through shadow banning and similar mechanisms, the speakers don't even know that their posts aren't visible to others. And the government typically doesn't announce its targets. So, most speakers don't even recognize they have a First Amendment claim.

Even when speakers are not left in the dark, the government's administrative and sub-administrative mechanisms flip around the burdens of proof and persuasion. Whereas government once had to prove the guilt of each of us before we could be punished for our speech, now each of us has to prove that the government unconstitutionally censored us and that the court should grant a remedy—just in order to make our words visible. This shift in burdens gives the government the benefit of the doubt.

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[69] HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, at 244.

[70] 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52.

These departures from older ideals of governance bode ill for the freedom of speech. Under the older ideals, government occasionally went beyond mere persuasion to pressure a newspaper not to cover a particular story. In the new vision, government can brazenly and systematically reduce critical voices across the nation.[71]

In short, doctrine has relaxed two fundamental structural protections for speech—the substantive limits on legislative power and the process limits on exercising power. When federal legislative power did not include a power over speech or the press, and when constraints on speech had to run through the legislative and judicial processes, the government could not easily censor Americans. But these days both substantive power and the processes for applying it are so loosely defined that they are almost meaningless as structural protections for speech. Indeed, the sub-administrative processes can usually escape both prior congressional authorization and subsequent judicial review, and therefore are especially apt to invite officials to seek censorship. Just to take the example that's easiest to understand, the government's expanded legislative power let it adopt Section 230. And in the shadow of Section 230 and hints about modifying it, the government can get the Platforms to adopt much of its censorship agenda.

Although it is painful to recognize, the limited powers and processes that once protected speech are now so unlimited as to invite censorship. The Constitution's structural protections for speech have been turned on their head.

II. *BLUM*'S CONSTRICTED VISION OF STATE ACTION

The Constitution's structural protections for speech have been so completely eroded that Americans are now especially dependent on the First Amendment. That has become the sole constitutional protection from federal censorship. Unfortunately, however, judicial doctrine on state action—really, government action—makes it difficult to enforce First Amendment speech claims. So, Americans not only are without much structural protection for speech, they also have diminished access to their speech rights—and that's even before this Article gets to the substantive protections offered by the First Amendment itself.

The doctrine on government action that lets government evade the First Amendment found classic expression in *Blum v. Yaretsky*:

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[71] For the difference between persuasion regarding speech and abridging the freedom of speech, see *infra* Section III.D.

> [A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.[72]

Although this is not the only regrettable statement of the doctrine, it stands out as the most notable and quotable. So, the danger can be summed up in terms of *Blum*.

The point, of course, is not that *Blum* opens the floodgates for all censorship, but rather that it lays a foundation for government to escape state action by working through private entities and avoiding overt coercion. Although some of the current government censorship cannot escape constitutional accountability under *Blum*,[73] other elements seem to find a safe harbor there. Indeed, on its reading of *Blum*, the government evidently thought it could get away with most of its suppression.[74] *Blum* invited the censorship.

A. The Question of Private Intermediaries

The Constitution's limits, including its rights, generally restrict government, not private parties. For example, the First Amendment bars government action—to be precise, federal action—not private action.[75] The Fourteenth Amendment also limits government action—specifically, state action. Therefore, interesting questions arise when government seemingly avoids constitutional constraints by working through private persons, whether individuals or organizations.[76]

Privatized censorship is not a uniquely American or modern problem; instead, it is a recurring threat. The English government in the sixteenth and seventeenth centuries, for example, relied on university officials and the Stationers' Company—

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[72] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (quotation marks omitted).

[73] Missouri v. Biden, 83 F.4th 350 (5th Cir. 2023) (finding coercion by some officials), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

[74] This is evident from the government's evasive moves and more expressly from its justifications of them.

[75] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) ("[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor.").

[76] For the privatization of power through conditions, *see* HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, at 238.

the printers' guild—to help with the monitoring and licensing of printed material.[77] At times, it required their assistance, but more typically they voluntarily cooperated.

This English seventeenth-century licensing was the primary example of censorship in Anglo-American experience. That licensing was therefore the clearest instance of what the First Amendment rejected.[78] From this, it appears that governmental censorship imposed through private agents or mechanisms is at the core, not the periphery, of what the Amendment forbids.

The federal courts, however, have struggled to understand privatized censorship—indeed, have been baffled by the full range of privatized regulation. The problem of privatized suppression would not be as difficult as they fear if they followed the First Amendment's standard of government action. But cases such as *Blum* set such high measures for government action as to let government do precisely what the Constitution forbids.

B. The Blum Requirement of Converting Private Action into Public Action

Blum propounds that government cannot be constitutionally accountable for its actions through a regulated private organization unless the government has "convert[ed]" the private action into government action.[79] According to *Blum*, this requires "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[80] Although often loosely called the "close nexus" test,[81] it is more concretely a measure of when government so controls private action that the private action can be deemed governmental.

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[77] FREDRICK SEATON SIEBERT, FREEDOM OF THE PRESS IN ENGLAND, 1476–1776: THE RISE AND DECLINE OF GOVERNMENT CONTROLS 73 (1952) ("The Stationers Company enforced both its own licensing ordinances and those of the Council through its control of the members of the craft.").

[78] This is why Blackstone emphasized, even if too narrowly, that the liberty of the press "consists in laying no previous restraints upon publications." 4 BLACKSTONE, COMMENTARIES *151.

[79] 457 U.S. at 1004.

[80] *Id.* (interior quotation marks omitted); *see also* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 176 (1972).

[81] *Blum*, 457 U.S. at 998, 1004 (quotation marks omitted).

Blum was a Medicare case, not a speech case. It was a suit by Medicare patients in private nursing homes against state officials.[82] The complaint was that the state distributed benefits based on the nursing homes' determinations about patients, and that those determinations therefore denied the patients due process of law.[83] The Supreme Court refused to find state action for purposes of due process and thereby set a standard for privatized rights violations that has seemed to limit claims against government for privatized censorship.[84]

Blum held that when a suit is brought against government, the government can't ordinarily be held accountable for private action unless it coercively converted the private conduct into public action.[85] The Court stated:

> [O]ur precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.[86]

Yet, notwithstanding what the Court said about "our precedents," *Blum*'s view of the relevant public-private nexus was much narrower than what was evident from earlier precedents, notably *Burton v. Wilmington Parking Authority*.[87] And although the Court has followed *Blum*'s conversion and coercion requirements in suits against private parties, it has never subsequently relied on *Blum* for these requirements in a case against government.[88] Nonetheless, *Blum*'s restrictive vision has remained salient. When officials use private entities to violate the rights of

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[82] *Id.* at 996.

[83] *Id.* at 995.

[84] *Id.* at 998.

[85] *Id.* at 1004 (quotation marks omitted).

[86] *Id.*

[87] 365 U.S. 715 (1961).

[88] For example, although *Blum* was cited in *Clapper v. Amnesty International USA*, 568 U.S. 398, 414 n.5 (2013)—a case against a government official—the Court cited *Blum* for the substantial risk test for standing, not conversion or coercion. Although *City of Cuyahoga Falls v. Buckeye Community Hope*, 538 U.S. 188 (2003), was a case against government, the Court in that decision didn't pursue the *Blum* analysis because "[n]ot only did the courts below not directly address this theory of liability, but respondents also appear to have disavowed this claim at oral argument" and "never articulated a cognizable legal claim on these grounds." *Id.* at 197. The cases against private parties that cite *Blum* include *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1931–32 (2019), and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982).

Americans, the officials allegedly do not violate the Constitution unless there is a cascade of usually coercive causation—from government, to private companies, down to private individuals.

This is puzzling, not least as to the First Amendment. That Amendment limits only government. So, in a First Amendment case *against a private actor*, it makes sense to ask whether the ostensibly private action has become governmental—whether the private action has been "convert[ed]" to public action.[89] But does this requirement—that private action be converted to government action—make sense in a suit against the government?

Blum acknowledged that, being a suit against government, it was "obviously different from those cases in which the defendant is a private party."[90] All the same, *Blum* urged that such cases could "shed light upon the analysis necessary to resolve the present case."[91] The conversion requirement, which had developed in suits against private parties, thus came to be applied in suits against government—now with an emphasis on government control. According to *Blum*, government "normally" can be "held responsible for a private decision" only when the government has gone so far that the private "choice must in law be deemed to be that of the State."[92]

Government thus can dramatically raise the bar for constitutional violations simply by using private cutouts. When government itself censors, plaintiffs can prevail by showing that it abridged the freedom of speech, but when government merely works through private entities, it escapes constitutional accountability unless plaintiffs can show that the private action was converted into government action.[93]

The First Amendment does not specify anything like this; nor does it obviously require it. On the contrary, a privatized reduction of the freedom of speech can abridge that freedom as much as a completely governmental reduction. The risk of the alternative view is that the government will cooperate with private bodies or, if

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[89] Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974).

[90] *Blum*, 457 U.S. at 998, 1003.

[91] *Id.*

[92] *Id.* at 1004 (quotation marks omitted).

[93] *Id.*

necessary, pressure them to abridge the freedom of speech in ways subtle enough to avoid turning their private action into public action.

Some examples involving other constitutional rights show the absurdity of the requirement that private action be converted into government action. Suppose the Secretary of the Interior borrows a private bulldozer and, driving it herself, deliberately levels your house—to improve the view from a nearby national park. Now imagine that she asks a private construction firm to do this for her, and the firm consensually cooperates, acting either for money or gratuitously out of patriotism. The bulldozer in the first instance and the construction firm in the second are entirely private, and there is no reason to think their action has been converted into government action. But there should be little doubt that the Secretary is engaging in an unconstitutional taking or exaction. To be sure, the action of the Secretary or the construction firm in bulldozing the house is a tort and a crime. But quite independently of that, the Secretary has violated the Constitution, with no need to consider whether the firm's act has been converted into government action.

Eugene Volokh offers another example, focusing on search and seizure jurisprudence:

> [S]ay that the police ask you to rummage through [a] roommate's papers. That rummaging may become a search governed by the Fourth Amendment. "[I]f a state officer requests a private person to search a particular place or thing, and if that private person acts because of and within the scope of the state officer's request," then the search will be subject to the constitutional constraints applicable to searches by the government. "Police officers may not avoid the requirements of the Fourth Amendment by inducing, coercing, promoting, or encouraging private parties to perform searches they would not otherwise perform."[94]

Even if done merely by persuasion, such privatized searches amount to an "impermissible evasion of the constitutional mandate."[95]

In these examples, the unconstitutionality does not depend on whether the government's instrument is human or inanimate. Nor does it depend on whether the private cooperation was obtained voluntarily or coercively, gratuitously or for cash. On the contrary, the government is accountable under the Constitution for its own

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[94] Eugene Volokh, *The Future of Government Pressure on Social Media Platforms: Some Thoughts*, DAEDALUS 9 (forthcoming 2024) (on file with author).

[95] *Id.* at 1.

action, even if it relies on private instrumentalities, regardless of whether any private action has been transformed into government action, and regardless of whether the physical or human instruments have been coerced, encouraged, paid, persuaded, or otherwise manipulated.

This brings us to the current censorship. When FBI agents seek the consensual cooperation of dominant social media platforms in suppressing conservative or vaccine-skeptical speech,[96] it should be possible to conclude that the FBI agents are abridging the freedom of speech, regardless of the private or governmental nature of the Platforms. The government's choice of private tools should not preclude a judgment that government is abridging the freedom of speech.

Blum, however, says otherwise. It reassures the government that it can be "held responsible for a private decision only when" the private entity's action "must in law be deemed to be that of the State."[97] That is a high barrier.

It is nearly a paradox to say that private action is governmental. Courts, moreover, hesitate to attribute government action to private parties, lest they diminish the essential sphere of private freedom. So, by saying that private action must be held to be public for constitutional constraints to apply, *Blum* tells the courts that government cannot be held accountable for privatized speech violations unless the judges are willing to say what they consider somewhat perverse and dangerous.[98] This is profoundly prejudicial to plaintiffs and utterly destructive of free speech.

The difficulty of reaching so strange a conclusion is not lost on government. The government assumes it can rely on *Blum* to justify its censorship through the Platforms.[99] *Blum*'s state action doctrine therefore does more than impede First

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[96] Missouri v. Biden, 83 F.4th 350, 388–89 (5th Cir. 2023) (summarizing the FBI's censorship), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

[97] *Blum*, 457 U.S. at 1004.

[98] Taking advantage of this, the government now argues that the government shouldn't be held to have violated the First Amendment, lest this lead to the "profoundly disruptive" conclusion that the private Platforms are subject to the First Amendment. Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 35.

[99] Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, Louisiana v. Biden, 543 F. Supp. 3d 388 (W.D. La. 2021), 2023 WL 3997749 (referencing *Blum* 43 times). *Louisiana v. Biden* was another name for *Missouri v. Biden*.

Amendment suits against government. Even more seriously, it encourages government to think it can use private firms to circumvent the First Amendment—as long as it doesn't turn them into government actors.

The underlying explanation for the damage done by *Blum* is that the plaintiffs in that case were claiming that they were owed due process in decisions about benefits—what once would have been considered unvested privileges.[100] Due process traditionally was owed only for constraints on life, liberty, or property, not government benefits. In 1970, however, in *Goldberg v. Kelly*, the Supreme Court recognized that due process could be owed in decisions about benefits.[101] Of course, this was a stretch and a potential burden on government resources, so by 1976, in *Mathews v. Eldridge*, the Court was lowering expectations for due process in benefits cases.[102] The Court could have admitted that it was rather strained to generalize that due process was owed for benefits, but instead it preserved the generality by lowering the amount of process that might be due and denying that much process was owed in the case before it.

The inflated ideal that due process was owed for decisions about benefits is what led to *Blum*. Having established a due process ideal it could not really live up to, the Court has often had to wiggle out of its own generalization. In some cases, ranging from *Mathews* to *Hamdi v. Rumsfeld*, [103] it has said that negligible process is sufficient. In other cases, it has wriggled out in other ways—in *Blum*, by adopting a constricted idea of state action, which allowed the Court to avoid the due process question. In other words, the weakness of the substantive claim about due process infected the judgment about state action.[104]

So, it is no coincidence that *Blum* established a state action standard that is lethal for freedom of speech. The extension of due process to benefits has established a dangerously low measure of due process where such process really matters, as in

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[100] 457 U.S. at 996.

[101] 397 U.S. 254 (1970).

[102] 424 U.S. 319 (1976).

[103] 542 U.S. 507 (2004).

[104] The Court in *Blum* admitted: "Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint." 457 U.S. at 1003.

Hamdi. No less worrisome, it has led to a dangerously high standard for government action in speech cases.

In sum, the *Blum*-style doctrine—requiring the conversion of private action into government action, even in suits against government—cuts into the First Amendment by narrowing access to the freedom of speech. Government predictably reads such cases as giving it a green light for sophisticated privatized suppression—the sort that runs, not too coercively, through private entities.

C. Blum and the Coercion Model

A second way that *Blum* and similar cases weaken the First Amendment's barrier to censorship is by elevating ideas about coercion. Such cases do not absolutely require a showing of government coercion. But they tend to treat coercion as the archetypical example of state action.

The propensity to treat coercion as the core type of unconstitutional action cuts across many areas of constitutional law, including commandeering, conditions, religious liberty, and free speech.[105] In each of these areas, coercion is actually a distraction from the Constitution's standards.[106] Nonetheless, coercion is casually taken to be central. At least in this sense, it enjoys the status of a meta-doctrine—the sort of doctrine that rises above, and sometimes is about, more particular doctrines.[107]

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[105] For the current focus on coercion, see Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012) (quotation marks omitted) (analyzing commandeering in terms of "when pressure turns into compulsion"); Trinity Lutheran Church v. Comer, 582 U.S. 449, 463 (2017) (analyzing free exercise in terms of "indirect coercion"). To this, I must add *mea culpa*, as my recent scholarship has mistakenly elevated at least the force of law (even if not physical coercion) as necessary for violations of most rights. HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, 196.

[106] *See* HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, at 136 (regarding anti-commandeering doctrine); *see supra* note 105 (regarding a condition restricting free exercise in *Trinity Lutheran*).

[107] For examples involving sub-administrative efforts at censorship, see Changizi v. HHS, 82 F.4th 492, 497 (6th Cir. 2023) (quotation marks omitted) (asking whether the defendant's actions had a determinative or coercive effect on the third party such that the actions of the third party can be said to have been caused by the defendant"); NRA v. Vullo, 49 F.4th 700, 707, 714 (2d Cir. 2022) ("The NRA's First Amendment claims turn on whether Vullo's statements . . . were 'implied threats to employ coercive state power to stifle protected speech,'" concluding that "the NRA has failed to plausibly allege that Vullo crossed the line between attempts to convince and attempts to coerce"),

Blum is among the cases that have overemphasized coercion, either expressly or in tone. The underlying question, as noted in Sections II.A and B, was to understand when government could be held responsible for private action. If government were sued under the First Amendment for a private party's suppression of speech, the plaintiff would have to show that the suppression had been so substantially caused or controlled by government as to become governmental. According to *Blum*:

> [A]lthough the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.[108]

Blum thus elevates "coercive power" as the principal example of what could convert private into public action.[109]

In the alternative, a plaintiff can show the government provided "significant encouragement."[110] Such encouragement, however, is defined by *Blum* in terms of what renders the private choice public. Indeed, it must be "such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[111] The choice *must* be deemed, not merely *may* be deemed, that of government. This brings the significant encouragement question back to what causes or controls the private action, which archetypically is government coercion.[112] It

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cert. granted, 144 S. Ct. 375 (2023); *see also* Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003) ("What matters is the distinction between attempts to convince and attempts to coerce.").

[108] 457 U.S. at 1004.

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] For example, in *Missouri v. Biden*, the Fifth Circuit interpreted *significant encouragement* in terms of *control* and *commandeering*:

> For encouragement, we read the law to require that a governmental actor exercise active, meaningful control over the private party's decision in order to constitute a state action. That reveals itself in (1) entanglement in a party's independent decision-making or (2) direct involvement in carrying out the decision itself. . . . In any of those scenarios, the state has such a close nexus with the private party that the government actor is practically responsible for the decision, because it has necessarily encouraged the private party to act and, in turn, commandeered its independent judgment.

will be seen in Section II.E that this near collapse of the significant encouragement test into the coercion test was not required by earlier precedents or in any way naturally predetermined. But at least as presented by *Blum*, the significant encouragement measure quietly reverts to coercion.

Indeed, the substantial encouragement measure has not been much developed in the case law.[113] Although not forgotten, it has remained a stepchild of the coercion measure.

The Court in *Blum* acknowledged some other pathways by which private action could become state action. It recognized that private action is attributable to the state when it is an exercise of power that was "traditionally the exclusive prerogative of the State."[114] It also conceded that an earlier case, *Burton*, had found state action where the state and the private actor were "joint participant[s],"[115] but it disparaged that sort of claim by the plaintiffs in *Blum* as a "rather vague generalization."[116] *Blum* treated these measures of state action as outliers, as understood by the Fifth Circuit in *Missouri v. Biden*.[117]

Far from hiding its narrow vision, *Blum* announced that government could "normally" be held responsible for private action "only" when it exercised "coercive power" or has provided the sort of "significant encouragement" that required

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83 F.4th 350, 380 (5th Cir. 2023) (citations and quotation marks omitted), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

The government argues that *Blum* requires "either coercive threats or equivalent significant encouragement—that is, positive inducements that overwhelm the recipient's independent judgment and render its decisions fairly attributable to the government." Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 14, 27. Indeed, not content with framing significant encouragement in terms of coercion, it claims that the "purpose" of the significant encouragement inquiry is to determine whether the private entity has been compelled. *Blum*, 83 F.4th at 28.

