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## Comrades or Foes: Did the Chinese Break the Law or New Ground Ground for the First Amendment

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## COMRADES OR FOES: DID THE CHINESE BREAK THE LAW OR NEW GROUND FOR THE FIRST AMENDMENT?

*Artem M. Joukov\**

### ABSTRACT

*Prior to exiting the White House, President Trump placed a variety of restrictions on Chinese-owned social media applications, TikTok and WeChat, threatening to greatly curtail their influence in the United States. While couching his actions in the context of national security, the former president engaged in viewpoint discrimination in plain violation of the First Amendment to the United States Constitution. The court rulings in favor of TikTok and WeChat were encouraging and should stem the tide of future government regulations of social media platforms. This article discusses how the decisions fit into the greater context of First Amendment jurisprudence and shows that government regulations of internet communication platforms is almost assuredly unconstitutional, whether the platform is foreign or domestic. Therefore, current and future proposals for state and federal regulations should be viewed with skepticism, as they would ultimately fail constitutional scrutiny.*

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## I. INTRODUCTION

*In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.*

—*The Declaration of Independence* (1776)

The rise of social media over the past two decades has brought to the forefront one of our most important rights as Americans: the freedom of expression.<sup>1</sup> We have seen the right challenged in a variety of ways, from laws against online bullying,<sup>2</sup> to (unsuccessful) prosecutions of Russian internet trolls,<sup>3</sup> to a variety of hearings on Capitol Hill regarding whether and how social media companies should be regulated.<sup>4</sup> Yet, perhaps the most serious infringement on social media speech is the banning of a social media company

<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> See, e.g., CAL. EDUC. CODE § 48900 (West 2022); FLA. STAT. § 1006.147 (West 2022); MO. REV. STAT. § 160.775 (West 2022); *Cyberbullying Laws*, FINDLAW (Jan. 18, 2019), <https://www.findlaw.com/criminal/criminal-charges/cyber-bullying.html>.

<sup>3</sup> Ryan Lucas, *Citing Security, Feds Drop Case Against Russians Linked To Election Interference*, NPR (Mar. 17, 2020, 2:09 PM), <https://www.npr.org/2020/03/17/817215010/citing-security-feds-drop-case-against-russians-linked-to-election-interference>; Katie Benner & Sharon LaFraniere, *Justice Dept. Moves To Drop Charges Against Russian Firms Filed by Mueller*, N.Y. TIMES (May 7, 2020), <https://www.nytimes.com/2020/03/16/us/politics/concord-case-russian-interference.html>.

<sup>4</sup> Katy Steinmetz, *Lawmakers Hint at Regulating Social Media During Hearing with Facebook and Twitter Execs*, TIME (Sept. 5, 2018, 2:17 PM), <https://time.com/5387560/senate-intelligence-hearing-facebook-twitter/>; Tony Romm et al., *Facebook, Google, Twitter CEOs Clash with Congress in Preelection Showdown*, WASH. POST (Oct. 28, 2020, 5:42 PM), <https://www.washingtonpost.com/technology/2020/10/28/twitter-facebook-google-senate-hearing-live-updates/>; Cecilia Kang, Nicholas Fandos & Mike Isaac, *Tech Executives Are Contrite About Election Meddling, But Make Few Promises on Capitol Hill*, N.Y. TIMES (Oct. 31, 2017), <https://www.nytimes.com/2017/10/31/us/politics/facebook-twitter-google-hearings-congress.html>.

altogether.<sup>5</sup> In initiating such a ban under the guise of deterring current or future law-breaking, the U.S. government silences not only certain individual speakers who run afoul of some particular law, but also a broad range of speakers (and listeners) who have done nothing wrong. This is where the largest violation of the freedom of expression lies, and this is where constitutional challenges to government overreach must begin.

That is precisely what happened to TikTok and WeChat: These social media companies drew the ire of the U.S. government for a variety of reasons.<sup>6</sup> The government claimed that these organizations were affiliated with foreign governments, illegally or improperly collected data on Americans for purposes of censorship and espionage, and were ultimately part of a scheme to harm the United States.<sup>7</sup> Yet, what the Trump administration sought to prohibit was quite plainly expressive conduct, both by the social media companies and their users, and both companies successfully challenged the administration's attempts to ban their platforms.<sup>8</sup> While Donald Trump lost his reelection bid, and the current president, Joe Biden, has distanced himself from Trump's unconstitutional acts, the specter of government regulation hangs over social media companies, foreign

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<sup>5</sup> Todd Spangler, *Trump's Unprecedented Bans of TikTok, WeChat Apps Slammed as Violating First Amendment*, VARIETY (Sept. 18, 2020, 12:03 PM), <https://variety.com/2020/digital/news/trump-bans-tiktok-wechat-app-first-amendment-1234774871/>; Andrew Cohen, *Making Sense of the Mayhem Surrounding Social Media Apps TikTok and WeChat*, BERKELEY L. (Oct. 13, 2020), <https://www.law.berkeley.edu/article/making-sense-of-the-mayhem-tiktok-and-wechat-ban/>; Christopher Gao, *Social Media Censorship, Free Speech, and the Super Apps*, CALIF. L. REV. ONLINE (Oct. 2020), <https://www.californialawreview.org/social-media-censorship-free-speech/>.