[113] As put by the Solicitor General, "[t]his Court has never found state action based on 'significant encouragement.'" Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 27.

[114] *Blum*, 457 U.S. at 1011 (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 353 (1974)); *see also* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) ("a private entity can qualify as a state actor in a few limited circumstances—including, for example . . . when the private entity performs a traditional, exclusive public function.").

[115] *Blum*, 457 U.S. at 1010.

[116] *Id.* at 1004.

[117] *Missouri*, 83 F.4th at 375 n.11 (setting a "high" standard for the joint participation test and rejecting its application).

the private action to be considered that of government.[118] Other ways to show government responsibility were not "normal[]."[119]

Disturbingly, and entirely predictably, *Blum*'s elevation of coercion has seemed to government to justify privatized censorship—provided government does not impose it coercively.[120] To avoid the appearance of coercion, the government often relies on a division of labor, so the officials making the demands for suppression are not usually those making the threats.[121] Although *Blum* does not actually excuse this subterfuge, the case leaves room for the government to imagine it works. For example, the government protests that officials seeking censorship never threatened the Platforms—as if that were relevant when the threats came from others in government.[122]

Going further, the government has even privatized its demands for censorship. It has made them largely through a consortium called the Election Integrity Partnership (EIP)—which later reconstituted itself as the Virality Project—and through myriad other private organizations.[123]

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[118] *Blum*, 457 U.S. at 1004.

[119] *Id.*

[120] The government tries to bring all First Amendment inquiries back to what it calls "the proper coercion inquiry," Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 36, and the "ultimate coercion inquiry," *id.* at 37.

[121] On this basis, the government suggests that its demands for censorship cannot be unconstitutional unless they are "threatening in tone or manner" and "reference adverse consequences." Application for Stay of Injunction at 25, Murthy v. Missouri, 144 S. Ct. 7 (2023) (No. 23A243 (23-411)). But, of course, the government has been careful to ensure that the threats are typically made by different officials than those who are asking for particular opinions to be suppressed.

[122] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 30–31 ("[t]he court also did not purport to conclude that officials from the FBI, CDC, CISA, or the Surgeon General's Office threatened platforms with adverse consequences if they failed to moderate content," and "the court did not identify even a single communication in which officials threatened the platforms with legal reforms, enforcement action, or any other adverse consequence for failing to moderate content").

[123] EIP, in its own words, was created "in consultation with CISA." *See* WEAPONIZATION OF CISA, *supra* note 60, at 41. Indeed, "high-ranking CISA" personnel helped in "forming" the organization." *Id.* at 39. And emails "show clearly that the EIP system was designed to operate as a unit, not as a separate entity from DHS." *Id.* at 44.

EIP has been summarized as follows:

> A consortium of four private groups worked with the departments of Homeland Security (DHS) and State to censor massive numbers of social media posts they considered misinformation during the 2020 election, and its members then got rewarded with millions of federal dollars from the Biden administration afterwards.
>
> The consortium is comprised of four member organizations: Stanford Internet Observatory (SIO), the University of Washington's Center for an Informed Public, the Atlantic Council's Digital Forensic Research Lab, and social media analytics firm Graphika. It set up a concierge-like service in 2020 that allowed federal agencies like Homeland's Cybersecurity Infrastructure Security Agency (CISA) and State's Global Engagement Center to file "tickets" requesting that online story links and social media posts be censored or flagged by Big Tech.

Greg Piper & John Solomon, *Outsourced Censorship: Feds Used Private Entity to Target Millions of Social Posts in 2020*, JUST THE NEWS (Sept. 30, 2022, 6:41 AM), https://justthenews.com/government/federal-agencies/biden-administration-rewarded-private-entities-got-2020-election. Ben Weingarten observes that:

> The non-governmental "anti-disinformation" consortium was conceived by and created in consultation with CISA officials in the run-up to the 2020 election. Its stated purpose was to fill the "critical gap" created by the fact no federal agency "has a focus on, or authority regarding, election misinformation originating from domestic sources within the United States."
>
> Stated differently, this was a vehicle CISA could use to outsource the censorship of domestic speech that for itself would likely constitute a violation of the First Amendment. Never mind that censorship by proxy itself may represent a First Amendment violation.

Ben Weingarten, *How DHS Went from Fighting Jihadists to Targeting Your Tweets*, DOC EMET PRODS. (May 31, 2023), https://docemetproductions.com/how-dhs-went-from-fighting-jihadists-to-targeting-your-tweets/.

In the aftermath of the 2020 election, an EIP report explained:

> [N]o government agency in the United States has the explicit mandate to monitor and correct election mis- and disinformation. This is especially true for election disinformation that originates from within the United States, which would likely be excluded from law enforcement action under the First Amendment and not appropriate for study by intelligence agencies restricted from operating inside the United States. As a result, during the 2020 election, local and state election officials, who had a strong partner on election-system and overall cybersecurity efforts in CISA, were without a clearinghouse for assessing mis- and disinformation targeting their voting operations . . . in consultation with CISA and other stakeholders, a coalition was assembled with like-minded partner institutions.

THE WEAPONIZATION OF "DISINFORMATION" PSEUDO-EXPERTS AND BUREAUCRATS, *supra* note 60, at 41. *See, e.g.*, *infra* note 169 for more on the "gap" in federal capacity resulting from, among other things, "very real 1st amendment questions."

Relying on *Blum*, the government has justified much of its censorship on a theory that *Blum* requires specific or particularized causation.[124] According to *Blum*, it must be shown that "the State is responsible for the specific conduct of which the plaintiff complains."[125] This specificity requirement is so loosely stated that the government feels free to interpret it as meaning something much more onerous. According to the government, "general pressure or incentives created by government action are . . . insufficient"[126]; instead, a "particular act of enforcement" has to be attributable to "particular conduct" by a "particular government official."[127] From that perspective, when a Platform suppresses a post by Dr. X expressing vaccine skepticism, the Platform's private action isn't converted into public action unless a specific official specifically forced the Platform to take its specific action against Dr. X's post. On this understanding, government can generally press the Platforms to suppress vaccine skepticism, and when a Platform then censors Dr. X's post, there is no government action, and the First Amendment is not violated.

Although the government does not get full compliance—perhaps only 50%—this is a feature, not a bug.[128] It allows government to claim that its demands are not very coercive and that there is little government causation.[129] It lets government shape the general tendency of censorship while avoiding responsibility in any particular instance.

Even more subtle evasion can be illustrated by the Hunter Biden laptop saga. The photos and emails on the laptop were a profound political and legal liability for

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[124] *See, e.g.*, Defendants' Opposition, Louisiana v. Biden, *supra* note 99, at 170 (citing *Blum*, among other authorities, for the proposition that "to give rise to state action . . . any purported government 'pressure' . . . must also be targeted at the specific actions that harmed the plaintiff").

[125] 457 U.S. at 1004.

[126] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 26.

[127] *Id.* at 18 (protesting that the Fifth Circuit "did not even purport to find that any particular act of enforcement affecting respondents was attributable to any particular conduct by any particular government official"). This aggressive interpretation of *Blum* has the added value for the government of justifying its division of labor (discussed in the text two paragraphs above).

[128] Missouri v. Biden, 83 F.4th 350, 365 (5th Cir. 2023) ("Apparently, the FBI's flagging operations across-the-board led to posts being taken down 50% of the time."), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

[129] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 39 ("That the platforms often declined to remove flagged content further confirms that the government was seeking to inform or persuade—not to coerce.").

Hunter's father, Joe Biden. The FBI knew the laptop was real, not a Russian plant.[130] Nonetheless, the FBI suppressed the laptop story in the midst of the 2020 election by carefully deceiving at least Twitter and Facebook into thinking the story was Russian disinformation.[131] When asked whether the story was true, the FBI refused to comment.[132] Even afterward, the Justice Department excused the FBI by distinguishing deception from coercion, arguing deception is "not an independent legal basis for attributing a private entity's acts to the Government under the state action doctrine."[133] Rather than being a constraint on censorship, coercion has become the measure of when censorship can be justified.

D. Blum Even Seems to Preclude Standing

Blum's emphasis on the need for both conversion and coercion even allows the government to deny that censored individuals have standing. For example, in petitioning for a stay against the Fifth Circuit's injunction in *Murthy v. Missouri*, the Solicitor General of the United States argued the plaintiffs failed to show that the Platforms' actions were "fairly traceable" to the government.[134] That apparently seems plausible to some of the Justices[135]—probably because of *Blum*'s doctrine that "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[136]

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[130] Response to Application for Stay of Injunction at 5, Murthy v. Missouri, 144 S. Ct. 7 (2023) (No. 23A243 (23-411)).

[131] *Id.* at 5–6.

[132] *Id.* at 6.

[133] Defendants' Opposition, Louisiana v. Biden, *supra* note 99, at 194.

[134] Application for Stay, Murthy v. Missouri, *supra* note 121, at 2; *see also* Changizi v. HHS, 82 F.4th 492, 498 (6th Cir. 2023) (quotation marks omitted) ("Because Plaintiffs have not adequately pleaded that HHS compelled Twitter's chosen course of conduct, we are left with a highly attenuated chain of possibilities that is too speculative to establish a traceable harm.").

[135] Murthy v. Missouri, 144 S. Ct. 32 (2023) (denying motion by Robert F. Kennedy, Jr., to intervene) (Alito, J., dissenting) ("In successfully arguing that we should stay the preliminary injunction entered below, the Government contended strenuously that respondents lack standing. If the Court ultimately agrees with that argument and orders that this case be dismissed, our decision will provide little guidance for deciding Mr. Kennedy's case, and Mr. Kennedy will be required to wait until the District Court separately assesses his claims.").

[136] 457 U.S. at 1004 (quotation marks omitted).

Indeed, if causation must be particularized and if government censorship demands must be met with 100% compliance, then the government can make it almost impossible to find the necessary conversion and coercion simply by keeping threats relatively general and not insisting on complete compliance. Just by lightening up on specificity and compliance, government can ensure that the harms to censored individuals do not seem "fairly traceable" to government.[137]

Is it true, however, that the *Blum*-justified censorship—the most extensive in the nation's history—is without a judicial remedy for lack of standing? For one thing, the realities of the current censorship reveal standing. The government censorship is not entirely privatized; on the contrary, it is orchestrated by government policy. The government's policies have sometimes come with particularized causation of the resulting suppression.[138] And just because there isn't 100% compliance doesn't mean there isn't coercion and causation. Moreover, *Blum* offers just one theory of federal censorship—a theory about power exercised through private intermediaries. In addition, the government's censorship policy is unconstitutional in ways not anticipated or governed by *Blum*—namely, by virtue of being *ab initio* void (as shown in Section III.C), by abridging the speech rights of the public (as shown in Section III.E), by abridging the speech rights of the Platforms (as addressed in Section III.F), and by chilling speech (as discussed in Section III.G). So even if *Blum*'s state action and coercion standards were correct (they aren't), they should be no obstacle to standing.

To the government and even some Justices, however, *Blum*'s logic leaves little room for standing. It not merely invites censorship but even bars the censored from coming into court.

This artificial *Blum*-generated standing obstacle is one reason there have been so few suits challenging the censorship. Just to get standing, one has to funnel one's

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[137] Application for Stay, Murthy v. Missouri, *supra* note 121, at 2.

[138] *See, e.g.*, Missouri v. Biden, 83 F.4th 350, 362 (5th Cir. 2023) ("Facebook recognized that a popular video did not qualify for removal under its policies but promised that it was being 'labeled' and 'demoted' anyway after the officials flagged it."), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

claims through the *Blum* vision of conversion and coercion.[139] Yet some of the government's most important censorship maneuvers—including its coordination for the Platforms and its financial and technical support for censorship and misinformation outfits—are not obviously coercive.[140] So, one can't even get into court, let alone get discovery, on the bulk of the current censorship system.

These standing and discovery problems reinforce the Supreme Court's conceptual failure. Cases and discovery can move forward in district courts only when they focus, like *Blum*, on conversion and coercion.[141] So, when cases and discovery are allowed to proceed, they can't dwell on the government's relatively cooperative censorship mechanisms. That means when a case eventually reaches the Supreme Court, there isn't a factual basis in the record for the Justices to understand the full and complex structure of the censorship. *Blum*, in other words, permits the Justices to see only the narrow slice of reality that fits their coercion-oriented preconceptions. The obstacle to judicial standing thus becomes an obstacle to judicial understanding.

E. Burton Is More Accurate and Is Not Entirely Overruled by Blum

Another case involving a suit against government for private action, *Burton v. Wilmington Parking Authority*, sets a very different—and better—standard for suits against government.[142]

The parking authority in *Burton* had not overtly discriminated. Instead, it had merely rented one of its buildings to a restaurant that discriminated. Nonetheless, the Supreme Court held that the government agency had denied black restaurant patrons the equal protection of the law. The case thereby became the leading precedent showing that a state could violate the Fourteenth Amendment even passively through a private party. State action could come in subtle ways.

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[139] *See Changizi*, 82 F.4th at 497–98 (quotation marks omitted) (reciting that, to show traceability, "a plaintiff must show that the defendant's actions had a determinative or coercive effect on the third party such that the actions of the third party can be said to have been caused by the defendant," and dismissing suit on ground that without plaintiffs' adequately pleading that the government "compelled" the Platform's censorship, "we are left with a highly attenuated chain of possibilities that is too speculative to establish a traceable harm").

[140] For the coordination and the support for the censorship and misinformation outfits, see *infra* Section II.F.

[141] See discussion of *Changizi* in *supra* note 139.

[142] Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

Of course, *Burton* is open-ended in not clearly defining the limits of government action—so it would be worrisome if it were widely applied at its edges. At the same time, it valuably offers a much more natural and realistic vision of how government works than *Blum*'s constricted test.

Unlike *Blum*'s emphasis on coercion or other government control of private decisions, *Burton's* reasoning focuses on *joint participation*:

> [T]hat the restaurant is operated as an integral part of a public building devoted to a public parking service indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn . . . . The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.[143]

And this joint participation mattered merely to show that the private action wasn't *purely private*. *Blum* claims that "normally" there must be coercion or such significant encouragement that the private choice "must in law be deemed to be that of the State."[144] *Burton*, in contrast, does not go so far, requiring only that the participation be not entirely private and thus at least partly governmental.

Indeed, the discrimination in *Burton* was merely passive: "By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."[145] Even without a government action requesting discrimination—or, nowadays, censorship—government backing for a discriminatory private venture can be unconstitutional state action.[146]

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[143] *Id.* at 725–26. Similarly, in *Lugar*, the Court held that "a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a state actor for purposes of the Fourteenth Amendment." 457 U.S. at 941 (quotation marks omitted).

[144] 457 U.S. at 1004.

[145] 365 U.S. at 725.

[146] *See also* Reitman v. Mulkey, 387 U.S. 369, 380 (1967) (quotation marks omitted) (commenting on *Burton* that, "[a]lthough the State neither commanded nor expressly authorized or encouraged the discriminations, the State had elected to place its power, property and prestige behind the admitted discrimination and by its inaction . . . has . . . made itself a party to the refusal of service . . . which therefore could not be considered the purely private choice of the restaurant operator").

The point is not simply to elevate *Burton* over *Blum* as a measure of state action. On the contrary, this Article argues against any generic state action doctrine; it urges judges, instead, to pay close attention to the different measures of unlawful government action required for different constitutional rights. But if there is to be a generic state action doctrine, *Burton* may, in some circumstances, be more relevant than is commonly understood. Exactly where to draw the line between public and private action is a difficult question. The awkwardness is to give expression to a boundary that fully holds government power accountable without going so far as to subvert private freedom.

Struggling to define this seemingly ineffable balance, the Supreme Court in *Flagg Brothers, Inc. v. Brooks* noted the "the symbiotic relationship" presented in *Burton*, where "the State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise."[147] On other occasions, the Court has talked about "significant involvement"—as when in *Moose Lodge No. 107 v. Irvis*, it summarized: "Our holdings indicate that, where the impetus for the discrimination is private, the State must have significantly involved itself with invidious discriminations, in order for the discriminatory action to fall within the ambit of the constitutional prohibition."[148] With or without these reformulations, *Burton*'s *joint participation* and *significant involvement* standards are not nearly as tight as the *coercion* and *significant involvement* tests propounded in *Blum*. And because *Burton*'s standards have the potential to be capacious, it has not been clear how far they should be taken.

Clarity, however, can be found in the context. *Burton*'s joint participation inquiry seems especially significant when—as during segregation and now amid censorship—the unconstitutionality is so pervasive as to constitute a regime or system.[149]

The racial discrimination of mid-twentieth century America did not involve just a few discrete public actions, but rather was a pervasive regime, with interwoven strands that cut across the public-private divide and did not always need to be made explicit. Similarly, the current viewpoint discrimination is not just a handful

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[147] 436 U.S. 149, 166 (1978); *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982).

[148] 407 U.S. at 725 (citations and quotation marks omitted).

[149] *Cf.* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 298 (2001) (speaking of "the pervasive entwinement of public institutions and public officials").

of distinct discriminatory actions. Instead, it is a regime or complex—an interlocking framework of censorship that blurs the public-private distinction and often is inexplicit.

Recognizing that mid-twentieth-century racial discrimination amounted to such a regime, *Burton* found state action by finding that the private racial discrimination in that case was not "merely private."[150] Tellingly, the government's role in the current private viewpoint discrimination has been very active compared to the passive role of government in *Burton*. But *Burton* is a valuable reminder that in a discriminatory regime, the government usually does not need to exert coercion or even issue explicit demands, because everyone knows what is expected of them and can be expected to cooperate.

It therefore does not make sense to look for government coercion or something like it in a regime or system of unconstitutionality; instead, mere joint participation between government and its private partners is enough to reveal the government's role. That's why joint participation was enough for the Court in *Burton* and why now, again, it should be sufficient in *Missouri*.[151]

Burton's standards could easily be abused if applied too freely. By the same token, *Blum*'s standards are dangerous because they are too narrow. So, *Burton* is valuable in recognizing subtle forms of government action. The only caveat is that it must be applied with care, thoughtfully rather than automatically—as illustrated by the importance of joint participation in a regime or system of unconstitutionality.

Whether under the First, Fourteenth, or any other Amendment, there are risks in formulating an exclusive doctrinal standard in terms different from those stated by the Constitution. If a doctrinally formulated line falls short of those evident in the Constitution, it is apt to become the justification for precisely what the Constitution prohibits—this being what has happened under *Blum*. The Court in *Burton* therefore may have shown good sense in refusing to state "a precise formula for

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[150] *Burton*, 365 U.S. at 721.

[151] For similar reasons—that there is a censorship regime—the Fifth Circuit in *Missouri v. Biden* was mistaken in evaluating the conduct of government agencies and officials "one set of officials at a time." 83 F.4th at 381. The censorship is imposed through a regime or system—its advocates call it a "whole of government" and even "whole of society" effort. It therefore is unrealistically parsimonious to evaluate the misconduct of each defendant separately without considering their participation in the censorship policy that cuts across the government.

recognition of state responsibility under the Equal Protection Clause."[152] As summarized in *Reitman v. Mulkey*:

> This Court has never attempted the impossible task of formulating an infallible test for determining whether the State in any of its manifestations has become significantly involved in private discriminations. Only by sifting facts and weighing circumstances on a case-by-case basis can a nonobvious involvement of the State in private conduct be attributed its true significance.[153]

To this, one might add that the true test of government action is the Constitution itself. The courts therefore cannot rely on doctrine to escape difficult decisions about government action. On the contrary, however much they struggle to formulate accurate doctrines, they still at least sometimes must wrestle with the Constitution and its natural application to the realities evident in their cases.

One may argue, from a legal realist perspective, that *Burton* offers an unusually lax account of state action because it was responding to a national crisis over racial discrimination. On this view, *Burton* is not a reliable precedent in less exigent circumstances. Indeed, the Court in *Blum* partly justified its narrow view of government action by reference to the weak substantive claim in that case.[154] But that is all the more reason to recognize *Blum*'s limited applicability: A state action test formulated very narrowly to bar a strained due process claim should not preclude a core free speech claim against a profoundly dangerous censorship regime. Put another way, when government action doctrine is framed to trim a previously overstated right, it is apt to be artificially confining. So, it would be invidious to follow *Blum*'s deliberately constricted reasoning in place of *Burton*'s more realistic understanding of how government actually governs.

Far from being loose in its finding of state action, *Burton* recognizes the realities of how government works through private parties. As put by Justice Brennan, joined by Justice Marshall, when dissenting in *Blum*:

> If the Fourteenth Amendment is to have its intended effect as a restraint on the abuse of state power, courts must be sensitive to the manner in which state power is exer-

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[152] 365 U.S. at 722.

[153] 387 U.S. at 378 (quotation marks omitted).

[154] When evaluating the relatively weak substantive claim in *Blum*, the Court acknowledged: "Faithful adherence to the 'state action' requirement of the Fourteenth Amendment requires careful attention to the gravamen of the plaintiff's complaint." 457 U.S. at 1003.

> cised. In an era of active government intervention to remedy social ills, the true character of the State's involvement in, and coercive influence over, the activities of private parties, often through complex and opaque regulatory frameworks, may not always be apparent.[155]

Without Brennan's realistic understanding of how government exploits private intermediaries, government can use private cutouts to wash away its constitutional sins.

Justice Brennan's dissent protested the case's "depart[ure] from the *Burton* precept" and its "recitation of abstract tests and a pigeonhole approach to the question of state action."[156] The Court, however, did not claim it was pruning or even qualifying *Burton*, but rather merely said that *Blum*'s facts did "not fall within the ambit of *Burton*."[157] Moreover, *Blum* cannot be understood to have fully overruled *Burton*, for under the *Blum* test, *Burton* would have upheld the racial discrimination in Wilmington. So, *Burton* must still be considered a valuable and authoritative precedent—even if in sharp tension with *Blum*. If *Burton* was correctly decided, then *Blum* cannot be considered the exclusive measure of state action.

Although *Burton*'s approach to state action may seem open-ended, the case is a valuable corrective to *Blum*'s dangerously narrow state action doctrine—a doctrine so constricted as to invite government censorship. At the very least, *Burton* reveals the significance of joint participation as a measure of government action in a regime or system of unconstitutionality—once the old discrimination regime and now the new censorship regime. More generally, it realistically recognizes that government can act unconstitutionally in all sorts of subtle and unanticipated ways, which are apt to evade doctrinal tests framed more narrowly than the Constitution. That is *Blum*'s error, and *Burton*'s wisdom.[158]

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[155] *Id.* at 1012 (Brennan, J., dissenting).

[156] *Id.* at 1013–14 (Brennan, J., dissenting).

[157] *Id.* at 1011 (Brennan, J., dissenting).

[158] One could take the contrast between *Blum* and *Burton* as a reminder that it is always important to consider both doctrine and the Constitution. Although doctrinal measures can offer a valuable perspective, one should always double-check the underlying principles that the doctrines are attempting to effectuate. But one cannot take so charitable a view of *Blum*, as its doctrinal tests are deliberately and dangerously constrictive. Rather than wrestle with the strained due process claim in that case, the Court fended it off with an artificially narrow vision of state action, thereby putting core rights at risk.

F. The Evasions Authorized by Blum

The current censorship illustrates how *Blum* leaves space for the suppression of speech. The government knows it cannot directly impose censorship, and *Blum* bars it from working through private parties with coercion or significant encouragement that would turn their action into government action. But as already hinted in Section II.C, the government can avoid these obstacles. Now, it is time for systematic analysis of how *Blum* courts censorship. It invites at least nine pathways.

First, the government runs its censorship through private entities, most prominently the Platforms, but frequently also through numerous intermediaries. Thus, not just the suppression but even the demands for it usually come through private cutouts, not directly from the government.[159]

Second, the government often (though not consistently) couches its demands for censorship in uncoercive terms. Even when operating against background threats, government tends to say it is drawing the Platforms' attention to misinformation, or that it is pointing out material that violates their terms of service. On other occasions, however, the government has not been so restrained. It sometimes has demanded suppression of information that is true and in compliance with the Platforms' terms of service.[160] Still, in many instances, the government frames its threats and pressures in understated ways.[161]

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[159] For example, CISA's Protecting Critical Infrastructure from Misinformation & Disinformation Subcommittee "discussed how CISA could outsource its MDM-related activities to third parties so as to bypass the First Amendment and 'avoid the appearance of government propaganda.'" THE WEAPONIZATION OF CISA, *supra* note 60, at 28. For an overview, see *id.* at 21–27. The director of the Election Integrity Project, Alex Stamos, said that the project's "purpose was 'to try to fill the gap of the things that the government could not do themselves' because the government 'lacked both kinda the funding and the legal authorizations.'" Michael Shellenberger, The Censorship Industrial Complex: U.S. Government Support for Domestic Censorship and Disinformation Campaigns, 2016–2022 (2023) (Congressional testimony of author and co-founder of the Breakthrough Institute and the California Peace Coalition), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/shellenberger-testimony.pdf [hereinafter Shellenberger Weaponization Testimony].

[160] *See infra* note 318 regarding *Flaherty*.

[161] For example, "the FBI would inform social media companies when CISA provided the FBI a 'misinformation' report." THE WEAPONIZATION OF "DISINFORMATION" PSEUDO-EXPERTS AND BUREAUCRATS, *supra* note 60, at 19. Former Facebook executive Alex Stamos testified: "[D]ealing with

Third, the government uses little devices (already noted in Section II.C) to minimize causation. It generally, even if not always, maintains a division of labor between the political actors who threaten regulatory reform and the administrative actors who make censorship demands. It often, but again not always, states its censorship demands at a high level of generality, leaving the details to be specified by private cutouts like EIP. It usually refrains from demanding full compliance from the Platforms.

Fourth, the government apparently trades government policy for censorship. When Facebook wanted protection from European limits on "data flow" from Europe, it apparently made a deal with the government of the United States.[162] The government arranged that Facebook would not be barred from sending data of European origin back to the United States, and in exchange got Facebooks' cooperation in censorship.[163] The government, moreover, apparently did this without threatening Facebook. Instead, it simply refrained from protecting Facebook from the Europeans until Facebook agreed to provide the desired censorship.

Fifth, the government sometimes sedulously prebunks[164] true information to mislead the platforms into suppressing it. Notably, the FBI knew that the Hunter

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a law enforcement agency that has coercive powers is just a risky thing to do . . . . And I think all executives of all public companies understand that *there's lots of parts of the government that can punish you for activity that you thought was appropriate.*" *Id.* at 20–21.

The Solicitor General emphasizes that when CISA "forwarded messages from state officials identifying false election-related information posted on the platforms," it "typically stated that CISA 'makes no recommendations' about how the platforms should respond and 'will not take any action, favorable or unfavorable,' based on the platforms' 'decisions about how or whether to use this information.'" Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 6. But such disclaimers apparently concerned only forwarded state censorship questions, not the federal government's own requests. And in any case, the threats of unfavorable consequences came mostly from the White House and members of Congress, not CISA, this being a careful division of labor to satisfy *Blum*.

[162] Michael Shellenberger, Alex Gutentag & Leighton Woodhouse, *New Facebook Files Expose Biden Censorship-For-Spying Scheme*, PUBLIC (Aug. 7, 2023), https://public.substack.com/p/new-facebook-files-expose-biden-censorship.

[163] *Id.*

[164] For an illustration of how this new term is used, see Laura Garcia & Tommy Shane, *A Guide to Prebunking: A Promising Way to Inoculate Against Misinformation*, FIRST DRAFT (June 29, 2021), https://firstdraftnews.org/articles/a-guide-to-prebunking-a-promising-way-to-inoculate-against-misinformation/.

Biden laptop was real, not a Russian plant.[165] Nonetheless, it urged the Platforms to watch out for Russian disinformation of this sort, thereby deliberately deceiving the Platforms into suppressing the laptop story just before the 2020 election.[166]

Sixth, the federal government has created, subsidized, or otherwise aided a range of private for-profit and nonprofit entities, which send requests to the Platforms asking them to suppress posts in line with government censorship priorities. The most important of these private entities were partly created by government and have worked closely with it—the preeminent example being the EIP and derivatively its successor organization, the Virality Project.[167] The government's goal in creating the EIP consortium was to privatize censorship demands—partly to overcome a lack of statutory authorization but also to avoid constitutional accountability. According to Renee DiResta's notes for her fall 2021 presentation at the annual CISA Summit: "In August 2020, [CISA and others] identified a massive gap in the capacity of federal, state, and local governments to become aware of, analyze and rapidly respond to misinformation and disinformation—both foreign and domestic—targeting the 2020 election."[168] "That gap had several components," including "[u]nclear legal authorities including very real 1st amendment questions."[169] By using private organizations such as EIP to make censorship demands on the Platforms, the government thought (in line with *Blum*) it could avoid those First Amendment questions.

Seventh, the federal government has helped to establish, has supported, and has shared technical knowledge with, a wide range of for-profit and nonprofit misinformation organizations. These groups grade online publications for their tendency

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[165] *See supra* note 130.

[166] *See id.*

[167] *See supra* note 123. At one point, the federal government also worked through a group that called itself the Cyber Threat Intelligence League (CTIL). This volunteer anti-disinformation group included a wide range of private defense and intelligence veterans plus some FBI and CISA officials, and it seems to have developed tactics that "over time appear to have been absorbed into multiple official projects, including those of the Department of Homeland Security." Shellenberger et al., *CTIL Files*, *supra* note 2.

[168] THE WEAPONIZATION OF "DISINFORMATION" PSEUDO-EXPERTS AND BUREAUCRATS, *supra* note 60, at 42. DiResta is a former CIA fellow and currently a leader of the Stanford Internet Observatory, which is part of the consortium.

[169] *Id.*

to share misinformation, and of course they do so with a sharp political slant.[170] In funding and helping them, the government seems to have carefully avoided formal conditions dictating its desired viewpoint discrimination, but there's little doubt it carefully gave its money and know-how in pursuit of it. The organizations distribute or even sell their misinformation scores to advertisers and others who are thereby encouraged to cut their support for sites with disfavored opinions. The government policy to fund and otherwise foster these organizations effectively abridges the freedom of speech while avoiding coercion, in compliance with *Blum*.

The censorship and misinformation-grading industries are especially interesting because once established, their dependence on government has diminished. Government initiative, seed money, and expertise was initially very important for setting up the component organizations and making them effective.[171] But having been unleashed by government, they increasingly subsist on their own and now tend to move ahead on their own steam.

Eighth, a significant number of former CIA and FBI agents have found employment at the Platforms, where they carry out both the Platforms' and the government's censorship.[172] Although the presence of former agents by itself is not unconstitutional, the government's placement of individuals within the Platforms to shape their suppression of speech would be.

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[170] For the use of private entities to inform the Platforms what should be suppressed, see *supra* note 123. For the use of subsidies used to launch private entities that grade speech for exclusion or advertising boycotts, see Gabe Kaminsky, *Disinformation Inc: Meet the Groups Hauling in Cash to Secretly Blacklist Conservative News*, WASHINGTON EXAMINER (Feb. 9, 2023, 6:00 AM), https://www.washingtonexaminer.com/policy/technology/2801668/disinformation-inc-meet-the-groups-hauling-in-cash-to-secretly-blacklist-conservative-news-2/. For the use of subsidies to launch and support surveillance of speech, see Margot Cleveland, *The U.S. Government Is Building a Vast Surveillance and Speech Suppression Web Around Every American*, THE FEDERALIST (Mar. 21, 2023), https://thefederalist.com/2023/03/21/grants-reveal-federal-governments-horrific-plans-to-censor-all-americans-speech/ ("The federal government has awarded more than 500-plus contracts or grants related to 'misinformation' or 'disinformation' since 2020.").

[171] *See* Kaminsky, *supra* note 170; Cleveland, *supra* note 170.

[172] *See* Alan MacLeod, *Meet the Ex-CIA Agents Deciding Facebook's Content Policy*, MPN (July 12, 2022), https://www.mintpressnews.com/meet-ex-cia-agents-deciding-facebook-content-policy/281307/.

Most of these mechanisms do not clearly amount to coercion or significant encouragement—although some do. Yet all of these government actions suppress speech. They do so designedly and on a colossal scale.

G. Evasion through Coordination

In addition to these eight evasions of the First Amendment invited by *Blum*, there is another, in which government provides the Platforms with coordination. Being the most prevalent and least understood censorship mechanism, this ninth evasion requires detailed analysis in its own section.

There is much overlap in the censorship agendas of the government and the Platforms—so the government has exerted pressure only at the margins. That pressure is serious enough, for it concerns the material that is most crucial, politically and medically, and because it has suppressed millions of postings.[173] The point here, however, concerns the censorship that the Platforms are already inclined to do on their own.

Even when imposing their own private censorship, the Platforms face a coordination problem. A Platform will sometimes be aiming merely to sanitize its own site by removing opinion it considers distasteful; but it still needs to limit the risk of losing users who seek the suppressed opinion elsewhere. It therefore must coordinate with the other Platforms to make sure they suppress the same sort of opinion.[174] The need for coordination is all the greater when a Platform aims to influence politics or opinion. For that purpose, it needs to ensure that what it suppresses will not appear on another dominant Platform—at least not one nearly as large and with substantially overlapping users. Otherwise, its censorship will not effectively shape the public mind.[175]

Although the Platforms therefore often need to coordinate, they cannot do so by themselves without antitrust difficulties. The government solves this problem by

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[173] Missouri v. Biden, 83 F.4th 350, 392 (5th Cir. 2023), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

[174] Of course, some content discrimination by the Platforms deliberately departs from what other Platforms are doing. For example, Facebook forbids pornography, and this is part of its branding, so it does not mind that other Platforms permit pornography.

[175] Although X, aka Twitter, says it has reduced its censorship under Elon Musk, this is not really a counterexample because X is relatively small and other Platform's users have limited overlap with its users. Even so, it is telling that there seems to be a concerted campaign to punish X for departing from the censorship agenda of the other Platforms and the government.

offering them coordination—by supplying them with guidance as to what is worthy of suppression, thus allowing the Platforms to align their censorship. Indeed, the government increasingly provides the coordination on a massive scale by subsidizing and working with the private censorship and misinformation outfits discussed in Section II.F.

All of this coordination, whether done directly or through cutouts, is a serious abridgement of the freedom of speech. But like the other evasions, listed in Section II.F, it is assumed to be unobjectionable because it avoids coercion.

H. The Anti-Evasion Principle

Reinforcing the failure of *Blum* is the Supreme Court's anti-evasion principle. Government cannot escape its constitutional limits through privatization or other evasions.

Although not often recognized, the anti-evasion principle has clear foundations in the Court's opinions. In *Cummings v. Missouri*—an unconstitutional conditions case—the Court declared that "what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows."[176] In *Frost & Frost v. Railroad Commission*—another unconstitutional conditions case—the Court declared: "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."[177] Later, in *Norwood v. Harrison*—an equal protection case concerning state aid to private schools—the Court added that it is "axiomatic" that the government "may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."[178] Perhaps the most notable expression of such ideas came from Chief Justice John Marshall in *Wayman v. Southard*: "It is a general rule that what cannot be done directly from defect of power cannot be done indirectly."[179] Together, these admonitions reveal a general principle against evasion, including the evasion accomplished through private parties.[180]

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[176] 71 U.S. 277, 325 (1867).

[177] 271 U.S. 583, 594 (1926).

[178] 413 U.S. 455, 465 (1973) (quotation marks omitted).

[179] 23 U.S. 1, 50 (1825).

[180] Note that, "[l]ike other principals that delegate acts to agents, the federal government cannot escape its legal limitations by asking others to act on its behalf." Philip Hamburger, *Unconstitutional*

One might conclude that this principle, by itself, bars the government from using private mechanisms to escape the First Amendment. More modestly, it is simply a reminder that the Constitution should be understood naturally and realistically, in accord with its text and intent, not in artificially narrow ways that defeat its evident meaning. It thus is another reason to conclude that the doctrine in *Blum* cannot be considered an accurate understanding of government action.

In sum, *Blum* has done much to invite censorship, and this says more about that precedent than about the censorship. When *Blum* or any other precedent suggests that the most massive system of censorship in American history does not constitute government action, that it is not coercive enough to violate the First Amendment, and that the censored lack standing to challenge it, one has to pause. It is astonishing to claim that any precedent or doctrine puts such a system of censorship beyond the reach of the First Amendment. That, however, is where *Blum* has led.

To this, it must be added that *Blum* is suspect because it deliberately narrowed state action to fend off an overstated due process claim.[181] Indeed, while the Supreme Court has followed *Blum* in cases against private parties, it has never subsequently followed *Blum*'s conversion and related coercion requirement in any case against government.[182] *Blum*'s weakness on the merits is matched by its feebleness as a precedent.

III. Confusing Abridging and Prohibiting

The First Amendment speaks of laws, not just any government action, and it distinguishes "abridging" from "prohibiting." These distinctions reveal how the Amendment bars the evasions that the *Blum* doctrine has invited.

Looking back to the question of government action discussed in Part II, one can see that the substance of a right reveals much about the sort of government action that would violate it. In judicial doctrine, a generic vision of government action has tended to elevate coercion as archetypical of constitutional violations,

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Conditions: The Irrelevance of Consent, 98 Va. L. Rev. 479, 517 (2012). Although my analysis of unconstitutional conditions has evolved since 2012, see Hamburger, Purchasing Submission, *supra* note 13, this basic point that the government cannot escape its constitutional limits seems as true as ever.

[181] *See supra* Section II.B.

[182] For this point and why *City of Cuyahoga Falls* is not an exception, see *supra* note 88.

thereby displacing the Constitution's substantive measures of what is prohibited. Of particular interest here, although the First Amendment's speech guarantee bars *abridging*, it has been interpreted in a manner that is much closer to *Blum*'s generic coercion measure of government action. Speech doctrine, like "state action" doctrine, thus misreads the Constitution in line with a coercion model, leaving much room for censorship.

A. The Coercion Model vs. Constitutional Rights

The coercion model conflicts with the substance of many rights. That initially may seem surprising, because coercion has come to seem the archetypical element of rights violations and law. But that mistakes both law and the substance of many rights.

Throughout the eighteenth century and even up into the twentieth, it was widely assumed that, ideally, the force of law was both internal and external. From that perspective, law could have a sort of moral force or obligation, which was backed up by its physical force or coercion.[183] Only in the twentieth century and later has coercion come to seem important to many judges—not because it is required by the Constitution, but because of the spread of legal positivism and its cousin-german, legal realism.[184] Positivism cannot easily be reconciled with either

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[183] In what became a standard American college text, Samuel Pufendorf associated the "power to oblige, that is, to impose an inward necessity, and the power to force or compel by penalties to observe the law." SAMUEL VON PUFENDORF, THE TWO BOOKS ON THE DUTY OF MAN AND CITIZEN ACCORDING TO THE NATURAL LAW ch. II, § 7, at 15 (Frank Gardner Moore trans., Oxford Univ. Press 1927) (1682).