<sup>6</sup> See, e.g., Thomas Barrabi, *Trump Orders TikTok Parent ByteDance to Sell Within 90 Days, Destroy User Data*, FOX BUS. (Aug. 14, 2020), <https://www.foxbusiness.com/markets/trump-order-tiktok-bytedance-sell-90-days>; Ana Swanson, David McCabe & Jack Nicas, *Trump Administration to Ban TikTok and WeChat from U.S. App Stores*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/business/trump-tik-tok-wechat-ban.html>.

<sup>7</sup> Geoffrey Gertz, *Why is the Trump Administration Banning TikTok and WeChat?*, THE BROOKINGS INST.: UP FRONT (Aug. 7, 2020), <https://www.brookings.edu/blog/up-front/2020/08/07/why-is-the-trump-administration-banning-tiktok-and-wechat/>; Suhauna Hussain & Wendy Lee, *Trump's TikTok and WeChat Bans: What They Really Mean for You*, L.A. TIMES (Sept. 18, 2020, 6:27 PM), <https://www.latimes.com/business/technology/story/2020-09-18/trump-is-making-good-on-his-promise-to-ban-tiktok-and-wechat-what-does-that-mean-for-you>.

<sup>8</sup> U.S. WeChat Users All. v. Trump, 488 F. Supp. 3d 912 (N.D. Cal. 2020); TikTok Inc. v. Trump, 490 F. Supp. 3d 73 (D.D.C. 2020); see Ashley Cullins, *TikTok Trounces Trump's Attempted Ban*, HOLLYWOOD REP. (Dec. 7, 2020, 6:56 PM), <https://www.hollywoodreporter.com/business/business-news/tiktok-trounces-trumps-attempted-ban-4101453/>; Matthew Walsh, *In Depth: Inside the Legal Battle to Defeat Trump's WeChat Ban*, NIKKEI ASIA (Nov. 2, 2020, 10:45 PM), <https://asia.nikkei.com/Spotlight/Caixin/In-depth-Inside-the-legal-battle-to-defeat-Trump-s-WeChat-ban>.

and domestic.<sup>9</sup> While we can celebrate the victory of First Amendment liberties that still extend to citizens and foreigners, the battle is far from over. The threat of internet communications regulation is still present in the United States, with politicians seeking to regulate what certain companies choose to broadcast depending on what will benefit the politicians themselves. The rulings by federal district courts in the WeChat and TikTok cases provide a beacon of hope for American and foreign internet communication companies: hope that their crucial services of bringing together large groups of people and a wide variety of opinions can continue.<sup>10</sup>

More than merely providing a blueprint for social media corporations to avoid government censorship, WeChat's and TikTok's successful opposition to President Trump's executive orders symbolizes that the First Amendment may yet stretch beyond American borders. This is a particularly important point given America's influence on the world stage and the realization by many foreigners that the best way to improve their own positions may be to influence election outcomes in the United States rather than the government bodies at home. The United States has the power to invade a large number of countries, topple long-established governments, influence foreign elections, and dominate economically. Via tariffs and sanctions, the United States can shape the developments of countries and entire world regions. It is only natural, then, that residents of these regions seek to influence American politics. The question remains whether First Amendment protections should extend to such influence.<sup>11</sup>

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<sup>9</sup> See generally Stephen Collinson & Maeve Reston, *Biden Defeats Trump in an Election He Made About Character of the Nation and the President*, CNN: POLITICS (Nov. 7, 2020, 9:44 PM), <https://www.cnn.com/2020/11/07/politics/joe-biden-wins-us-presidential-election/index.html>; Rachel Sandler, *Biden Asks Court to Pause Trump's WeChat Ban*, FORBES (Feb. 11, 2021, 2:46 PM), <https://www.forbes.com/sites/rachelsandler/2021/02/11/biden-asks-court-to-pause-trumps-wechat-ban/?sh=3e4e64c62f8a>.

<sup>10</sup> *U.S. WeChat Users All.*, 488 F. Supp. 3d at 912; *TikTok Inc.*, 490 F. Supp. 3d at 73.