[184] On legal realism's German origins and why it is germane, see Katharina Isabel Schmidt, *How Hermann Kantorowicz Changed His Mind About America and Its Law, 1927–34*, 41 L. & HIST. REV. 93 (2023).

For legal positivism and the role of Bentham and Austin, see *Legal Positivism*, STAN. ENCYC. OF PHIL., https://plato.stanford.edu/entries/legal-positivism/. Although positivism began to spread in America in the last half of the nineteenth century, it became pervasive here only in the twentieth, persuading many judges and other lawyers to understand law as the sovereign's coercive command. For the late reception of Austinianism even in England, largely through the posthumous publication efforts of Sarah Austin, see LOTTE HAMBURGER & JOSEPH HAMBURGER, TROUBLED LIVES: JOHN AND SARAH AUSTIN 192 (1985). Adding some sophistication, legal realism offered a broader vision of law to include all that officials can enforce, whether through rules, orders, or interpretations. On the relation of realism to positivism, see Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001). Of course, as Leiter aptly observes, there were many shades of realism. *Id.* at 279. Either way, the force of law was reduced to government coercion.

popular expectations about law's binding quality or philosophic recognition that law cannot be explained in narrowly coercive terms.[185] H.L.A. Hart points out that the law cannot be understood narrowly as a matter of state coercion because it often provides authorization, which isn't obviously a matter of coercion,[186] and because it limits officials, who can't easily be understood as coercing themselves.[187] In important ways, therefore, the reductionistic vision of law as coercive does not make sense.

Aligned with this jurisprudential point—that the force of law should not be conflated with coercion—are the substantive realities of various rights, as recognized by the Supreme Court. Rights are often deemed to be violated without any pressure at all, let alone coercion.

Imagine that an FBI officer sees a front door ajar and slips in, without touching it, to search the house without a warrant or reasonable cause. That's unconstitutional without any coercion—without even the slightest pressure. Similarly, when a federal educational program unconstitutionally discriminates in refusing to accept an applicant, it uses no constraint or pressure other than refusing to provide her with the benefit of an education. The substantive measures of these rights allow the courts to find constitutional violations without any coercion, pressure, or other constraints.

Recently, in *Trinity Lutheran Church v. Comer*, the Supreme Court quietly recognized the tension between its generic coercion principle and the substantive measure of the First Amendment's free exercise of religion.[188] The state of Missouri had denied a playground-resurfacing grant to a Lutheran church on the ground that it was a religious organization, and the Court held this denial unconstitutional.[189] Although the case involved only the slightest financial pressure on the church, arising only from the denial of a small grant, the Court felt obliged to speak about the constitutional violation in terms of "coercion"—a label that seemed

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[185] For popular attitudes, see HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, at 188. For the philosophy, see H.L.A. HART, THE CONCEPT OF LAW 34–43 (Oxford: Clarendon Press 1961) (1900).

[186] *Id.* at 35–41 (regarding authorizing or power conferring rules).

[187] *Id.* at 41–43 (regarding rules limiting officials).

[188] 582 U.S. 449, 449 (2017).

[189] *Id.*

strangely distant from the mild realities of the case.[190] Bridging the gap, the Court said the case involved "indirect coercion."[191] More accurately, it might have just admitted that coercion, although often important, is not the only measure of whether a law prohibits the free exercise of religion.[192]

Coercion can matter for rights, but it is not as central as often supposed. On the contrary, if different rights forbid different types of government conduct, in accord with their different phrasing, history, and purposes, then a focus on coercion as the model or archetypical instance of a violation is apt to distort constitutional analysis. To be sure, as already noted, the Court sometimes avoids the ill effects of the coercion model by understanding coercion very capaciously or by rephrasing it as *indirect coercion*. More typically, however, the coercion model erodes our freedom by impeding the enforcement of rights. Indeed, it encourages government to think it can intrude on our rights as long as it plausibly avoids coercion.

Ultimately, it must be questioned whether the Constitution justifies any government or "state" action doctrine distinct from the substance of different rights: Any independent doctrine is apt to be a generic measure of government action and thus will tend to detract from the different measures of forbidden government conduct specified by different rights, including the freedom of speech.

B. Abridging the Freedom of Speech vs. Prohibiting the Free Exercise of Religion

The First Amendment distinguishes "abridging" from "prohibiting." Whereas the Amendment bars "prohibiting" the free exercise of religion, it forbids so much as "abridging" the freedom of speech. This distinction has not drawn much attention.[193] There is no surviving debate about it from the Founding, and it often is

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[190] *Id.* at 450.

[191] *Id.*

[192] *See infra* Section III.B.

[193] *But see* Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601, 612 (2013) ("*Abridge* is a verb with multiple meanings, but the one most relevant here is '[t]o curtail, lessen, or diminish (rights, privileges, advantages, or authority).'"). My scholarship has pointed out the importance of the word *abridging* for unconstitutional conditions. HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, at 169 ("When a law directly constrains speech, it can be difficult to sort out whether it violates the First Amendment, for this amendment does not specify the difference between a law that abridges the freedom of speech and one that does not. But when a

treated as if it were merely a matter of literary variation.[194] But it would seem to matter for understanding the freedom of speech.

In forbidding the *abridging* of the freedom of speech, the First Amendment apparently bars the reducing of the freedom. The Amendment thus appears to go much further than the doctrines focusing on coercion.

This natural textual conclusion is confirmed by contemporary dictionaries. In Samuel Johnson's *Dictionary*, for example, to abridge was, first, to "make shorter" and, second, to "contract" or "diminish."[195] Its third meaning was to "deprive of," including to deprive one of a right or privilege.[196] Other dictionaries are similar: Their initial and most consistent definitions involve reducing; secondarily, some add depriving.[197] Although these two sets of definitions could be considered incompatible, they could also be considered entirely consistent, and this is far more probable. The First Amendment's word *abridging* thus seems to mean diminishing, reducing, or contracting the freedom of speech—this being all that is necessary to deprive one of that right.[198]

Indeed, it was a familiar locution to speak of *abridging* the freedom or liberty of speech or the press and to associate this with reducing or restraining the freedom. To take a prominent example, the *Old Whig* wrote:

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condition restricts speech, the inquiry can be easier, for if the condition confines speech more severely than the government could do directly, then it is clear that the condition is abridging the freedom of speech.").

[194] *See, e.g.*, Michael W. McConnell, *The Origins and Historical Understanding of the Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1487 n.394 (1990) ("The word choice may . . . reflect what is called 'elegant variation.'").

[195] *Abridge*, SAMUEL JOHNSON'S DICTIONARY (1755 ed.), https://johnsonsdictionaryonline.com/views/search.php?term=abridge.

[196] *Id.*

[197] *See, e.g.*, 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (London 1775) (defining *abridging* as "Shortening, diminishing, depriving"); A NEW COMPLETE ENGLISH DICTIONARY (London 1760) (defining *abridge* as "to contract, diminish, or cut short"); N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (London 1721) (defining *abridge* generally as "to make shorter in Words, still retaining the Sense and Substance" and in common law as "to make a Declaration, or Count shorter").

[198] *Cf.* Declaration of the N.Y. Ratifying Convention (July 26, 1788), *in* 18 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 297, 299 (1995) ("That the freedom of the press ought not to be violated or restrained.").

> I shall only add two observations more: The one is that *abridging the liberty of the press* is the most natural and commodious project that can be framed for the restoration of *popery* . . . . The second is this, that *restraining the liberty of the press*, in debates about *religion* and *politics*, directly tends to impose the same restraint with respect to *philosophy*, and in all matters of *science* whatsoever."[199]

Abridging apparently meant the same as *restraining*, *reducing*, *diminishing*, etc. An obscure but more suggestive illustration came from the resolutions of a Dublin militia. At their initial meeting in 1784—as reported in the *Hibernian Magazine*—the Builders Corps adopted a series of resolutions, including this: "Resolved, that any law framed for the purpose of controuling or abridging the freedom of speech, or of the press, is unconstitutional."[200]

Less obscure is the evidence from the *Federalist*. In a footnote arguing that the Constitution could safely be ratified without guaranteeing the liberty of the press, Alexander Hamilton simultaneously wrote about "an abri[d]gement of the liberty of the press" and said that "the liberty of the press ought not to be restrained."[201]

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[199] 2 THE OLD WHIG: OR, THE CONSISTENT PROTESTANT 225 (London 1739).

[200] *At a General Meeting of the Builders Corps, Duly Summoned for the Purpose, and Held on Sunday May 16, 1784*, THE HIBERNIAN MAG., May 1784, at 278, 279.

Likewise, when a standing order of the House of Lords limited the time for entering protests (reasons for dissenting from a vote), some lords complained that the order was "restrictive of an Ancient Right" and said it was "abridging the Right of Protesting with Reasons." Protest (Mar. 3, 1721 [i.e., 1722]), *in* A COMPLEAT COLLECTION OF THE PROTESTS OF THE LORDS DURING THIS LAST SESSION OF PARLIAMENT 2 (1722) (in second pagination series). A later pamphlet recited that "the strength and power of the Crown cannot be more effectually injured than by reducing the Property or abridging the freedom of the great body of the subjects." AN INQUIRY INTO THE LATE MERCANTILE DISTRESSES, IN SCOTLAND AND ENGLAND 130 (1772). Commenting on the Book of Job, a theologian wrote: "They were by no means abridged the liberty of speaking; every one present, without any check or restraint, used the utmost freedom in opening their mind, how contrary soever it might be to what I had suggested." 2 LEONARD CHAPPELOW, A COMMENTARY ON THE BOOK OF JOB 260 (1752).

The point is not that the word *abridging* couldn't be used in other ways, but that the use of *abridging* to mean reducing was familiar. Of course, some writers meant the opposite and therefore used other words, as when Junius wrote about "a general forfeiture" of the liberty of the press or other rights. THE LETTERS OF JUNIUS, supra note 40, at 303. This, however, just confirms the different implication of *abridging*.

[201] THE FEDERALIST NO. 84 (Alexander Hamilton) 580, note.

Indeed, the *Federalist* repeatedly used the word *abridging* and variations of it in ways that typically alluded to reducing.[202]

The difference in the First Amendment between *abridging* and *prohibiting* was deliberate. In July 1789, the draft Bill of Rights contained adjacent paragraphs guaranteeing, in the first, religious rights and, in the second, speech, assembly, and petitioning rights—saying in each that the rights shall not be "infringed."[203] In early September, however, the Senate combined the two paragraphs. The resulting new paragraph barred Congress from making any law "prohibiting" the free exercise of religion or "abridging" the freedom of speech, or the press.[204]

This contrast is revealing. Laws can do many things: they can prohibit, they can authorize, they can define, and so forth. A law *prohibiting* is archetypically one that comes with the force of law, perhaps its inward obligation and at least its outward coercion.[205] So, when the First Amendment distinguishes laws *abridging* and those *prohibiting*, it tells us something important. A law can abridge the freedom of speech, or the press, without necessarily coercing or otherwise prohibiting it.

To be sure, very little pressure is necessary for prohibiting the free exercise of religion. Although a law *prohibiting* centrally involved coercion, at its edges the word's meaning could include mere hindering.[206] This conclusion fits with the early American view that Parliament's three penny tax on tea amounted to tyranny, and

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[202] THE FEDERALIST CONCORDANCE 4 (Thomas S. Engeman et al. eds., 1980).

[203] H. COMM. REP. (July 28, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 24, at 30. James Madison had initially proposed: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments . . . ." Madison Resolution (June 8, 1789), *in id.* at 12.

[204] CREATING THE BILL OF RIGHTS, *supra* note 24, at 38 nn.8 & 12 (regarding Senate amendments on September 4 and 9, 1789); *see also* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 14 (1827) ("no law can rightfully be passed to restrain or abridge the freedom of speech, or of the press."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 740, § 1882 ("What is meant by restraint of the press, or an abridgment of its liberty?").

[205] The force of law is suggested by Samuel Johnson's primary definition of *prohibit*, namely "[t]o forbid; to interdict by authority." *Prohibit*, SAMUEL JOHNSON'S DICTIONARY (1755 ed.), https://johnsonsdictionaryonline.com/views/search.php?term=prohibit.

[206] *See id.* (defining *prohibit*, secondarily, as "[t]o debar; to hinder").

that even a small religious assessment violated religious liberty.[207] Similarly, in contemporary doctrine, even a small monetary difference in treatment is considered a penalty and thus a prohibiting of the free exercise of religion.[208]

But not even a minor prohibition is required for abridging the freedom of speech. Whereas the First Amendment bars *prohibiting* the free exercise of religion, it denies government the power even to *abridge* the freedom of speech. Thus, government cannot in any degree reduce the freedom of speech. If it does so, it violates the First Amendment, regardless of whether there is any government prohibiting, coercing, or pressuring.

The First Amendment's very text thus bars the evasions of speech rights that have seemed to be permitted by the Supreme Court's emphasis on conversion and coercion. The First Amendment is not confined to the government's direct censorship, but can also reach the government's censorship through private organizations—as already evident from seventeenth-century English suppression through private organizations.[209] The textual standard, moreover, bars all abridging of the freedom of speech—by any means. It thus forbids such abridging through overt and subtle threats, through encouragement, through voluntary arrangements or cooperation with the Platforms, through the provision of coordination, through deceptive prebunking,[210] through subsidies or assistance to private entities to do any such things, and through inserting personnel in the Platforms or other entities.

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[207] An Act for Establishing Religious Freedom, *supra* note 14, at 85 ("that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness."); James Madison, *Memorial and Remonstrance against Religious Assessments* (1785), *in* 8 THE PAPERS OF JAMES MADISON 298 (1973).

[208] Trinity Lutheran Church v. Comer, 582 U.S. 449 (2017).

[209] *See supra* Section II.A.

[210] It could be argued that government prebunking or deception to induce the suppression of information, such as the Hunter Biden laptop, is government persuasion that merely abridges particular instances of speech, not the freedom of speech. For the distinction, see *infra* Section III.D. But whereas persuasion would have invited the Platforms to make an informed consensual decision to drop the news story, the deception induced them to drop it without such consent. Moreover, rather than merely induce the Platforms not to promote the story, the deception led them to suppress the speech of others who were sharing the story.

Of course, not all threats, deception, subsidies, and so forth abridge the freedom of speech, but the freedom of speech can be abridged through any of these mechanisms.[211]

When the government orchestrates massive viewpoint suppression, common sense would suggest that it is violating the First Amendment. Fortunately, the Amendment itself clearly requires the same conclusion—without any need to ask about prohibiting, coercing, etc.

C. Ab Initio Void, so No Need to Show that Government Caused Suppressive Effects

The First Amendment also reveals that government can violate the First Amendment merely by adopting a law or policy abridging the freedom of speech, regardless of whether it causes any suppressive effects. When government works through private organizations for censorship, *Blum* seems to mean that the Platforms' private action cannot be considered government action unless the government has exercised so much "control" over the Platforms' decisions removing speech that those decisions lose their "independent" private character.[212] From this perspective, government does not violate the First Amendment unless it causes actual suppressive effects. But that defeats the First Amendment's text and sensible meaning.

The First Amendment begins: "Congress shall make no law . . . ." Congress therefore has no authority *ab initio* to make a law abridging the freedom of speech. And derivatively, the executive has no authority to make a policy abridging the freedom of speech.[213] So, such a law or policy is unconstitutional the moment it is

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[211] There remains an inquiry as to what the First Amendment means by "the freedom of speech." At least at a theoretical level, it appears to have been understood as a natural right. *See* Hamburger, *Natural Rights*, *supra* note 23, at 909. But there is little reason for this Article to pursue the definition of the freedom of speech, as the current censorship seems to violate the First Amendment on all familiar and plausible conceptions of the freedom.

[212] Missouri v. Biden, 83 F.4th 350, 374, 376–77, 380, 387–88, 397 (5th Cir. 2023) (regarding meaningful control), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023); *id.* at 375–77, 380, 386, 388, 391, 397 (regarding independent decisionmaking or judgment).

[213] Incidentally, if the First Amendment's text is to guide its interpretation, it may be wondered how its guarantee that "Congress shall make no law . . ." can include a prohibition on executive policies. For an explanation, see *infra* Section III.D.

adopted, and this means the violation can be "complete before the law is applied at all."[214]

This isn't to dispute that a law or policy can abridge the freedom of speech by its effects, not just by its terms. In *Murthy v. Missouri*, for example, the government's policies have "had the intended result of suppressing millions of protected free speech postings."[215] Moreover, a law that by its terms abridges the freedom of speech can have chilling effects by leading speakers to tone down or suppress what they say.

But the crucial point is that even without physically suppressing speech or chilling it, a law or policy that by its terms (let alone more subtly) abridges the freedom of speech is already contrary to the First Amendment.[216] There being no authority at the outset to make such a law or policy, it is unconstitutional *ab initio*. Of course, standing to challenge such a law or policy can lie only in those who are adversely affected, but they include not only those actively suppressed by government but also those who hesitate to speak on the basis of a plausible or non-hypothetical reason to fear the law or policy's application to them.[217] They already are chilled in their speech by a law or policy that is *ab initio* void.

Because a law abridging the freedom of speech is unconstitutional as soon as it is adopted, the 1798 Sedition Act was unconstitutional and void from the very

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[214] Nicholas Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1255 (2010).

[215] *Missouri*, 83 F.4th at 392 (quotation marks omitted).

[216] Even without the First Amendment's textual foundation, the Fourteenth Amendment has justified such conclusions in equal protection cases:

> In *Peterson* v. *City of Greenville*, 373 U.S. 244, and in *Robinson* v. *Florida*, 378 U.S. 153, the Court dealt with state statutes or regulations requiring, at least in some respects, segregation in facilities and services in restaurants. These official provisions, although obviously unconstitutional and unenforceable, were deemed in themselves sufficient to disentitle the State to punish, as trespassers, Negroes who had been refused service in the restaurants. In neither case was any proof required that the restaurant owner had actually been influenced by the state statute or regulation.

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

[217] According to *Laird v. Tatum*, a plaintiff "must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action." 408 U.S. 1, 13 (1972) (quotation marks omitted). More moderately, in *Clapper v. Amnesty International USA*, it was said that the plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." 568 U.S. at 416.

start.[218] For the same reason, the government's policies suppressing speech through social media platforms have been unconstitutional from the moment they were adopted.

The implications for the current censorship are manifest in *Murthy v. Missouri*. Relying on *Blum* and derivative precedents, the government claims that the government has not violated the First Amendment because it has not transformed the Platforms' private suppression into government suppression.[219] From this point of view, there is no constitutional violation unless the government can be shown to have coercively caused the suppressive effects. Yet all of the government's censorship policies were candidly framed to reduce disfavored viewpoints. All such policies therefore violated the First Amendment the moment they were adopted, regardless of whether the government followed up and caused suppressive effects.

This immediate unconstitutionality is especially valuable against concealed censorship. Under *Blum*, plaintiffs can get recourse only after they can show that the government's speech policies caused suppression through private parties—something that can be done only slowly and inadequately under a secretive censorship regime. The *Blum* standard has thus let the federal government get away with years and years of suppression without legal consequences simply by keeping much of the suppression secret. So the *Blum* misreading is very dangerous. It has allowed the government's censorship to grow unchecked for five years. Even now, it leaves Americans without adequate recourse. It therefore is important to understand that even when censorship policy is secretive and suppressive effects are difficult to document, the policy is *ab initio* void; otherwise it might never be fully defeated in the courts.

In short, government policies that by their terms abridge the freedom of speech violate the First Amendment. There is no need to show suppressive effects or that government caused them.

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[218] Sedition Act, 1 Stat. 596 (1798) (expired 1801).

[219] Application for Stay, Murthy v. Missouri, *supra* note 121, at 21–22 (arguing that "Respondents' First Amendment Claims Lack Merit" on the ground that under *Blum* and related cases, the "content-moderation decisions at issue here are not state action").

D. The First Amendment's Text Helps to Distinguish Unlawful Government Censorship from Lawful Government Persuasion

If the First Amendment bars all abridging, or reducing, of the freedom of speech—as argued above—might it go too far? In particular, might it too severely limit government persuasion?

There are, of course, two sides to the question. On the one hand, current doctrine nearly defines the government's lawful persuasion as the absence of coercion—thereby seeming to let government use its own speech to evade the First Amendment.[220] Accentuating this risk is the doctrine on government speech rights, which will be discussed in Part IV.

On the other hand, the Constitution's abridging test might prevent government from making innocent attempts at persuasion. For example, the government sometimes has needed to dissuade a newspaper from publishing "sensitive" information, classified or unclassified, that might endanger individuals or the nation. Is it to be believed that the First Amendment bars these innocent and even valuable conversations?

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[220] The Fifth Circuit's opinion in *Missouri v. Biden* illustrates how the current emphasis on coercion leads to a distinction between coercion and persuasion, thus permitting government to censor through private parties as long as it is not overtly coercive. The Fifth Circuit wrote that "on one hand there is persuasion, and on the other there is coercion and significant encouragement—two distinct means of satisfying the close nexus test. . . . Where we draw that line, though, is the question before us today." *Missouri*, 83 F.4th at 374. In greater elaboration:

> [T]o help distinguish permissible persuasion from impermissible coercion, we turn to the Second (and Ninth) Circuit's four-factor test. Again, honing in on whether the government "intimat[ed] that some form of punishment" will follow a "failure to accede," we parse the speaker's messages to assess the (1) word choice and tone, including the overall parties' relationship; (2) the recipient's perception; (3) the presence of authority, which includes whether it is reasonable to fear retaliation; and (4) whether the speaker refers to adverse consequences.

Id. at 380–81. The court added:

> [E]ven though coercion may have been readily apparent here, we find it fitting to consult the Second Circuit's four-factor test for distinguishing coercion from persuasion. In asking whether the officials' messages can reasonably be construed as threats of adverse consequences, we look to (1) the officials' word choice and tone; (2) the recipient's perception; (3) the presence of authority; and (4) whether the speaker refers to adverse consequences.

Id. at 382.

The Amendment does not go so far. On the contrary, its text offers hints as to the difference between unlawful government censorship and lawful government persuasion. The goal is not necessarily originalist, but more generally to discern the boundary between unconstitutional censorship and permissible persuasion.

First, the First Amendment bars government from abridging the *freedom* of speech, not just abridging speech. So, it cannot be assumed that every government action reducing speech violates the First Amendment, and this leaves room for government to persuade newspapers or Platforms to drop some speech.

Second, the First Amendment applies to law and, by extension, policy. It thereby permits government to engage in persuasion diminishing speech as long as it does not rise to a law or policy.

The application of the First Amendment to policy requires detailed explanation. The Amendment narrowly states: "Congress shall make no Law . . . abridging the freedom of speech, or of the press." In an administrative era, this is widely taken as a bar against any law *or executive policy* abridging that freedom. This interpretation of congressional law to include executive policy is difficult to square with the Amendment's original intent or meaning. Yet it has the grim virtue of resting on contemporary realities and doctrine.

Realistically, when the executive imposes censorship, it is regulating and thus legislating in place of Congress. The executive may assume that its censorship policies escape the First Amendment's focus on congressionally made law. But those censorship policies are regulatory and thus legislative; they are the sort of policies that the Constitution assumes should be adopted by Congress, not the executive. So, when legislative power unconstitutionally escapes Congress, the First Amendment's limits on legislative power should follow that power and not be confined to the institution. The First Amendment's crucial limits on legislative power should not be rendered a nullity by letting legislative power run through the executive. Put another way, it is bad enough for legislative power to circumvent its bounds, and it would be even worse if that initial evasion allowed legislative power additionally to circumvent constitutional rights. Therefore, if only as a matter of realism, the First Amendment's freedom of speech should apply to government censorship policy, even if it runs outside laws made by Congress.

This conclusion is also justified doctrinally. When the executive is merely persuading a publisher to drop a particular story that might threaten the nation's se-

curity and so forth, it can be understood to be acting on its own constitutional authority and thus without any need for legislative authorization. But when the executive pursues a policy abridging the freedom of speech, it would seem to be acting in a regulatory manner, and so would need congressional authorization. As Daniel Hemel points out, when executive action thus abridges the freedom of speech, either it is "authorized by a statute, in which case the statute itself violates the First Amendment," or it is "ultra vires executive action."[221] In the latter instance, it collides with the Constitution's legislative and executive vesting clauses,[222] the Nondelegation Doctrine,[223] and possibly the due process of law.[224] Of course, the first possibility means that "when executive regulatory policy violates the First Amendment, it is the underlying act of Congress that conflicts with the Constitution."[225] And the second means that "some cases in which courts have found that the executive branch has violated the First Amendment should perhaps be recast"—as cases in which the executive branch has violated other clauses—"but the practical result is the same."[226] One way or the other, when the executive makes policy abridging the freedom of speech, it is constitutionally accountable.

The larger point here is that because the First Amendment bars only law and other policy abridging the freedom of speech, it still permits other persuasion. It leaves room for government conduct that does not amount to a law or policy. It also leaves space for government conduct that, even if policy, reduces speech without diminishing the freedom of speech.

Consider an easy example. Imagine that the government, acting genuinely without pressure, asks an individual newspaper in a particular instance to refrain from publishing an individual instance of speech. Ordinarily, such a request is not a law or policy. To be sure, it could be part of a broader policy. Standing by itself,

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[221] Hemel, *Executive Action*, *supra* note 193, at 604.

[222] *See* Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083, 1172, 1176 (2023).

[223] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring Congress to state at least an "intelligible principle").

[224] Hemel, *Executive Action*, *supra* note 193, at 604. Hemel emphasizes the due process violation, not the others, but with reservations. *Id.* at 617.

[225] *Id.* at 604.

[226] *Id.* at 604–05.

however, that single request is not a policy.[227] Equally significant, although it concerns speech, it does not necessarily reduce the *freedom* of speech; that would depend on the circumstances.

It is another matter altogether, however, when government candidly and persistently—by means ranging from coercion to coordination and deception—seeks to reduce disfavored content or viewpoints on all (or even many) of the dominant social media platforms. That is definitely a policy, even if not quite a law, and the coercion is not the only reason it reduces the *freedom* of speech. Either the persistence of the policy or its reach across a significant group of Platforms suggests that it is abridging the freedom of speech, not just speech.

Between these extremes, there are many fact patterns that are more difficult to analyze. Suppose the executive made a single coercive demand for suppression of a single publication. Coercion, remember, is not necessary for a speech violation. But it does indicate that the executive is acting in a regulatory or legislative manner, thus making even this single action a policy within the reach of the First Amendment.[228] Moreover, although coercion is not necessary for an abridging of the freedom of speech, it does reduce that freedom. So even this single act of coercion violates the First Amendment.

Now suppose that the executive adopted a policy (as, in fact, it did) to diminish the amount of vaccine-skeptical opinion published on the Platforms. And suppose (what is not true) that the policy was to be carried out entirely through coordination among the Platforms and deception of the Platforms—that is, without coercion. This clearly would be a policy, and it clearly reduces, or abridges, the freedom of speech of Americans who post on the Platforms. Note, moreover, that this policy would violate the First Amendment without proof of suppressive effects, because (as discussed in Section III.C) the mere adoption of the policy is unconstitutional—not to mention that it chills the freedom of Americans to speak on the Platforms.

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[227] Eugene Volokh writes, "[p]erhaps one difference might be between occasional one-off conversations and systematic programs," Volokh, *The Future of Government Pressure*, *supra* note 94, at 11, and that "even if some actions are not subject to constitutional scrutiny when done as part on an occasional one-off basis, they may become unconstitutional when done as part of a systematic approach." *Id.* at 14.

[228] According to Eugene Volokh, "when it comes to coercive threats aimed at suppressing speech, both the ad hoc demands and the systematic ones are unconstitutional." *Id.*

The goal isn't to run through all the possibilities, but merely to recognize that not every government action is a law or policy and not every reducing of speech abridges the freedom of speech. The First Amendment itself thus offers valuable hints as to how lawful government persuasion can be distinguished from unlawful government suppression.

E. Government Is Censoring the Public

Once one casts aside *Blum* and focuses on the First Amendment, one can see that the government is using the Platforms to censor the public in ways that reduce or abridge the freedom of speech. To be sure, some of the government's methods are coercive and some convert the Platforms' action into government action—as when the government threatens and harasses the Platforms to censor. Much of the government censorship, however, is not obviously coercive or apt to convert the private action of the Platforms into government action. This supposedly lesser but actually just as central censorship includes cajoling the Platforms, deceiving them (about the Hunter Biden laptop),[229] bargaining with them (for example, giving them trade protection for dataflows from Europe in exchange for censorship),[230] and most pervasively, offering coordination as to what should be censored. Although all of this is more mild and subtle than coercion, it is just as suppressive, and the central point is that it is *abridging* the freedom of speech.

The coordination needs special emphasis because it so crucial and far reaching. As noted earlier in Section II.G, a Platform needs to coordinate its censorship with the other Platforms, whether it aims just to sanitize its own site or aspires to shape public opinion. Either way, it needs to protect itself from losing users to other Platforms, and it cannot hope to shape public opinion effectively if the disfavored opinion will appear on the other Platforms—at least, that is, the other Platforms that are nearly as large and have significant overlap in users. The Platforms therefore need to coordinate with each other. But they cannot coordinate among themselves without violating the antitrust laws,[231] so government supplies information about what

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[229] *See supra* Section II.C.

[230] *See* Michael Shellenberger, Alex Gutentag & Leighton Woodhouse, *New Facebook Files Expose Biden Censorship-for-Spying Scheme*, PUBLIC (Aug. 7, 2023), https://public.substack.com/p/new-facebook-files-expose-biden-censorship.

[231] 15 U.S.C. § 1.

should be censored. Although this governmental coordination is mostly not coercive and does not convert the private censorship into government censorship, it is, by itself, a profoundly effective policy for reducing, or abridging, the freedom of speech.

In aid of its censorship, whether done coercively or through more subtle methods, the government has initiated, subsidized, and otherwise assisted and encouraged the development of private firms, nonprofits, and academic centers.[232] One result is an entire industry devoted to coordinating censorship and conveying the government's censorship expectations. Another result is another industry, devoted to grading alleged misinformation in line with government policy—both to help Platforms coordinate and to encourage speech outlets and advertisers to avoid what they are told is dangerous and disreputable opinion. By now, the subsidies and other encouragement have given these industries a life of their own. All the same, the government's action in subsidizing, assisting, encouraging, and shaping these industries clearly has been reducing or abridging the freedom of speech.

None of this is to deny that some of the actions of the Platforms and other private entities could be deemed governmental under *Blum*.[233] For at least that portion of the censorship, *Blum*'s standard for a First Amendment suit against the government has been met, and the private entities can also be sued for violating the First Amendment. But the argument here is that however valuable *Blum* may be for understanding when private action becomes unconstitutional in a suit against a private party, it sets too high a standard for determining when government censorship is unconstitutional—that is, for deciding a First Amendment case against the government. Under the First Amendment, all of the government's policies reducing the freedom of speech, even those that are not coercive, are abridging the freedom of speech and are unconstitutional.

F. Government Is Censoring the Platforms

In addition to using the Platforms to censor Americans, the government is censoring the Platforms.[234] This understanding of the censorship has been curiously unrecognized.

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[232] *See supra* note 171 (citing Kaminsky and Cleveland articles).

[233] 457 U.S. 991.

[234] Bantam Books v. Sullivan, 372 U.S. 58 (1963).

The suppression of a private party with additional suppressive effects for others is familiar from *Bantam Books, Inc. v. Sullivan*.[235] Sullivan was a member of a Rhode Island commission that threatened to recommend prosecution to pressure publishers into dropping "objectionable" publications. Although the authors were also injured parties, Bantam Books chose to bring suit in defense of its First Amendment rights, and it prevailed.[236] Similarly, the officials seeking the current censorship have suppressed not just the Platforms' users, but also the Platforms, at least in their capacity as custodians of their users' speech—for example, by pressing them to tamp down posts that did not violate their terms of service and even to change those terms.[237]

In a host of cases, the Platforms have insisted that their censorship of material posted on their sites is their constitutionally guaranteed freedom of speech.[238] If indeed the Platforms are speakers—as they have claimed—then government's policies and persistent efforts seeking the suppression of postings can directly abridge their freedom of speech, not just that of their users. So, at least when the government is in direct contact with the Platforms, *Blum* can be irrelevant. That is, when the Platforms are being unconstitutionally censored, there is no need to consider whether they are private intermediaries whose actions have been converted into government action.

Of course, in many instances, the Platforms have no objection to the censorship requests. But when the government applies coercion, lesser pressures, inducements, and other mechanisms that deprive the Platforms of their freedom, it is abridging their freedom of speech. And if the Platforms themselves have been unconstitutionally censored, their users—including both those who post and those

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[235] *Id.* at 67.

[236] *Id.*

[237] Missouri v. Biden, 83 F.4th 350, 389 (5th Cir. 2023) (regarding the FBI's pressure on the Platforms), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

[238] Notable examples include NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022), *cert. granted*, No. 22-555, 2023 WL 6319650 (2023); NetChoice, LLC v. Att'y Gen. of Fla., 34 F.4th 1196 (11th Cir. 2022), *cert. granted sub nom.* Moody v. Netchoice, LLC, 2023 WL 6319654 (2023).

who read—have injuries in fact that are fairly traceable to the constitutional violation. The users therefore have standing to sue in their own right and, if necessary, vicariously.[239]

But there is no need for the Court to go so far as to hold that the Platforms are speakers, because more modestly and accurately, they have speech rights as custodians. It is doubtful whether the Platforms have speech rights to censor their users.[240] In contrast, it is clear that the Platforms carry the speech of members of the public. On this account, they serve as custodians, if not bailees, of the speech of those who post on their sites.[241] Even if not formally considered bailees, their role is analogous.

Thus, when government, contrary to the First Amendment, adopts a policy suppressing speech carried by a Platform, it is violating the speech rights both of the Platform, acting as custodian, and of the individuals who posted the speech. The Platform's speech claim is merely derivative; although it is not the underlying speaker, it is the custodian for individual speakers, and as such it enjoys their speech rights against the government. Of course, their speech rights are also violated, it being their speech that is suppressed, so at least if the Platforms do not assert their

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[239] *See* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 60 (2021) (discussing "third-party standing for collaterally injured parties," especially where "constitutional injuries would persist if third-party standing were not allowed").

[240] *See* Brief of Amicus Curiae Professor Philip Hamburger in Support of Defendant-Appellant, NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022) (No. 21-51178), 2022 WL 803461 (arguing that social media platforms have no speech or speech rights in their censorship of their users); Brief of Amicus Curiae Professor Philip Hamburger in Support of Respondent, NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022), *cert. granted*, No. 22-555, 2023 WL 6319650 (2023), 2024 WL 305374 (likewise).

[241] *See* James Grimmelmann & Christina Mulligan, *Data Property*, 72 AM. U. L. REV. 829, 873 (2023) ("Recognizing the fundamental similarity between bailments of physical things and bailments of informational things allows legal institutions to evaluate and protect both data owners' and data storage providers' interests."); João Marinotti, *Tangibility as Technology*, 37 GA. ST. U. L. REV. 671, 671 (2021) (arguing that traditional categories of property law are "sufficiently robust to incorporate new and evolving digital assets"); João Marinotti, *Possessing Intangibles*, 116 NW. U. L. REV. 1227 (2022) (offering a theory of property law in an age of digital and crypto-assets); *see also* Danielle D'Onfro, *The New Bailments*, 97 WASH. U. L. REV. 97 (2022) (arguing for the application of the law of bailments to cloud storage).

rights for them, they can assert their own First Amendment rights against the government.[242] In short, the government's censorship of the Platforms leaves the affected individuals with First Amendment claims against the government.

G. Chilled Speech and the Right to Receive Opinion

The combination of chilled speech and readers' rights reinforces the argument here about the irrelevance of *Blum* and the importance of the First Amendment's word *abridging*.

Government has repeatedly made public as well as private statements seeking censorship from the Platforms.[243] The government's announced censorship policy is grossly overbroad, reaching far beyond its lawful power, and it thereby has tended to chill the speech of Americans—not merely by working through the Platforms, but more directly and broadly by communicating its suppressive policy to the public. Anyone with views opposed to the government has had reason to temper what they say to avoid being deplatformed, demonetized, deboosted, etc. Government policy thereby directly chills Americans in their freedom of speech, quite apart from the suppression that the government obtains through the Platforms.

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[242] *Cf.* RESTATEMENT (FOURTH) OF PROPERTY § 9(e) (2016) ("Bailors have the following rights . . . . To recover damages from a third party for harm to the bailor's interest in the item caused by that party's tortious actions, so long as those damages have not already been recovered from or by another party.").

Although the government is abridging the freedom of speech of the Platform's users, and although the Platform is merely serving as a custodian and is only vicariously asserting its users' speech rights, the Platform has a First Amendment claim. Indeed, a user or bailor cannot bring its own claim if the Platform or custodian has already recovered damages on the user's behalf.

[243] Missouri v. Biden, 83 F.4th 350, 359–66 (5th Cir. 2023) (reciting censorship demands by officials from the White House, Surgeon General, CDC, FBI, National Institute of Allergy and Infectious Diseases, CISA, and Department of State), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023). For example, "[i]n a joint press conference with the Surgeon General's office, the White House Press Secretary said that the White House 'expect[s] more' from the platforms, including that they 'consistently take action against misinformation' and 'operate with greater transparency and accountability.'" *Id.* at 362–63. As for private communications, "[i]n one email, a White House official told a platform to take a post down 'ASAP,' and instructed it to 'keep an eye out for tweets that fall in this same [ ] genre' so that they could be removed, too. In another, an official told a platform to 'remove [an] account immediately'—he could not 'stress the degree to which this needs to be resolved immediately.' Often, those requests for removal were met." *Id.* at 360.

Although a federal law or policy abridging the freedom of speech should be considered void *ab initio*, the chilling effects of the policy are worth noting. They reinforce the conclusion that the government violates the First Amendment even without actively suppressing any speech. As soon as government merely threatens to suppress speech, it gives Americans reason for timidity in their expression.

This chilling of speech is doubly unconstitutional because it affects Americans' right to read or receive opinions—a right that the First Amendment protects alongside the rights of speakers.[244] Although often presented as distinct from speakers' rights, readers' rights can be considered an essential element of the right to speak.

People cannot develop their views with any sophistication unless they can read other views that challenge, enlarge, moderate, or otherwise refine their own. So, when government demands the suppression of some speech and chills even more, it reduces the diversity, value, and moderation of opinion—thereby diminishing the opportunity for each individual to develop and express his own considered views.

Put another way, censorship reduces the output of critical voices, which lessens Americans' intellectual input, which in turn limits their intellectual output. Reading and speaking are inextricably linked in conversation. One cannot speak intelligently and thoughtfully without access to uncensored opinion.