<sup>11</sup> See Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV. 1373 (2014); see also TIMOTHY ZICK, *THE COSMOPOLITAN FIRST AMENDMENT: PROTECTING TRANSBORDER EXPRESSIVE AND RELIGIOUS LIBERTIES* (Cambridge Univ. Press 2014); Timothy Zick, *First Amendment Cosmopolitanism, Skepticism, and Democracy*, 76 OHIO ST. L.J. 705, WM. & MARY L. SCH. RSCH. PAPER NO. 09-309 (2015); Timothy Zick, *Falsely Shouting Fire in a Global Theater: Emerging Complexities of Transborder Expression*, 65 VAND. L. REV. 125 (2012); Timothy Zick, *The First Amendment in Trans-border Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941 (2011); Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543 (2010) (citing *Haig v. Agee*, 453 U.S. 280, 308 (1981) (assuming *arguendo* that the First Amendment applied overseas); *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (concluding that the First Amendment's Establishment Clause "should apply extraterritorially"); Timothy Zick, *The First Amendment, and the World*, WASH. MONTHLY (Jan. 23, 2016), <https://washingtonmonthly.com/2016/01/23/the-first-amendment-and-the-world/>; Note, "Foreign" Campaign Contributions and the First Amendment, 110 HARV. L. REV. 1886 (1997); Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2017); Richard L. Hasen, *Will the Supreme Court's Understanding of the*

The TikTok and WeChat cases suggest that such protections should, in fact, extend to corporations with significant contacts in the United States. At least to the extent that these organizations operate within the physical borders of the United States, their users' speech appears to be as protected as anyone else's. How far free speech protections reach is still hard to discern. WeChat and TikTok appear to have received protections only for the speech President Trump sought to ban, which was electronically transmitted to users who were physically within U.S. borders. Whether the companies could be punished for speech they distribute in foreign nations remains an open question. It is also possible that such speech would not survive censorship if it sought to directly influence political elections in the United States through false information. After all, the federal government had, for a long time, pursued Russian individuals and corporations for doing exactly that on the eve of the 2016 presidential election.<sup>12</sup>

This article reviews how the First Amendment saved WeChat and TikTok in the United States. In Part I, I describe the capabilities of WeChat, TikTok, and other internet communication media. In Part II, I provide a breakdown of First Amendment jurisprudence promulgated by the U.S. Supreme Court and how that jurisprudence applies or should apply to internet communications. Part III demonstrates that the jurisprudence developed in *WeChat* and *TikTok* should guide future regulation of social media and other internet communication corporations. I then discuss how this furthers the protections available to the American people, all American companies, and even foreign individuals and entities. Part IV concludes by showing that the presence of foreign ideas should be welcomed in the United States and that suppression of free thought, free expression, and free association is a far greater danger to the United States than any enemy, foreign or domestic.

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*First Amendment Thwart Laws Aimed at Limiting Foreign Influence in U.S. Elections?*, JUST SEC. (June 12, 2018), <https://www.justsecurity.org/57624/supreme-courts-understanding-amendment-thwart-laws-aimed-limiting-foreign-influence-u-s-elections/>.

<sup>12</sup> Tara Francis Chan & Alexandra Ma, *Here Are Some of the Russian Facebook Ads Meant to Divide the US and Promote Trump*, BUS. INSIDER (Nov. 2, 2017, 7:33 AM), <https://www.businessinsider.com/russian-facebook-ads-2016-election-trump-clinton-bernie-2017-11>; Taylor Hatmaker, *Here's How Russia Targeted Its Fake Facebook Ads and How Those Ads Performed*, TECHCRUNCH (Nov. 1, 2017, 7:49 PM), <https://techcrunch.com/2017/11/01/list-russian-ads-facebook-instagram/>; Alexis C. Madrigal, *What, Exactly, Were Russians Trying To Do with Those Facebook Ads?*, THE ATLANTIC (Sept. 25, 2017), <https://www.theatlantic.com/technology/archive/2017/09/the-branching-possibilities-of-the-facebook-russian-ad-buy/541002/>.

II. PART II: WECHAT, TIKTOK, AND THE MARCH OF TECHNOLOGY<sup>13</sup>

WeChat and TikTok represent a growing technology sector in China that is quickly overtaking technology sectors in the United States and Europe.<sup>14</sup> In many ways, the development of TikTok mirrors and competes with YouTube and the development of WeChat competes with Facebook, WhatsApp, and other communications apps. This symbolizes the arrival of Chinese social media companies on the world scene. With the Chinese population making up approximately 20% of the world's population,<sup>15</sup> any application that becomes successful in China is, almost by definition, a world player in the social media field. This is quite remarkable, given the West's criticisms of Chinese censorship

<sup>13</sup> BLADE RUNNER 2049 (Alcon Entertainment & Sony Pictures 2017).