The standard theory of free speech emphasizes the value of "uninhibited" debate.[245] It assumes that free speech means rough and tumble argument, often going to excess. This feeds into the government's assumption that unmoderated debate (meaning uncensored debate) tends toward extremes.[246]

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[244] Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); *Missouri,* 83 F.4th at 373 (on right of states to hear their citizens).

[245] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (speaking of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

[246] Defendants' Opposition, Louisiana v. Biden, *supra* note 99, at 7 (quotation marks omitted) (arguing that "Twitter, Facebook, and YouTube, among others, . . . operate under particularly strong economic incentives to moderate content, because they rely on a large user base to attract advertisers and thus focus on retaining the large group of users who may be alienated by more extreme views").

But this misses the deeper value of uncensored debate. Even if some persons will inevitably go to extremes, the extremes facilitate the development of more moderate views. As John Stuart Mill observed, the tendency of popular opinions to embody only elements of the truth means that one should hear all viewpoints to get closer to the complete truth: "[S]o long as popular truth is one-sided, it is more desirable than otherwise that unpopular truth should have one-sided asserters too; such being usually the most energetic, and the most likely to compel reluctant attention to the fragment of wisdom which they proclaim as if it were the whole."[247] Although extreme opinions draw some into their vortex, they are crucial for prompting more sober observers to moderate and refine their views.[248] Thus, "there is always hope when people are forced to listen to both sides."[249]

Suppression, however, threatens that hope. The chilling of unpopular perspectives offered by scientists and physicians can profoundly hold back scientific and medical debate. So can the chilling of patients' reports of adverse vaccine events. Therefore, when vast numbers of Americans are chilled in their scientific and medical speech, it dangerously injures all of us, who suffer a diminished opportunity to learn and to reconsider and refine our own views. The government's chilling policy appears to have had a massive and cascading effect in reducing the diversity of opinion, in leaving extremes unmodulated, and in diminishing the quality of public discussion.

In sum, the combination of chilled speech and readers' rights shows how the government's censorship policy injures Americans directly, not just through the Platforms. That policy abridges the freedom of speech even without converting private action to public action, even without coercion or significant encouragement, and even before proof that any individual had his or her post taken down.

Incidentally, the combination of chilled speech and the right to receive information reinforces why an injunction is justified against all of the government's censorship, not just against the particular suppression of the particular plaintiffs in a

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[247] JOHN STUART MILL, ON LIBERTY 84 (1859).

[248] Mill wrote: "I acknowledge that the tendency of all opinions to become sectarian is not cured by the freest discussion, but is often heightened and exacerbated thereby; the truth which ought to have been, but was not, seen, being rejected all the more violently because proclaimed by persons regarded as opponents." *Id.* at 93–94. But "it is not on the impassioned partisan, it is on the calmer and more disinterested bystander, that this collision of opinions works its salutary effect." *Id.* at 94.

[249] *Id.*

particular case. When even just one opinion is removed from debate, we all suffer intellectually and in the expression of our views. So, when government gets the Platforms to quiet down millions of posts, it dampens public discussion for all of us. And when, as observed here, government additionally chills the speech of innumerable others, the smothering effect on the national conversation is profound. In tamping down public discussion—whether through the Platforms or more directly by chilling speech—the government has seriously affected every one of us, confining what we hear and thereby also what we think and say. Each of us thus suffers from the injury to the speech of others.[250] None of us have our full freedom of speech unless everyone else has it too. The government is therefore deeply mistaken in claiming that the plaintiffs in *Murthy v. Missouri* do not need an injunction against the suppression of others.[251]

The broader point in Part III, however, is that judicial doctrine has confused abridging and prohibiting. The government has therefore assumed it can get away with relatively non-coercive censorship.

IV. THE EXECUTIVE'S FREEDOM OF SPEECH

The government feels that its censorship is justified by the doctrine on government speech rights. From its point of view, the executive has constitutional authority and perhaps even a constitutional right to speak. So, at least while the executive does not crudely issue regulations, but more informally uses sub-administrative speech to obtain suppression, it imagines that it is merely presenting its point of view.

A. Speech as Sub-Administrative Regulation

Government speech, however, is not just more speech, contributing to the range of ideas in American society. On the contrary, in an era of sub-administrative power, even informal comments by officials can be instruments of regulation. This

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[250] *Cf.* Missouri v. Biden, 83 F.4th 350, 398 (5th Cir. 2023) (speaking of "harms that radiate" out to affect "every social-media user"), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

[251] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 47 ("Whether a defendant's conduct also might have harmed nonparties has no bearing on whether more limited relief would adequately redress *the plaintiffs*.").

is especially worrisome because sub-administrative regulation done through seemingly casual government speech is an expanding pathway for evading constitutional limits, including the First Amendment.[252]

In a regime that complied with the Constitution's vesting of legislative power in Congress, the executive's speech would not be regulatory. Within the scope of executive power, the president and his subordinates could, for example, admonish Americans to comply with lawful statutes, they could encourage Americans to follow moral injunctions beyond the requirements of statutes, and they could urge statutory and constitutional reforms.[253] But the speech of executive officials would have no role in regulating Americans or their speech. To be sure, executive speech could apprise Americans of the executive's understanding of the law, but until adopted by the independent judgment of a court, that interpretation would have little if any regulatory authority.

Even in the administrative regime that prevailed in much of the twentieth century, sub-administrative executive speech had limited regulatory effect. Agency interpretations, sometimes merely informal interpretations, could enjoy judicial deference.[254] At least ideally, however, executive speech of a sort less formal than enunciated in administrative rules did not ordinarily have regulatory effect.[255]

Sub-administrative power, however, challenges any pretense that informal executive speech is not regulatory. Already in the twentieth century, there was growing regulation by raised eyebrow and threat of administrative hassle—such as threats of extra inspections. In this century, sub-administrative power has become

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[252] *See supra* Section I.C.

[253] For the executive power, see U.S. CONST. art. II, § 1; *see also id.* art. II, § 2 ("he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."); *id.* art. II, § 3 ("[h]e shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."); *id.* art. II, § 3 ("he shall take Care that the Laws be faithfully executed").

[254] United States v. Mead Corp., 533 U.S. 218 (2001); Auer v. Robbins, 519 U.S. 452 (1997); Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Skidmore v. Swift Co., 323 U.S. 134 (1944).

[255] Although some doctrine on judicial deference conflicted with the ideal of notice-and-comment rulemaking, such rulemaking has long been the ideal of administrative power. *See, e.g.*, PETER L. STRAUSS, ADMINISTRATIVE JUSTICE IN THE UNITED STATES 220 (2d ed. 2002) (referring notice-and-comment rulemaking as the "central model").

the cutting edge of administrative power. To open up new regulatory frontiers unapproved by Congress or potentially barred by the Constitution, officials use not statutes, nor even administrative rules, but informal speech—sometimes in public, sometimes in private—to hint, threaten, badger, cajole, coordinate, or otherwise regulate. Being below the level of what courts ordinarily consider coercive or final agency action, such sub-administrative speech enables officials to evade political and even constitutional obstacles, including the First Amendment.[256]

That is why so much of the current censorship looks like speech vs. speech—government speech against private speech. And that is why (as will be seen in Section IV.C) the government defends its censorship in terms of its own freedom of speech. But in an era of sub-administrative power, government speech cannot be assumed to be merely speech. All too often, it is a means of underhanded regulation, which is especially effective at evading constitutional limits.

B. The Executive's Speech Authority Under Its Executive Power

The government speech doctrine is rarely discussed in terms of executive power, and it therefore seems important to recognize that the President and his subordinates enjoy executive power and thus some constitutional authority to speak.[257] But the power to regulate is part of the legislative power, not the executive power, so the executive depends on Congress for authority to regulate. The Constitution grants Congress the power to "regulate Commerce . . . among the several States," and the executive's domestic regulatory power (outside the military, the territories, and the District of Columbia) derives primarily from this legislative power over commerce. So, even on the assumption that the executive may regulate, that regulatory authority is derivative of Congress's commerce power, not inherent in the executive.[258]

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[256] *See, e.g.*, NRA v. Vullo, 49 F.4th 700, 707 (2d Cir. 2022) (finding no coercion), *cert. granted*, 144 S. Ct. 375 (2023). For final agency action, see *supra* note 59.

[257] Another question about the executive's authority to speak would be how much it includes an authority to engage in domestic propaganda—to reshape the public opinion by which the public holds government to account. That, however, can be left for another day.

[258] United States v. Lopez, 514 U.S. 549, 557 (1995).

Any such derivative regulatory authority must also be at least loosely authorized by Congress.[259] And it must comply with the First Amendment.[260] Whatever the executive's own authority to speak or its authority to *exercise* Congress's regulatory power, it cannot thereby regulate in a way that abridges the freedom of speech.

Therefore, even before one examines the executive's First Amendment claims, it is difficult to conclude that the executive inherently has any regulatory authority over speech or to abridge the freedom of speech. A president and his subordinates can speak to demand compliance with constitutionally lawful statutory duties and can advocate moral duties and legal reforms.[261] They don't have any authority, however, to adopt or impose regulatory policies governing speech that are unauthorized by Congress or that abridge the freedom of speech.[262]

C. Does the Executive Have Rights Under the Free Speech Clause?

Whether the executive has First Amendment speech rights is an interesting and largely unexplored question. The government speech doctrine developed in cases on government benefits, suggesting that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[263] The doctrine, however, has come to include the broader functional observation that it is "not easy to imagine how government could function if it lacked this freedom."[264] And with this idea that government needs speech have come hints that this is a First Amendment freedom. Drawing on such ideas, the government in

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[259] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring Congress to state at least an "intelligible principle").

[260] One might add that it also must comply with the Fifth Amendment's due process of law. *See* the argument of Daniel Hemel quoted in *supra* Section III.D.

[261] Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000) (recognizing that government may "advocate and defend its own policies").

[262] For suggestions on the difference between regulatory and non-regulatory policies, see HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, at 11, 61–71 (regarding regulatory conditions).

[263] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

[264] Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

Murthy v. Missouri has claimed that it has a "right" [265] to make its censorship demands and that this is something to which it is "entitled."[266]

Of course, the question here isn't really about government as a whole, but about the executive. At one level, as seen in Section IV.B, the issue is about executive power, and as already noted, although executive power includes some authority to speak, it's doubtful whether this includes any regulatory power over speech. It remains to be considered, however, whether the president and the rest of the executive enjoy the First Amendment's freedom of speech.

The freedom of speech or the press was widely recognized in the founding era as a natural right—that is, as a right enjoyed by the people prior to the formation of government. For example, a proposed committee report on what became the Bill of Rights (in the hand of Roger Sherman) stated: "The people have certain natural rights which are retained by them when they enter society, Such are the rights . . . of Speaking, writing and publishing their Sentiments with decency and freedom."[267] As a matter of theory, the freedom of speech belongs to the people, not government.[268]

Indeed, although the freedom of speech is often said to be an individual right, created for the protection of individuals, it more broadly is a limit on federal power, thus protecting all who are subject to it.[269] Such a point could be made about most

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[265] Defendants' Opposition, Louisiana v. Biden, *supra* note 99, at 147, 153, 166, 174, 213, 254 ("a government official has a right to engage in non-binding speech on matters the official finds important").

[266] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 2, 23 ("entitled").

[267] Roger Sherman's Proposed Committee Report (July 21–28, 1789), *in* CREATING THE BILL OF RIGHTS, supra note 24, at 267. For other such statements, see Hamburger, *Natural Rights*, *supra* note 23, at 919 n.39.

[268] To be sure, government could enjoy natural rights—as when it owned property. But that's not to say that government was meant to enjoy the Constitution's protections for the natural rights of property, bearing arms, free exercise of religion, assembly, or speech. Indeed, there seems to be no founding evidence that the First Amendment was thought to protect the government's freedom of speech. Instead, as noted above in the text, it was understood to protect the people.

[269] *See* HAMBURGER, LIBERAL SUPPRESSION, *supra* note 43, at 274 ("There is a tendency to think of the enumeration of rights as a series of protections for individuals, and the Supreme Court has, in fact, limited a few rights to individuals. The enumeration of rights, however, was framed as a series of limitations on the power of government. After the Constitution sketched out government

of the rights enumerated in the Bill of Rights. But it is clear enough about the freedom of speech because the First Amendment is framed as a limit on Congress and therefore doesn't confine its rights to any particular entity or type of entity. Included are not just the people in the sense of citizens, nor just individuals, but also corporations and other entities—as long as they are within the protection of American law.[270]

The breadth of this protection makes sense structurally, because the First Amendment was a limit on power, not simply a guarantee of rights:

> In some philosophical accounts, rights are logically derived from the nature of individuals. The Constitution, however, was designed not merely to protect individuals but more broadly to limit government, and for this purpose, its protections for rights generally had to avoid creating distinctions among those who could claim them.[271]

Being a structural limit on legislative power, the First Amendment had to protect all who could be affected by that power. And this breadth of protection had the added value of ensuring a breadth of societal support for freedom of speech.[272]

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power with the broad brushstrokes of enumerated powers, it then penciled in more detailed limits with the enumerated rights. And because these rights are limits on government, they typically do not confine their freedom to individuals.").

[270] *Cf.* United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984) (holding that "private property" in the Takings Clause of the Fifth Amendment encompasses the property of state and local governments when condemned by the United States). For the limited domain of constitutional rights, being confined to persons within the protection of the law, see Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009).

[271] HAMBURGER, LIBERAL SUPPRESSION, *supra* note 43, at 275.

[272] "When rights are equally enjoyed . . . individuals can find at least some allies in organizations, and idealistic organizations can find some allies in business associations, and so forth. Equality thus takes rights beyond the Constitution's formal guarantees by giving these rights a depth and breadth of social support." *Id.* at 288. Alas, federal law these days attributes different speech right to churches, businesses, political organizations, and so forth:

> The result is a fracturing of Americans and their rights, in which specialized types of speech are divided among specialized speakers. In thereby slicing and dicing Americans and their constitutional rights, the government abridges the constitutional freedom both of associators and of their associations. Indeed, it fragments the interests of the people in their rights, undermining the structural protection for liberty that comes when all persons have an equal claim to rights and thus an equal interest in defending them.

Id. at 328.

Even states are protected. Being subject to federal law, they are protected by the First Amendment's limits on federal law. Far from being a novelty, this is familiar from the nation's first serious First Amendment controversy. When Virginia and Kentucky (under the leadership, respectively, of James Madison and Thomas Jefferson) adopted their resolutions against the 1798 Alien and Sedition Acts, these states relied on the First Amendment, protesting, in the words of the Virginia resolutions, against the exercise of "a power not delegated by the constitution, but on the contrary expressly and positively forbidden by one of the amendments thereto."[273] The First Amendment was a limit on federal power, and so it could be asserted by all that were subject to that power, including states.[274]

What does this mean for the federal government? Can it assert First Amendment rights? The one possible justification is narrowly textual. Although the Amendment generally limits the federal government, it begins: "Congress shall make no law . . . ." In thus limiting Congress, perhaps the First Amendment protects the federal executive and judiciary. From this perspective, those departments can have First Amendment claims—at least against Congress.

But this is a rather artificial basis for overturning the old and continuing understanding that the First Amendment is a limitation on the federal government. The Amendment probably focuses on congressional laws to confine the scope of its rights, not to give its rights to the executive. The focus on laws, in other words, clarifies that the Amendment isn't limiting nonregulatory executive action. For example, as observed in Section III.D, the word *laws* leaves room for some executive persuasion, but that's not to say it gives the executive any freedom of speech in its persuasion. As put by Justice Stewart, "[t]he First Amendment protects the press

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[273] Virginia Resolutions (1798), *in* 17 THE PAPERS OF JAMES MADISON 189 (David B. Mattern et al. eds., 1991).

[274] It was understood that the Constitution applied to the rights of states in relation to the federal government. In a rare discussion of how to draft the Constitution, the Committee of Detail observed that the Constitution should not begin with a preamble, partly because "we are not working on the natural rights of men not yet gathered into society, but upon those rights, modified by society, and interwoven with what we call the rights of states." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 137 (Max Farrand ed., 1911) (omitting italics and parentheses indicating how the document was edited).

from governmental interference; it confers no analogous protection on the Government."[275]

Confirming this conclusion is the historical reality that it's difficult to find any founding era claim that the First Amendment protects the executive or the federal government. Instead, the overwhelming evidence is that the freedom of speech and other rights limited the federal government. Both Alexander Hamilton and James Madison described the rights as "exceptions" to power.[276] When proposing the Bill of Rights, Madison also said that the rights were "barriers against power."[277] The notion of federal government speech rights thus departs from the founders' understanding of rights.

More broadly, the federal government, in relation to the people, has powers, not rights.[278] Whereas the Constitution vests powers in government, it guarantees rights against government. Only in international relations, where nations have no common superior, does the federal government have rights.[279] Domestically, it only has powers. This matters because if government has domestic rights as well as powers, its rights could defeat the rights guaranteed to the people—a danger illustrated

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[275] CBS v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring).

[276] Alexander Hamilton explained in *Federalist No. 78*, "[b]y a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance as that it shall pass no bills of attainder, no *ex post facto* laws, and the like." THE FEDERALIST NO. 78 (Alexander Hamilton) 524. Similarly, when James Madison introduced the initial draft of the Bill of Rights on the floor of the House of Representatives, he observed that "a bill of rights" would "enumerat[e] particular exceptions to the grant of power." CREATING THE BILL OF RIGHTS, *supra* note 24, at 83.

[277] James Madison, Speech (June 8, 1789), *in* CREATING THE BILL OF RIGHTS, *supra* note 24, at 80.

[278] Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1502, 1504 (2001) ("Beyond the specific textual limits of the First Amendment, the general idea of government 'freedom' is deeply problematic in the constitutional structure. The very point of the Constitution was to confine and limit government in order to preserve individual liberty. To read the First Amendment as instead recognizing the government's freedom is, once again, to turn the Constitution upside down. It in effect reverses the constitutional formula, making government the speaker and the people the regulators.").

[279] *See, e.g.*, 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 21 (1827) (on the rights and duties of nations in a state of peace).

by the unfortunate phrase "public rights," which now defeats due process and jury rights.[280]

Similarly, it is worrisome that judicial doctrine leaves room for the government to think it has a speech right. This "threatens to shift the balance of power between the government and the people."[281]

D. Could the Executive's Alleged Speech Right Be Unlimited by the People's Speech Rights?

The risk under the Supreme Court's government speech doctrine is not merely that the executive imagines it has a First Amendment right, but that its supposed speech right will be unlimited by anyone else's speech rights. Although the Court has spoken about this only in generalities, such as that the government is "entitled to say what it wishes,"[282] it has left the impression that "whatever limits exist on government speech, they are not to be found in the First Amendment."[283] Of course, *Blum* and related cases seem to suggest that government cannot engage in coercion to suppress speech, but otherwise the doctrine seems to leave government speech unrestrained.[284] So, it should be no surprise that in *Murthy v. Missouri*, the executive claims it is "entitled" to speak "free from First Amendment scrutiny."[285]

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[280] The notion of public rights did not appear in the Constitution, but rather was drawn from civil law. But after it acquired a modest place in case law, in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 284 (1856), it was eventually used to justify administrative proceedings, in violation of traditional jury and due process rights. *See, e.g.*, Atlas Roofing v. OSHA, 430 U.S. 442, 461 (1977); Crowell v. Benson, 285 U.S. 22, 50 (1932).

[281] Bezanson & Buss, *supra* note 278, at 1502, 1504.

[282] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995).

[283] *See* Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411 (2004).

[284] *See, e.g.*, *Vullo*, 49 F.4th at 706–07 (quotation marks omitted) ("Government officials cannot, for example, use their regulatory powers to coerce individuals or entities into refraining from protected speech. At the same time, however, government officials have a right—indeed, a duty—to address issues of public concern."); *id.* at 714 ("In determining whether a particular request to suppress speech is constitutional, what matters is the distinction between attempts to convince and attempts to coerce.").

[285] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 23, 28 (arguing that when government speaks, "the Free Speech Clause has no application," and that government speech is "exempt from First Amendment scrutiny") (citing Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009)) (interior quotation marks omitted).

From its perspective, when it speaks, "the Free Speech Clause has no application."[286]

But is that true? The government defends its speech in terms of the "bully pulpit."[287] But the *bully* pulpit (meaning excellent) does not justify unconstitutional *bullying* (in the sense of threatening).[288] Recall from Section IV.A that the executive is using its speech sub-administratively to abridge the freedom of speech. So, putting aside the bully pulpit metaphor, it must be asked whether the executive, in addition to the speech authority it enjoys as part of its executive power, also has First Amendment speech rights that are unlimited by the speech rights of those it is seeking to suppress?[289]

The question nearly answers itself.

For one thing, even if the executive had freedom of speech against Congress, that would be a right only against Congress, not against the people. As already noted, the First Amendment's words "Congress shall make no law" could be understood to protect the executive. This textual argument, however, which could be twisted to give the executive the freedom of speech, also confines any such freedom to a claim against Congress.

This limitation is particularly important here because the executive is using a speech claim to justify what in reality is an exercise of power—a sub-administrative power to regulate the people and their speech, even to abridge their freedom of speech.[290] Federal powers, however, are subject to rights,[291] so it doesn't make sense

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[286] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 29.

[287] *Id.* at 24; Application for Stay, Murthy v. Missouri, *supra* note 121, at 3, 5, 28.

[288] *Bully*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/bully.

[289] It may be thought that the government's government-speech arguments in *Murthy* are aimed simply at the Fifth Circuit's injunction, not the speech rights of Americans. In fact, the government's bully pulpit and government speech arguments are directed specifically against the plaintiffs' free speech and state action claims. *See* Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 14, 24, 34 (on bully pulpit); *id.* at 14, 23, 28, 37 (on government speech).

[290] *See supra* Section IV.A.

[291] Philip Hamburger, *Inversion of Rights and Powers*, 63 BUFF. L. REV. 731, 747 (2015) ("Americans carved out rights as exceptions from powers. They gave power—legislative, executive, and judicial—to their governments and then guaranteed rights that restricted or withdrew portions of this power. Power thus was subject to enumerated rights rather than the other way round.").

to think that the executive's use of speech to suppress speech is unlimited by the First Amendment.

More generally, as seen in Section IV.C, the federal government has *power* over the people, not rights, and the rights are "exceptions" to that power.[292] It therefore is a reversal of the constitutional order to say that the government has rights against the people that defeat the rights of the people.

Supreme Court doctrine on government speech, however, is profoundly unclear about such limitations. And *Blum* and related cases seem to suggest that the only relevant limitation is coercion.[293] So, under current judicial doctrine, the executive has reason to think it can say what it wishes, even in pursuit of speech limitations, as long as it is not coercive. Making the most of this doctrine, the government in *Murthy v. Missouri* draws an artificially sharp distinction between its speech and its coercion and declares that it has a right to speak "free from First Amendment scrutiny."[294]

This isn't just a momentary forgetfulness about whose rights were meant to be protected by the Bill of Rights—as becomes clear from the government's approach to the chilled speech doctrine. In *Murthy*, the executive has precisely *nothing* to say about how the government's policies and actions chilled the speech of the plaintiffs

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[292] *See supra* note 276 (regarding Hamilton and Madison on rights as exceptions to power).

[293] *See, e.g.*, NRA v. Vullo, 49 F.4th 700, 706–07 (2d Cir. 2022) (quotation marks omitted) ("Government officials cannot, for example, use their regulatory powers to coerce individuals or entities into refraining from protected speech. At the same time, however, government officials have a right—indeed, a duty—to address issues of public concern."), *cert. granted*, 144 S. Ct. 375 (2023); *id.* at 714 ("In determining whether a particular request to suppress speech is constitutional, what matters is the distinction between attempts to convince and attempts to coerce.").

[294] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 23 (quotation marks omitted). For the government's sharp line between its speech and its coercion, consider this passage from its brief: "Of course, the government may not punish people for disagreeing with it or use its authority to suppress contrary views. Nor may the government circumvent that limitation by compelling a nominally private party to do the suppression for it. But those principles limit only compulsion through threats or inducements, not the government's own speech." *Id.* (citations omitted). Even in thus conceding a coercion limit, the government treats its speech as distinct from its compulsion, so as to justify its claim that its speech is constitutionally unconfined.

and other Americans.[295] Instead, it repeatedly expresses deep concern that an adverse decision will "chill" its own speech.[296] The government's freedom of speech displaces ours; its suppression-seeking speech is unlimited by our freedom of speech.

In such ways, the government speech doctrine has inadvertently let the executive think it is justified in using speech to establish a vast system of power over the speech of almost all Americans. In this vision of the freedom of speech—the *executive's* freedom of speech—the executive can sub-administratively use "information" and "guidance" to censor public debate.[297] Judicial doctrine on government speech thus becomes a foundation for elevating the executive as the nation's arbiter of truth and error—the Grand Administrator, which knows best when to insist on its "accurate information" in place of our "misinformation"[298]—whether in science and medicine, or in elections and politics.[299]

All in all, the executive has neither constitutional authority nor any right that justifies its speech-abridging policies. None of this is to deny that the executive may engage in persuasion along the lines suggested in Section III.D—at least within the scope of its executive power. But it is perverse and dangerous to suggest that it has any constitutional authority to use speech to regulate speech or abridge the freedom of speech. And it is even more illogical and hazardous to urge that the executive has the freedom of speech, that such a right is unlimited by our freedom of speech, and that the executive thus has a right to use its speech to censor ours. These, however, are the possibilities left open by the Supreme Court's carelessly framed government speech doctrine.

V. UNQUALIFIED IMMUNITY

Topping off the structural, state action, First Amendment, and government speech doctrines, qualified immunity completes the judicial invitation for censorship. The point isn't to condemn all qualified immunity, although there is much

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[295] *Id.* For chilling, *see supra* Section III.G.

[296] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 16, 47, 49, 50.

[297] *Id.* at 6.

[298] *Id.* at 6–7.

[299] *Id.* at 11–12.

scholarship to that effect.[300] Rather, what invites censorship is the unqualified character of this immunity.

Qualified immunity is a judicially created doctrine protecting federal and state officials from paying damages for their departures from law,[301] as long as they do not violate any "clearly established" right—meaning they are safe from legal accountability as long as there is even the slightest reasonable ambiguity.[302]

Officials used to be without qualified immunity and so were very careful to stay within the bounds of law, lest they be sued. This was true already in England, and it remained typical in America.[303] The claims against officers came not in any special *Bivens*-like actions, but in ordinary actions in state courts, usually for tort or trespass. Thus, although sovereign immunity barred actions against the United States or any of the states, regular causes of action for damages were available in state courts against wayward federal and state officials.[304]

This was a crucial protection for liberty. First, it was an incentive for lawful conduct. Where there was any question about the bounds of lawful conduct, officials understood that they should not go near the edge unless they were willing to pay the price and that they should get legal advice whenever there was any doubt. Officials therefore were ordinarily much more careful to avoid violating rights than today. Second, constitutional questions could be addressed in suits against individual officials without the undue hesitation that judges often reveal when asked to

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[300] *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 82 (2018); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 304–07 (2014).

[301] Harlow v. Fitzgerald, 457 U.S. 800 (1982) (applying qualified immunity to presidential aides).

[302] Anderson v. Creighton, 483 U.S. 635, 638 (1987).

[303] HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 300, at 302–03.

[304] Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 204 (1991); HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 300, at 185, 299–309; William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L REV. 45, 55–57 (2018).

hold government acts unlawful. Third, the liability of officials was structurally important. It ensured that rights came with remedies, thereby preserving the balance of power between the people and government.[305]

Of course, it was understood that officials might sincerely be misled by ambiguities in law and precedent. But the solution was to let them argue, on the basis of the ambiguities, for reducing damages, not to bar suits against them.[306]

Although there are wholesale critiques of qualified immunity, the narrower concern here is that the doctrine categorically protects all officials, thus failing to preserve accountability where it is most needed. The doctrine, for example, protects executive officials not only when exercising executive power, but even when engaging in administrative power—indeed, when exercising sub-administrative regulation. It protects such officials, moreover, when they could have easily consulted government lawyers before violating anyone's rights.

The unqualified character of qualified immunity also fails to recognize the value of cross-jurisdictional remedies for rights violations. It is one thing for a state legislature to protect state officials from state damages suits. But there is structural value in having state damages actions against federal officers—just as there is structural value in having federal damages actions under 42 U.S.C. § 1983 against state officers. Precisely because each government, federal or state, is apt to protect its

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[305] As I have written before:

> Already in English law, the liability of officers was foundational—as was commonly illustrated by two judicial opinions. The judges in the fifteenth century informed Henry VI that if the king commanded a man to arrest another, the second man would have an action of false imprisonment against the first, even if the arrest were done in the king's presence—the point being that a facially unlawful order, even if directly from the king, was no justification for a ministerial act. In the same century, Chief Justice John Markham "told King Edward IV that he could not arrest a man on suspicion of treason or felony, as any of his liege subjects may, because if he does wrong the party cannot have an action"—the principle being that there had to be potential liability for the discretionary act of making an arrest without a warrant. These opinions (usually paired to cover both ministerial and discretionary acts) reached lawyers on both sides of the Atlantic through the writings of Coke and other commentators, and for centuries they framed common law assumptions about officer liability.

HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 300, at 305, n.e. In other words, even medieval law was civilized enough to reject qualified immunity.

[306] *Id.* at 185.

own officers, it is crucial to preserve cross-jurisdictional remedies, so that federal officers are accountable in state courts and state officers are accountable in federal courts.

The cost of categorical immunity across jurisdictions is visible in two of the speech cases currently before the Supreme Court. In *NRA v. Vullo*, a state official urged banks and insurers to cut off their services to the National Rifle Association on the ground that its promotion of gun ownership came with reputational risks for the financial institutions.[307] In *Murthy v. Missouri*, federal officials encouraged and pressured the Platforms to censor Americans.[308] In both cases, although the officials had plenty of time to get legal advice, they used sub-administrative methods of regulation to suppress dissenting viewpoints. Nor should this be surprising in light of the blanket immunity for officials whenever there is any plausible ambiguity that might justify their unlawful conduct. Just as the state official in *Vullo* had no reason to fear a damages judgment in federal court under Section 1983,[309] so the federal officials in *Murthy v. Missouri* had no reason to fear a damages judgment in state court under state tort law.

Qualified immunity has categorially protected all officials who can claim a smidgeon of ambiguity, and it thereby has emboldened officials from the White House, the FBI, Homeland Security, and other agencies to violate the First Amendment. They feel secure in the knowledge that even the slightest ambiguity in law or precedent will protect them, whatever their actions or circumstances.

The perverse effect of this unqualified immunity in barring damages suits is multiplied by doubts as to whether there can be injunctions. Qualified immunity largely prevents censored Americans from securing damages from officials for their past censorship harms. Therefore, the only plausible remedy for the censorship is to secure an injunction against future harms. But the Supreme Court, as noted in

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[307] NRA v. Vullo, 49 F.4th 700, 709 (2d Cir. 2022), *cert. granted*, 144 S. Ct. 375 (2023).

[308] *See, e.g.*, Missouri v. Biden, 83 F.4th 350, 389 (5th Cir. 2023) ("we find the [P]latforms' decisions were significantly encouraged and coerced by the FBI"), *cert. granted sub nom.* Murthy v. Missouri, 144 S. Ct. 7 (2023).

[309] *Vullo*, 49 F.4th at 719 (quotation marks omitted) (holding that Vullo is "entitled to qualified immunity because the law was not clearly established and any First Amendment violation would not have been apparent to a reasonable official at the time," and "the contours of that right were not so sufficiently clear that a reasonable official in the circumstances here would have understood that what she was doing violated that right").

Section II.D, seems to doubt whether there's even standing for an injunction. And as hinted in Section III.G, there's insufficient recognition that when government censorship policy suppresses and chills the speech of many Americans, it diminishes what plaintiffs can read and ultimately say. So, there's a risk that, even against the most massive censorship system in the nation's history, Americans can secure neither damages nor an effective injunction.

Whatever is done with qualified immunity, the Supreme Court should recognize the danger of offering it so categorically. In the meantime, the unqualified doctrine tends to liberate federal officials to suppress Americans without fear of paying damages. It is the final touch by which doctrine invites officials to evade the Constitution's barriers against censorship.

VI. DANGERS FOR INDIVIDUALS AND SOCIETY

The current censorship is perilous—for individuals and society. The dangers include mind control and the consolidation of government and society—with all the obvious risks for independent judgment and freedom in politics and science. Without free speech, no freedom can be secure.

A. Mind Control, Elections, and Science

Censorship limits more than speech. The whole point is to restrict what others read and therefore may think. At stake is control not just of publicly expressed opinion, but of the mind. With that comes control over elections and the stifling of science.

Far from being extravagant, the point about mind control is well recognized within the government. Beginning at least in 2019, the information warfare methods that the United States developed in its operations against foreign threats were self-consciously turned inward against domestic dissent.[310] Moreover, the head of

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[310] *See* THE WEAPONIZATION OF CISA, *supra* note 61, at 5 ("CISA, a little-known agency buried in the depths of DHS, soon expanded its mission to combat 'foreign disinformation.' Not long thereafter, under the pretext of protecting 'election infrastructure,' CISA began surveilling and censoring American citizens online, directly and by proxy."); *Missouri*, 83 F.4th at 365 ("[T]he FBI's activities were not limited to purely foreign threats. In the build up to federal elections, the FBI set up 'command' posts that would flag concerning content and relay developments to the platforms. In those operations, the officials also targeted domestically sourced 'disinformation' . . . ."); Weingarten, *supra* note 124 (discussing how government and its private allies "would quickly turn their attention from the disinformation of foreign adversaries, to the purported 'mis-, dis-, and mal-information'

the Cybersecurity and Infrastructure Security Agency candidly expanded its efforts from protecting America's material infrastructure to securing its "cognitive infrastructure."[311]

The notion that by shaping minds one can improve lives has become a popular vision of efficient regulation.[312] Benign as this view may seem, it has not been much of a leap for government to imagine that it can efficiently protect us from harm by protecting us from "misinformation." Censorship thus seems an admirably efficient means of shaping behavior. Rather than force people to live up to a rigorous law, government can shape minds with censorship to get what seems like voluntary conformity.

Inevitably, the mind control has been aimed at elections. On the theory that Russia was interfering with American elections, the government justified getting the Platforms to suppress domestic dissent and information centrally relevant to elections, such the Hunter Biden laptop story. Although the FBI knew the laptop was real, not Russian disinformation, it sought censorship of the story on the theory that it *was* Russian disinformation.[313] And this is just the most famous example.

(MDM) of Americans."); Shellenberger, *CTIL Files*, *supra* note 2 ("Breuer admitted in a podcast that his aim was to bring military tactics to use on social media platforms in the U.S."); MICHAEL J. GLENNON, FREE SPEECH AND TURBULENT FREEDOM: THE DANGEROUS ALLURE OF CENSORSHIP IN THE DIGITAL ERA (forthcoming 2024) (manuscript on file with author); Alistair Somerville & Jonas Heering, *The Disinformation Shift: From Foreign to Domestic*, GEO. J. OF INT'L AFFS. (Nov. 28, 2020), https://gjia.georgetown.edu/2020/11/28/the-disinformation-shift-from-foreign-to-domestic/ (candidly urging that "as false narratives continue to emanate from the highest ranks of the outgoing US administration, fighting disinformation will now require a coordinated 'whole-of-society' approach that addresses both foreign and domestic vulnerabilities").

[311] *See* Miller, *Cyber Agency, supra* note 61. Similarly, "'Cognitive security is the thing you want to have,' said [Sara-Jayne] Terp on a 2019 podcast. 'You want to protect that cognitive layer. It basically, it's about pollution. Misinformation, disinformation, is a form of pollution across the Internet.'" Shellenberger, *CTIL Files*, *supra* note 2. Although British, Terp worked for a while on CTIL with a CISA badge. *Id.*

[312] For one version of such ideas, see RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

[313] Tiana Lowe Doescher, *FBI Admits They Knew Hunter Biden's Laptop Was Real When They Killed the Story*, WASHINGTON EXAMINER (July 20, 2023, 11:15 AM), https://www.washingtonexaminer.com/?p=2570146 ("Laura Dehmlow, head of the FBI's Foreign Influence Task Force, said during a hearing with the House Judiciary Committee that top officials on foreign interference 'certainly' knew that the hotly debated laptop did indeed belong to the first son.").

The federally orchestrated censorship ramped up precisely to suppress election-related posts.[314]

By influencing political choices in elections, officials can hope to perpetuate their own power. So, if Americans cannot rely upon the courts to protect their freedom of speech, there will be little point to elections—or to seeking recourse in the courts. Without voice, voting becomes nearly meaningless, and without voice and a meaningful vote, there unfortunately is apt to be violence.

Beyond the political costs are also the scientific losses. Whether in medicine, technology, or public policy, modern society is based on rational scientific inquiry, in which received truths are questioned and tested.[315] But this pathway toward the progressive advancement of knowledge depends on freedom of speech. When scientific dissent (let alone moral, legal, and political dissent) is suppressed as "error" or "misinformation," the very mechanism of advancing knowledge is defeated.

Just as the Inquisition's theological censorship soon encompassed scientific suppression, the current censorship has targeted all sorts of medical opinion. The censorship has suppressed the view that the COVID-19 virus originated in a Wuhan laboratory.[316] It has suppressed doubts about masking and the vaccines.[317] It even has tanked simple reports of adverse vaccine events—information that is crucial for scientists, doctors, and patients to evaluate the vaccines' risks.[318]

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[314] *See supra* note 123 on the role of EIP.

[315] *See generally* CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos & Alan Musgrave eds., 1970).

[316] Missouri v. Biden, 83 F.4th 350, 365 (5th Cir. 2023).

[317] *Id.* at 367.

[318] *See* Blathnaid Corless, *We're Being Censored, Claim Victims of AstraZeneca Covid Vaccine*, THE TELEGRAPH (Jan. 6. 2024), https://www.telegraph.co.uk/news/2024/01/06/were-being-censored-victims-of-astra-zeneca-covid-vaccine/; Complaint at 7, Dressen v. Flaherty, No. 3:23-cv-155 (S.D. Tex. May 22, 2023) (alleging, regarding suppression of true speech about adverse vaccine events, "[a]s just one example, in an email exchange in March 2021 between a Facebook executive and the White House Director of Digital Media, Rob Flaherty informed the Facebook executive: 'We are gravely concerned that your service is one of the top drivers of vaccine hesitancy—period. . . . We want to know that you're trying, we want to know how we can help, and we want to know that you're not playing a shell game . . . this would all be a lot easier if you would just be straight with us.' In a clear attempt to appease the White House official, the Facebook executive replied about a week later, informing Flaherty that Facebook had made a number of policy changes, including the

The censorship thus blinds the nation. It prevents individuals from seeing serious dangers and the opportunities for protecting ourselves. It even blinds the government. By stifling information that might force it to reconsider its policies, the government dooms its own medical and scientific efforts.