<sup>14</sup> Catherine Shu, *TikTok, WeChat and the Growing Digital Divide Between the US and China: Two 'Parallel Universes' Are Now Even Further Apart*, TECHCRUNCH (Sept. 22, 2020, 9:04 AM), <https://techcrunch.com/2020/09/22/tiktok-wechat-and-the-growing-digital-divide-between-the-u-s-and-china/>; Naomi Xu Elegant, *For China's Social Media Giants, It's a Battle for the Ages*, FORTUNE (Oct. 25, 2019, 7:18 AM), <https://fortune.com/2019/10/25/wechat-douyin-tiktok-china/>; Gabor Holch, *WeChat, Zoom, TikTok and the Future of Chinese Technology Culture*, ASIA POWER WATCH (Sept. 25, 2020), <https://asiapowerwatch.com/wechat-zoom-tiktok-and-the-future-of-chinese-technology-culture/>; Yingzhi Yang & Brenda Goh, *ByteDance's Chinese Version of TikTok Hits 600 Million Daily Users*, REUTERS (Sept. 15, 2020, 1:56 AM), <https://www.reuters.com/article/us-china-bytedance/bytedances-chinese-version-of-tiktok-hits-600-million-daily-users-idUSKBN2660P4>; Rebecca Fannin, *The Strategy Behind TikTok's Global Rise*, HARV. BUS. REV. (Sept. 13, 2019), <https://hbr.org/2019/09/the-strategy-behind-tiktoks-global-rise>.

<sup>15</sup> *China Population (Live)*, WORLDOMETER, <https://www.worldometers.info/world-population/china-population/> (last visited Oct. 21, 2022).

of speech and a wide variety of expression.<sup>16</sup> The fact that social media applications such as these can “make it big” in China suggests that, while certain types of speech are not permissible, a large amount of expression is quite kosher (and even quite profitable) under the Communist regime. While users may be wise to avoid using these applications to communicate political messages, they are nevertheless encouraged to communicate about popular entertainment, upload music videos, discuss science, and otherwise convey ideas deemed appropriate by the Chinese Communist Party.

A. *WeChat*

*“A printing press took the thoughts from someone’s mind and inked them onto a piece of paper anyone might read. It was a kind of magic. A magic to alter the world.”*

—Gita Trelease<sup>17</sup>

WeChat is a remarkably innovative multimedia company that permits its users to communicate with one another individually and in groups, send and receive money, make mobile payments, browse the internet, view videos, download images, and videos, make audio and video calls, play video games, broadcast video live, keep a calendar, and share their geographic location.<sup>18</sup> WeChat is an application that contains other applications within it, sometimes

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<sup>16</sup> See, e.g., Yaqiu Wang, *How China’s Censorship Machine Crosses Borders—and into Western Politics*, HUM. RTS. WATCH (Feb. 20, 2019, 2:20 PM), <https://www.hrw.org/news/2019/02/20/how-chinas-censorship-machine-crosses-borders-and-western-politics>; Beina Xu & Eleanor Albert, *Media Censorship in China*, COUNCIL ON FOREIGN RELS. (Feb. 17, 2017, 7:00 AM), <https://www.cfr.org/background/medias-censorship-china>; *China’s Censorship of the Internet and Social Media: The Human Toll and Trade Impact: Hearing Before the Congressional-Executive Comm’n on China*, 112th Cong. (2011); Juliette S. Miller, *China’s Censorship and Cultural Power—Necessarily at Odds?*, CUREJ: COLL. UNDERGRADUATE RSCH. ELEC. J. U. PA. (Jan. 1, 2020), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=1291&context=curej>; Liza Negri, *The Past, Present, and Future of Freedom of Speech and Expression in the People’s Republic of China*, TOPICAL RSCH. DIG.: HUM. RTS. IN CHINA, <https://korbel.du.edu/> (last visited Oct. 8, 2022).

<sup>17</sup> GITA TRELEASE, ENCHANTEE 19 (Flatiron Books 2019).

<sup>18</sup> Bani Sapra, *This Chinese Super-App is Apple’s Biggest Threat in China and Could Be a Blueprint for Facebook’s Future. Here’s What It’s Like To Use WeChat, Which Helps a Billion Users Order Food and Hail Rides.*, INSIDER (Dec. 21, 2019, 9:16 AM), <https://www.businessinsider.com/chinese-superapp-wechat-best-feature-walkthrough-2019-12>; Arjun Kharpal, *Everything You Need To Know About WeChat—China’s Billion-User Messaging App*, CNBC (Feb. 4, 2019, 2:22 AM), <https://www.cnbc.com/2019/02/04/what-is-wechat-china-biggest-messaging-app.html>; Juan, *WeChat, the App for Everything*, QPS (May 16, 2020), <https://qpsoftware.net/blog/all-wechat-features-2020>.