The censorship has therefore been lethal. It is already familiar from the literature on Institutional Review Boards (IRBs) that when privatized government censorship suppresses medical knowledge, it tends to have a body count—in the case of IRBs, a vast number of deaths.[319] The losses from the COVID censorship are surely smaller, but an individual example is suggestive.

Ernest Ramirez did not know about the adverse vaccine events because the government suppressed information about them.[320] So, he pressed his sixteen-year old son, Ernesto Jr., to get vaccinated, and five days later, Ernesto died due to an enlarged heart—a symptom that has been linked to the mRNA vaccines, especially in young men.[321] The father then posted about his loss and his sadness—for example, on what would have been his son's seventeenth birthday, he posted a photo on Facebook and Twitter of himself beside his son's casket at his funeral, the caption being: "My good byes to my Baby Boy."[322] Twitter deleted the photo altogether and

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removal of 'Groups, Pages and Accounts' containing, in the executive's words, 'often-true content' that 'can be framed as sensation[alist], alarmist, or shocking.'").

[319] Although IRBs operating under the Common Rule probably save a handful of lives each year, their suppression of knowledge is likely, since 1972, to have deprived at least hundreds of thousands of life-saving information. Hamburger, *IRB Licensing*, *supra* note 47, at 81–82. The IRB body count is suggested by Peter Pronovost's study of catheter-related bloodstream infections. Peter Pronovost et al., *An Intervention to Decrease Catheter-Related Bloodstream Infections in the ICU*, 355 NEW ENG. J. MED. 2725 (2006). HHS shut down this study out of concerns that there had not been sufficient IRB approval, stopping further collection of data. But it was published in 2006 with the effect of saving at least 17,000 lives per annum in the United States alone. Kevin B. O'Reilly, *Effort Cuts Down Catheter-Related Infections*, AM. MED. NEWS (Jan. 22, 2007), https://amednews.com/article/20070122/profession/301229957/7/; *see also* Allison Lipitz-Snyderman et al., *The Ability of Intensive Care Units to Maintain Zero Central Line–Associated Bloodstream Infections*, 171 J. AM. MED. ASS'N 856 (2011). To date, that means over 250,000 lives (again, just counting the United States). And that was just one study. If one very conservatively supposes that the IRB system impedes only a few profoundly lifesaving studies each year, the lost lives since the imposition of IRBs in 1972 runs into the millions.

[320] Complaint, Dressen v. Flaherty, *supra* note 318, at 4, 108–12.

[321] *Id.*

[322] *Id.* at 4, 110.

warned Ramirez: "Make sure you're sharing reliable information. Visit the COVID-19 Information Center for reliable vaccine info and resources."[323]

Ramirez thus was doubly damaged by the government's censorship of adverse vaccine events. Having been deprived of the opportunity to know about the risks of the COVID-19 vaccines, he pressed his son to take a vaccine that killed him. Then, he was prevented from sharing his grief. The censorship is lethal for some of those deprived of information, and in suppressing even personal expressions of pain, it is nearly totalitarian.

The suppression of personal feelings, opinion, and even the truth is not accidental. On the contrary, it was early acknowledged within the censorship regime that "[m]ost misinformation is actually true."[324] That's right: Although some of the censored "misinformation" was false, much of it was recognized to be true "but set in the wrong context."[325] From this perspective, already in 2019, misinformation was not defined so much by whether it was true or false as by its tendency to be politically or culturally worrisome—at least from the government's perspective.[326]

The next year, when COVID-19 arrived, the government censored "misinformation" that, in its view, might threaten the efficacy of its pandemic policies. But its censorship in support of such regulation often suppressed accurate information

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[323] *Id.* at 4.

[324] Shellenberger, *CTIL Files*, *supra* note 2 (quoting a 2019 podcast by a leader of CTIL, Sara-Jayne Terp, who, although British, displayed a CISA badge).

[325] *Id.*

[326] This was candidly explained by Terp:

> "Most misinformation is actually true," noted [Sara-Jayne] Terp in the 2019 podcast, "but set in the wrong context." Terp is an eloquent explainer of the strategy of using "anti-disinformation" efforts to conduct influence operations. "You're not trying to get people to believe lies most of the time. Most of the time, you're trying to change their belief sets. And in fact, really, uh, deeper than that, you're trying to change, to shift their internal narratives . . . the set of stories that are your baseline for your culture. So that might be the baseline for your culture as an American."

Shellenberger, *CTIL Files*, *supra* note 2.

and skepticism about the government's approach, and in retrospect some of its policies—whether on vaccines, masks, or distancing—were mistaken.[327] Tellingly, it now is clear that the government's censorship apparatus sometimes deliberately suppressed true information—for example, it targeted information about adverse vaccine events on the theory that this was necessary to prevent vaccine hesitancy.[328]

The censorship invited by judicial doctrines has thus contributed to the development of a new regime, in which we are not merely governed from below in a republic, or even ruled from above in an administrative state, but even more insidiously are manipulated through censorship. Rather than merely regulate bodies, government now prefers to shape minds, with dire implications for representative government, science, and personal freedom.

B. Consolidation of Government and Society

The government censorship policy does not stand alone. It is much intertwined with corporate censorship policy and censorious popular opinion. The government has made censorship a "whole of government" policy—indeed, a "whole of society" policy, in which government aligns itself with private institutions to work together against dissent.[329]

Socially, government censorship is aligned with social censoriousness. Our society is suffering a plague of cancellations—of mob-like demands for individuals to be disgraced and defenestrated for their opinions.[330] Views that yesterday were unremarkable are today considered outrageous and worthy of politically-inflected

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[327] For example, even Anthony Fauci now admits the limited efficacy of masks. *See* Alecks Phillips, *Fauci COVID Mask Admission Sparks Furious Backlash*, NEWSWEEK (Sept. 4, 2023), https://www.newsweek.com/anthony-fauci-mask-admission-backlash-coronavirus-1824364.

[328] For instance, the Virality Project—which was a product of the government's Election Integrity Project and one of the government's private cutouts—pressed Twitter to suppress "[t]rue content which might promote vaccine hesitancy," such as "stories of true vaccine side effects." @MTaibbi [Matt Taibbi], X (Mar. 17, 2023, 10:00 AM), https://twitter.com/mtaibbi/status/1636729200110452738.

[329] J.D. Madox, *Toward a Whole-of-Society Framework for Countering Disinformation*, MOD. WAR INST. AT WEST POINT (May 10, 2021), https://mwi.westpoint.edu/toward-a-whole-of-society-framework-for-countering-disinformation/.

[330] *See Cancel Culture*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/cancel%20culture; Greg Lukianoff, *Yes, the Last 10 Years Really Have Been Worse for Free Speech*, THE ETERNALLY RADICAL IDEA (Jan. 24, 2024), https://greglukianoff.substack.com/p/yes-the-last-10-years-really-have?r=2gh8e.

moral condemnation. To some degree, the censoriousness drives the censorship, but at the same time, the censorship invites the censoriousness.

Although this cancel culture is disturbing enough, the alignment of government censorship and social censoriousness is even more worrisome. Whereas individuals once could find governmental protection against social discrimination, and could find relief in society from governmental discrimination, they now often face the combined pressure of government and society.

Even more overtly, government has allied itself with business corporations, academic institutions, and other nonprofits in pursuit of censorship—forming what has been called the "Censorship Industrial Complex."[331] Traditionally, these institutions acted more-or-less independently, thus allowing individuals to find some refuge, for themselves and their liberty, in the different stances taken by different institutions. In pursuit of censorship, however, the federal government has used shared interests, funding, and coordination to align different institutions into a phalanx of public and private power against dissent.[332]

The combination of governmental, popular, and corporate control leaves individuals with diminished freedom to think for themselves. Not just in politics and science—important as they are—but also in moral judgment, individuals need enough independence to work through their judgments on their own. Instead, however, they now face pressure from multiple directions to adopt pre-approved opinions, bending or even abandoning their own judgment for that of the authorities.

The only hope against the consolidation of public and private control is for nearby or otherwise accessible jurisdictions to maintain room for dissent. Against this possibility, however, the federal government coordinates the censorship across the several states and even across international borders.[333] Moreover, the Supreme

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[331] *See generally* Shellenberger Weaponization Testimony, *supra* note 159.

[332] For the risk of such alignment, see HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, at 246–48.

[333] Allan Evans, *State Department Funded Foreign Think Tank Working to Censor Americans*, DAILY CALLER (Feb. 13, 2023, 7:38 PM), https://dailycaller.com/2023/02/13/state-department-think-tank-disinformation/ (reporting that the Institute for Strategic Dialogue—a British nongovernmental organization—received a State Department grant in September 2021 "to 'advance the development of promising and innovative technologies against disinformation and propaganda' in Europe and the U.K.").

Court may soon (mistakenly) overturn Texas's use of traditional common carrier doctrine to protect open debate within its own borders.[334]

In such ways, the nation faces a form of control more familiar from other parts of the world—a type of joint governance, neither entirely public nor private, which once was called "corporatism" and now is increasingly considered just normal. The Constitution generally does not limit private power or joint public-private power. But that is no excuse for failing to enforce its limits on government.

The censorship is well on its way to transforming American government and society. The outward forms of freedom will persist, but the reality of censorship and control will render them meaningless. So the Supreme Court needs to reconsider its wayward doctrines—on structural protections, state action, speech, government speech, and qualified immunity—before the opportunity to change course passes and the Republic, sooner than necessary, goes the way of all things.

VII. A CONSTITUTION OF HOPE OR OF FEAR?

What sort of constitutional law is necessary to protect constitutional rights? A constitutional jurisprudence that allows officials to get away with censorship for years, and perhaps never face personal accountability, is not good enough. What is needed is a jurisprudence that will stop officials from even beginning such a project.[335]

Consider two very different visions of constitutional law. One takes an optimistic view of human nature, anticipating that government needs broad power and will exercise it responsibly. Another takes a more pessimistic view of human nature, imposing hard limits on power to protect against its predictable abuse.

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[334] NetChoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022), *cert. granted*, No. 22-555, 2023 WL 6319650 (2023).

[335] Vincent Blasi has written:

> [I]n adjudicating first amendment disputes and fashioning first amendment doctrines, courts ought to adopt what might be termed the pathological perspective. That is, the overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment, in other words, should be targeted for the worst of times.

Vincent A. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

The Constitution balances these visions to get the best of both. It grants broad legislative powers to Congress, but also imposes hard limits—giving only limited powers, funneling legislative power through Congress and judicial power through the courts, and confining all power with rights. In this way, it optimistically authorizes a powerful federal government while protecting Americans from the misuse of that power.

Judicial doctrine, however, has eroded these limits. While doctrine still bars censorship, it no longer does so with the clarity and efficacy needed to prevent officials from thinking they might get away with it.

Justice is slow, and the officials have sedulously kept much of their censorship secret. They have thereby delayed a judicial reckoning for half a decade and two election cycles, and they may still be hoping to delay until they can secure a change in the Supreme Court's personnel.

By allowing officials to get away with this, the current style of jurisprudence has done profound damage. It has left room for efforts that may, perhaps for the foreseeable future, cripple free speech in this country. Already, the censorship and allied developments are subverting popular attachments to free speech and independent thought, inculcating in their place, it seems, a reliance on authority and a disgust for dissent. The censorship is thus part of a revolution in personal and public ideals that may yet remake the nation, its intellectual foundations, and its freedoms—a transformation that may render constitutional claims an exercise in futility and the Supreme Court merely decorative.

The Court therefore needs to think very seriously about the Constitution as it ought to be understood—a constitution that simultaneously establishes great power and sufficiently constrains it. As things stand, judicial doctrine seems to invite evasions of the Constitution's limits, including the First Amendment.

Conclusion

Whether on commerce, administrative and sub-administrative power, state action, abridging the freedom of speech, government speech, or qualified immunity, the Supreme Court's doctrines are, at best, a disappointment. Far from preventing censorship, they have invited it, leaving room for government to evade the Constitution's protections for speech. Americans are therefore now subject to massive censorship, which threatens to subject a free people and their republic to a new regime based on the centralized manipulation of their thought.

First, the Constitution's structural protections for speech have been severely undermined. Commerce doctrine has given the federal government a regulatory control over speech that the Constitution was expressly understood not to have granted. Although Congress's enumerated powers once marginally included some authority over speech and communication, now the commerce power apparently includes unlimited regulatory authority over such things. This is especially sobering for speech-oriented entities, such as the Platforms, which are singularly vulnerable to speech regulation.

Adding to the danger is administrative and sub-administrative regulation in the shadow of congressional regulation. Whereas regulation once had to run through elected representatives in Congress and then through independent judges and juries in the courts, it now can administratively evade these process protections—mostly completely when sub-administrative regulation escapes even prior congressional authorization and subsequent judicial review. The combination of congressional power over speech in Section 230[336] and sub-administrative regulation in the shadow of that power has been one of the foundations of the federal censorship.

Second, current state action doctrine, typified by *Blum*, asks for proof that the government has converted private action into government action, archetypically by coercion. State action doctrine thus lets government evade the freedom of speech by acting through private cutouts and avoiding overt coercion. It is doubtful whether there should be any government or "state" action doctrine apart from what is required by different rights. Regardless, there is no justification for state action doctrine to subject plaintiffs to a narrower hoop than is imposed by the substantive right being enforced.

Third, the First Amendment distinguishes *abridging* the freedom of speech from *prohibiting* the free exercise of religion. The Amendment thus focuses on what abridges, or reduces, the freedom of speech, not just that which coercively suppresses or otherwise prohibits speech. Judicial doctrine, however, ignores the difference between abridging and prohibiting, and emphasizes coercion. Once again, doctrine invites the government to suppress speech through means that avoid overt coercion.

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[336] 47 U.S.C. § 230.

In barring the making of any law abridging the freedom of speech, the First Amendment renders any such law or policy void *ab initio*. The government's censorship policies are therefore immediately void, without any need to show that they have had suppressive effects. Echoing *Blum*, however, many judges seem to think that plaintiffs need to show suppressive effects. The government therefore assumes it can get away with even a publicly announced suppressive policy—as long as it can keep the suppressive mechanisms and effects relatively privatized and secret. Under the current censorship, for example, the proof that the federal government caused the privately enforced suppressive effects has been elusive and sometimes even hidden, and it therefore has taken half a decade for suppressed speakers to persuade a court, finally, to take the censorship seriously.

Incidentally, the First Amendment's text offers valuable hints about the distinction between unconstitutional government censorship and lawful government persuasion. Working from the word *law* and the phrase *freedom of speech*, courts can simultaneously bar government evasion of the First Amendment and leave room for government persuasion.

Fourth, the Supreme Court's loosely framed government speech doctrine suggests to the executive that it has a freedom of speech—a freedom unconfined by the people's freedom of speech. This conclusion conflicts with almost everything that is known about the Bill of Rights and the First Amendment.[337] But judicial doctrine on government speech is so open-ended that the government feels it has a speech right that defeats our speech rights.

Fifth and finally, the unqualified character of qualified immunity has given officials courage that they will not have to pay damages for their misadventures in censoring their fellow citizens—at least while they stay within the ambit of any ambiguity. Whatever the fate of qualified immunity, its categorial protection for officials—even when exercising sub-administrative power, even when seeking censorship, and even when there is time to get legal advice—has seemed to give officials a safe harbor precisely when that does not make sense.

The second and third developments are especially sobering, as they reveal that some supposed verities of twentieth-century constitutional jurisprudence have done tremendous damage. State action doctrine has taken on a life of its own, independent of the particular rights in which the Constitution demarcates different

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[337] *See supra* Sections IV.C & D.

degrees and even kinds of government action. Moreover, a simplistic coercion model of constitutionally significant government action has infected doctrine on state action, constitutional rights, and even governmental structure.[338] Hence, our current difficulties. Under the weight of the state action doctrine and the coercion model, the First Amendment's different rights get blurred together, without distinguishing abridging and prohibiting.

As it happens, much of the government's censorship isn't really justified by *Blum*—as nearly admitted by the government when it repeatedly twists that precedent in *Murthy v. Missouri*. For example, in the government's telling, *Blum*'s emphasis on "coercive power"[339] becomes a "compulsion" test.[340] Of course, coercion (a type of wrongful threat or pressure) is not compulsion (the circumstances in which one could not have done otherwise),[341] and the Court has never self-consciously raised the bar so high. Nonetheless, on the basis of one casual use of the word "compel" in *Manhattan Community Access Corporation v. Halleck*, the government quotes *Blum* to establish "this Court's compulsion test for state action."[342] This is a warped version of *Blum*, not *Blum* itself.

Another governmental exaggeration of *Blum* is that a "particular act of enforcement" must be attributable to "particular conduct" by a "particular government

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[338] For an example of the doctrine on governmental structure, see Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012) (requiring coercion and even compulsion for unconstitutional federal commandeering of the states). But what is inaptly called "commandeering" is simply a deviation from the federal structure of American government under the Constitution, and departures from the Constitution's structures are unconstitutional on their own, without any requirement of coercion. *See* HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, at 136–37.

[339] 457 U.S. at 1004.

[340] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 14, 23, 25.

[341] Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1291–92 (2013). Although the notion of compulsion is familiar from nineteenth-century ideas of duress in contracts, it is unclear why it should have any role in constitutional law. *See* HAMBURGER, PURCHASING SUBMISSION, *supra* note 13, at 200.

[342] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 26 (quoting *Blum*, 457 U.S. at 1004, which merely discusses "coercive power," and citing *Halleck*, 139 S. Ct. at 1928, which reads *Blum*'s coercive power in terms of when government "compels" a private entity). Note, moreover, that *Halleck* was just a case against a private defendant.

official."[343] Even *Blum* doesn't set so persnickety a standard. But in requiring proof of government responsibility for "specific conduct,"[344] *Blum* leaves room for the government to think it is justified in insisting on particularized causation.[345]

Such strained uses of caselaw confirm that existing doctrine does not justify as much of the current censorship as the government claims. All the same, *Blum* and the other precedents have opened up possibilities that the Justices never contemplated. They have encouraged the government to imagine it can get away with an entire system of suppression.

If the judges are to redeem themselves—if they do not wish to be known for courting the destruction of our freedom—they need to heed the lessons of their failures. They need to reconsider their lax interpretation of federal powers, their tolerance for sub-administrative power, their *Blum* misreading of state action in terms of conversion and coercion, their confusion between abridging and prohibiting, their notions of government speech rights, and their unqualified grant of qualified immunity.

Of course, it is improbable that the Court will, or even can, correct all these doctrines at once. Even the bare minimum of doctrines—on state action, abridging, and government speech—is probably beyond what the Court can promptly reconsider.

Even more sobering, the current censorship has had half a decade to become deeply entrenched. In that time, government pressure, coordination, funding, and personnel have created a censorship industrial complex—a whole regime of interlocking academic, nonprofit, and other private entities that by now act on their own to coordinate the Platforms. So, notwithstanding the constitutional bar against government censorship, the government has already successfully launched this ship into private waters. A judicial remedy may therefore already be too late. By using secrecy and judicial doctrine to escape constitutional accountability for five years,

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[343] Brief for Petitioners, Murthy v. Missouri, *supra* note 2, at 18; *see supra* Section II.C.

[344] *Blum*, 457 U.S. at 1004.

[345] Of course, *Blum* is not the only precedent stretched by the government. For example, the government deploys the chilled speech doctrine to complain that its speech is being chilled—while saying nothing as to how its speech chills the speech of vast numbers of Americans. *See supra* Section III.G.

the government may have successfully subjected the Republic to censorship for the indefinite future.

Nonetheless, the Justices need to rethink their doctrines—as soon as possible. Their doctrines invited the censorship. So, not only the censorship but also the doctrines need to go.