called “mini-applications” in the tech community.<sup>19</sup> Through these mini-applications, programmers can continue to add to WeChat’s expanding repertoire of offerings, including things like ride share apps and food delivery apps, similar to Lyft, Uber, DoorDash, and Uber Eats. This is hardly an exhaustive list of WeChat’s functions, and its developers are adding more and more almost monthly.<sup>20</sup> The app is so innovative and develops so quickly that it will likely have greater functionality just a few days after I finish typing this sentence. It operates on mobile phones, personal computers, tablets, and a variety of other devices, and many of its functions are free—at least monetarily.<sup>21</sup> The application does gather a significant amount of data from its users, which is quite valuable to WeChat.<sup>22</sup> Users convey this data voluntarily (though perhaps unknowingly): no one is compelled by law in any country to use WeChat or any of its applications, and users can find detailed descriptions of what data they surrender to the application in the Terms of Service.<sup>23</sup>

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<sup>19</sup> *WeChat Mini Program: An Epic Guide*, WECHAT WIKI (Aug. 3, 2020), <https://wechatwiki.com/wechat-resources/wechat-mini-program-epic-tutorial-guide/>.

<sup>20</sup> See Iris Deng, *Chinese Riders Can Now Book a Trip from Tencent’s Map App as Internet Giant Plays Catch Up*, S. CHINA MORNING POST (Sept. 23, 2020, 2:37 AM), <https://www.scmp.com/tech/apps-social/article/3102545/chinese-riders-can-now-book-trip-tencents-map-app-internet-giant>; Josh Horwitz, *In China You Can Now Hail a Taxi and Pay the Driver on WeChat*, TECHINASIA (Jan. 6, 2014), <https://www.techinasia.com/china-hail-taxi-pay-driver-wechat>; Min Xuan Ng, *WeChat Pay’s Credit Scoring System Now Links with Ride-Hailing Apps*, TIMEOUT (Oct. 8, 2019, 4:38 PM), [https://www.timeoutshanghai.com/features/Blog-City\\_life/70380/WeChat-Pays-credit-scoring-system-now-links-with-ride-hailing-apps.html](https://www.timeoutshanghai.com/features/Blog-City_life/70380/WeChat-Pays-credit-scoring-system-now-links-with-ride-hailing-apps.html).

<sup>21</sup> See generally *How Much Does Messaging on WeChat Cost?*, TECHBOOMERS (May 4, 2017 5:49 AM), <https://techboomers.com/t/is-wechat-free-how-much-it-costs>; *WeChat for Windows*, [https://windows.weixin.qq.com/?lang=en\\_US](https://windows.weixin.qq.com/?lang=en_US) (last visited Oct. 8, 2022); Pim de Vos, *How To Use WeChat on Two Devices or More*, TRENGO INSIDE (May 4, 2020), <https://treno.com/blog/communication/wechat-multiple-devices/>; Giorgia Borza, *How To Use WeChat (or Weixin): The Complete Guide for Foreigners*, SAPORE DI CINA (Oct. 21, 2020), <https://www.saporedicina.com/english/how-to-use-wechat-or-weixin/>; *Download weChat for Android Tablet*, <https://wechatdownload10.com/wechat-for-android-tablet.html> (last visited Oct. 8, 2022).

<sup>22</sup> Gennaro Cuofano, *How Does WeChat Make Money? The WeChat Business Model in a Nutshell*, FOURWEEKMBA, <https://fourweekmba.com/how-does-wechat-make-money/>; *WeChat’s Owner Tencent Sees Profits Soar by More Than 60%*, BBC NEWS (May 17, 2018), <https://www.bbc.com/news/business-44149371>; Yue Wang, *How People Are Earning Millions from Tencent’s WeChat—But Not Everyone’s Happy*, FORBES (Jan. 23, 2018, 10:10 PM), <https://www.forbes.com/sites/ywang/2018/01/23/how-people-are-earning-millions-from-tencents-wechat-but-not-everyones-happy/?sh=42f8355d5563>.

<sup>23</sup> *WeChat Terms of Service*, WECHAT (Aug. 19, 2021), [https://www.wechat.com/en/service\\_terms.html](https://www.wechat.com/en/service_terms.html); see also Jeffrey Knockel et al., *WeChat, They Watch: How International Users Unwittingly Build Up WeChat’s Chinese Censorship Apparatus*, CITIZENLAB (May 7, 2020), <https://citizenlab.ca/2020/05/we-chat-they-watch/>; Malcolm Higgins, *Is WeChat Safe To Use?*, NORDVPN (May 11, 2020), <https://nordvpn.com/blog/is-wechat-safe/>.

WeChat provides services to more than one billion active users every month.<sup>24</sup> The vast majority of its users are in China, though tens of millions use the application outside of China.<sup>25</sup> These users include Chinese students studying in the United States, immigrants from China to the United States, and even individuals who are not part of the Chinese diaspora who find the application to be useful for a variety of purposes despite a lack of any connection to the People's Republic of China or surrounding areas.<sup>26</sup> Hence, many people from different countries, with different political views, who speak multiple languages, and who partner with individuals across the globe use WeChat to form associations, voice their political ideas, discuss developments in science, and create and engage with entertainment content. All of these communications and associations are, however, closely monitored: WeChat keeps and shares its user data with the Chinese government and the Chinese Communist Party upon request.<sup>27</sup>

This is where many critics take aim at WeChat: the gathering and sharing of data.<sup>28</sup> Individuals accept a terms of use agreement that outlines much of WeChat's data collection, and it is widely known that WeChat users will likely be monitored by the Chinese government. Yet critics argue WeChat's policies invade people's privacy and can be used by a massive surveillance state to track an individual's locations, his or her ideas, his or her associations, and his or her expressions in order to, at the very least, exert governmental pressure on the individual to fall in line. With the data WeChat collects on its users and on human

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<sup>24</sup> Terry Stancheva, *21 Mind-Blowing WeChat Statistics You Should Know in 2021*, REV. 42 (July 4, 2021), <https://review42.com/resources/wechat-statistics/#:~:text=WeChat%20has%20more%20than%201,the%20Q4%202019%20stats%20reveal.&text=WeChat%20audience%20stats%20show%20that,active%20users%20in%20a%20month>.

<sup>25</sup> *Id.*

<sup>26</sup> Lotus Ruan, Jeffrey Knockel, Jason Q. Ng, & Masashi Crete-Nishihata, *One App, Two Systems: How WeChat Uses One Censorship Policy in China and Another Internationally*, CITIZENLAB (Nov. 30, 2016), <https://citizenlab.ca/2016/11/wechat-china-censorship-one-app-two-systems/> ("Users potentially affected by this restriction are vast: students studying abroad, tourists, business travelers, academics attending international conferences, and anyone who has recently emigrated out of China.").

<sup>27</sup> *WeChat Shares Consumer Data with Chinese Government*, PYMNTS.COM (Sept. 25, 2017), <https://www.pymnts.com/safety-and-security/2017/wechat-hands-over-user-data-to-chinese-government-amid-privacy-concerns/>.

<sup>28</sup> See generally Shannon Liao, *Over 300 Million Chinese Private Messages Were Left Exposed Online*, THE VERGE (Mar. 4, 2019, 5:07 PM), <https://www.theverge.com/2019/3/4/18250474/chinese-messages-millions-wechat-qq-yy-data-breach-police>; Ryan General, *WeChat Admits It Gives All Private User Data to the Chinese Government*, NEXTSHARK (Sept. 15, 2017), <https://nextshark.com/wechat-admits-gives-private-user-data-chinese-government/>; Yaqiu Wang, *WeChat Is a Trap for China's Diaspora: App's Dominance Forces People To Adopt Self-Censorship*, HUM. RTS. WATCH (Aug. 14, 2020, 3:00 PM), <https://www.hrw.org/news/2020/08/14/wechat-trap-chinas-diaspora>.

behavior in general, it may be that the application can predict human behavior with relative certainty and perhaps even identify (and curtail) free speech activities such as the formation of protests.<sup>29</sup> Compared to many American social media companies, who themselves face criticism about failing to maintain user privacy, WeChat is far worse.

*B. TikTok*

*“The internet is the most important tool for disseminating information we’ve had since the invention of the printing press. Unfortunately, it’s also one of the best ways of stealing or suppressing information and for putting out misinformation.”*

—Stewart Stafford<sup>30</sup>

While WeChat can be described as a jack of all trades, TikTok is an application much narrower in focus (though the two social media giants are spilling over into each other’s space).<sup>31</sup> TikTok focuses primarily on providing a platform for content creators to post short, entertaining videos.<sup>32</sup> It is difficult to classify these videos as any particular brand of entertainment, but there appears to be a general difference compared to the content, let us say, of Netflix or YouTube.<sup>33</sup> TikTok videos tend to be shorter, more to the point, and usually do not involve long political debates or discussions.<sup>34</sup> TikTok videos are not movies, though movies can frequently be found either for free or for purchase on Netflix

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<sup>29</sup> See, e.g., *Hong Kong Protests Lead to Censorship on WeChat*, WALL ST. J. (Oct 3, 2014, 8:14 AM), <https://www.wsj.com/articles/BL-CJB-24337>.

<sup>30</sup> *Printing Press Quotes*, GOODREADS, <https://www.goodreads.com/quotes/tag/printing-press>. (last visited Oct. 8, 2022).

<sup>31</sup> Vivian McCall, *What is WeChat? Everything You Need to Know About the Popular Messaging App, Including How to Sign Up*, BUS. INSIDER (Feb. 22, 2021, 6:01 PM), <https://www.businessinsider.com/guides/tech/what-is-wechat>; Werner Geysler, *What Is TikTok?—The Fastest Growing Social Media App Uncovered*, INFLUENCER MKTG. HUB (June 11, 2021), <https://influencermarketinghub.com/what-is-tiktok/>.

<sup>32</sup> Deborah D’Souza, *What is TikTok?*, INVESTOPEDIA (July 5, 2022), <https://www.investopedia.com/what-is-tiktok-4588933>; Jessica Worb, *How Does the TikTok Algorithm Work?*, LATER (Apr. 10, 2022), <https://later.com/blog/tiktok-algorithm/>.

<sup>33</sup> Jyotirmaya Sarkar, *TikTok vs. YouTube—Detailed Comparison Explained*, TWISTARTICLE.COM (May 25, 2020), <https://twistarticle.com/tiktok-vs-youtube-detailed-comparison-explained/>; Adam Epstein, *For the First Time, Netflix Name-Checked TikTok as a Major Competitor*, QUARTZ (July 17, 2020), <https://qz.com/1881983/netflix-says-tiktok-is-now-a-major-competitor/>.

<sup>34</sup> *TikTok Video Length & Video Formatting Guide*, BOOSTED, <https://boosted.lightricks.com/tiktok-video-length-video-formatting-guide/> (last visited Oct. 8, 2022).

and YouTube.<sup>35</sup> TikTok videos are usually not political discussions and debates, which can also be found on YouTube or on a multitude of podcasts across the web. TikToks can include dances, songs, funny compilations, etc.<sup>36</sup> TikTok videos can be best thought of a more focused version of YouTube (as YouTube contains a variety of short TikTok-like videos, but that is not its main or only focus).<sup>37</sup>

Perhaps TikTok's competitive advantage can be classified in its algorithm, which pairs users with videos in which they may be interested.<sup>38</sup> This type of pairing, of course, cannot be done without gathering data on the TikTok user and using that data to determine which videos are most likely to interest that user.<sup>39</sup> To accomplish this, TikTok gathers not only some data from the customers' completion of its sign-up process but also from the content the consumer viewed in the past.<sup>40</sup> Data can include anything from how long the viewer spent watching the video, to whether the viewer liked the video, to a variety of other datapoints, many of which may very well be trade secrets.<sup>41</sup> This targeted data collection also allows TikTok to pair consumers with its advertisers in a very "personalized" way.<sup>42</sup> In the same way that TikTok's machine learning algorithm can sometimes predict the videos which might interest consumers, TikTok can also predict what products or services may interest them, matching the consumer and the advertiser accordingly.<sup>43</sup>

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<sup>35</sup> See TIKTOK, <https://www.tiktok.com/> (last visited Aug. 25, 2022); YOUTUBE, <https://www.youtube.com/> (last visited Aug. 25, 2022); NETFLIX, <https://www.netflix.com/> (last visited Aug. 25, 2022).

<sup>36</sup> Katie Louise Smith, *What is the Most Viewed Video on TikTok? Here Are the Top 10*, POPBUZZ (Aug. 2, 2021, 10:51 AM), <https://www.popbuzz.com/internet/viral/most-viewed-video-tiktok/>.

<sup>37</sup> TIKTOK, <https://www.tiktok.com/> (last visited Aug. 25, 2022); YOUTUBE, <https://www.youtube.com/> (last visited Aug. 25, 2022).

<sup>38</sup> Molly McGlew, *This is How the TikTok Algorithm Works*, LATER (June 23, 2021), <https://www.popbuzz.com/internet/viral/most-viewed-video-tiktok/>.

<sup>39</sup> Robert McMillan, Liza Lin & Shan Li, *TikTok User Data: What Does the App Collect and Why Are U.S. Authorities Concerned?*, WALL ST. J. (July 7, 2020), <https://www.wsj.com/articles/tiktok-user-data-what-does-the-app-collect-and-why-are-u-s-authorities-concerned-11594157084>.

<sup>40</sup> *TikTok: What Data Does It Collect on Its Users, and How Do Other Apps Compare?*, SKY NEWS (Sept. 20, 2020, 2:00 AM), <https://news.sky.com/story/tiktok-what-data-does-it-collect-on-its-users-and-how-do-other-apps-compare-12041562>.

<sup>41</sup> Shannon Mullery, *How the TikTok Algorithm Works in 2021*, TINUITI (Apr. 12, 2021), <https://tinuiti.com/blog/paid-social/tiktok-algorithm/>.

<sup>42</sup> Kait Sanchez, *TikTok Will No Longer Let People Opt Out of Personalized Ads*, THE VERGE (Mar. 17, 2021, 2:32 PM), <https://www.theverge.com/2021/3/17/22336093/tiktok-mandatory-personalized-ads-privacy-tracking>.

<sup>43</sup> See Garrett Sloane, *How TikTok is Revamping Its Ad Business Ahead of Apple's New Privacy Rules*, ADAGE (Mar. 19, 2021), <https://adage.com/article/media/how-tiktok-revamping-its-ad-business-ahead-apples-new-privacy-rules/2322966>.

This matching of advertisers to consumers is lucrative, as without it, firm marketing teams could waste hundreds of millions of dollars every year without finding their target customers.<sup>44</sup> Being able to “zero-in” on a consumer, then, is a service worth paying for. TikTok collects these advertising dollars and shares a fraction with the individuals who make TikTok videos to keep them incentivized to post more and more.<sup>45</sup> These content creators benefit from having users view their videos and drive more and more traffic to their profiles. This traffic generates more views, more notoriety, and more advertising dollars to be shared between TikTok and the content creator.<sup>46</sup>

TikTok’s business model seems to resemble the models of other social media giants. It is perhaps most similar to YouTube, but it is no secret that Facebook, Instagram, Google, and other tech giants gather consumer data for advertising purposes.<sup>47</sup> The advertisements involved can theoretically include political advertisements or just ordinary political videos (despite TikTok’s claims to the contrary), which would make it much easier for politicians and special interests, whether foreign or domestic, to influence voters.<sup>48</sup> It is the gathering of data by companies like TikTok and other organizations that would allow political messages to be distributed in a way that does not waste advertising dollars.<sup>49</sup> For example, ads that sneak through TikTok’s filter against political content might be directed at swing voters in elections rather than targeting an individual that will vote one way no matter the information (or disinformation) to which he or she may be exposed.<sup>50</sup> This, of course, underscores the problem that the Trump administration had with TikTok: Its data-gathering activities

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<sup>44</sup> Rebecca Walker Reczek, Christopher Summers & Robert Smith, *Targeted Ads Don’t Just Make You More Likely to Buy — They Can Change How You Think About Yourself*, HARV. BUS. REV. (Apr. 4, 2016), <https://hbr.org/2016/04/targeted-ads-dont-just-make-you-more-likely-to-buy-they-can-change-how-you-think-about-yourself>.

<sup>45</sup> Mike Winters, *How Much Money Can You Make on TikTok?*, LIFEHACKER (Nov. 30, 2020, 10:30 AM), <https://lifehacker.com/how-much-money-can-you-make-on-tiktok-1845773683>.

<sup>46</sup> Louise Matsakis, *TikTok Is Paying Creators. Not All of Them Are Happy*, WIRED (Sept. 10, 2020, 7:00 AM), <https://www.wired.com/story/tiktok-creators-fund-revenue-sharing-complaints/>.

<sup>47</sup> See Arielle Pardes, *All the Social Media Giants are Becoming the Same*, WIRED (Nov. 30, 2020, 7:00AM), <https://www.wired.com/story/social-media-giants-look-the-same-tiktok-twitter-instagram/>.

<sup>48</sup> Natasha Lomas, *TikTok Called Out for Lack of Ads Transparency and for Failing to Police Political Payola*, TECHCRUNCH (June 3, 2021, 9:00 AM), <https://techcrunch.com/2021/06/03/tiktok-called-out-for-lack-of-ads-transparency-and-for-failing-to-police-political-payola/>.

<sup>49</sup> David Cohen, *Mozilla: TikTok Does Not Accept Political Ads, But . . .*, ADWEEK (June 3, 2021), <https://www.adweek.com/social-marketing/mozilla-tiktok-does-not-accept-political-ads-but/>.

<sup>50</sup> Cat Zakrzewski, *The Technology 202: Influencers are Evading TikTok’s Political Ad Ban, Researchers Say*, WASH. POST (June 3, 2021, 9:38 AM), <https://www.washingtonpost.com/politics/2021/06/03/technology-202-influencers-are-evading-tiktok-political-ad-ban-researchers-say/>.

could theoretically affect American political (and some non-political) sentiments.

This type of impact did not have to take place through targeting advertisements. Just like Google, Facebook, and YouTube, TikTok has the power to emphasize or de-emphasize the work of some creators.<sup>51</sup> For example, if TikTok's artificial intelligence engine detected that a particular individual was on the fence about a political issue, it was entirely possible for the engine to recommend to this user arguments favoring only one side of the political aisle. It would not have been impossible for the consumer to seek balancing arguments elsewhere, but one set of political ideas would pop up effortlessly in his or her feed, while another had to be painstakingly found either on TikTok or on some other social media platform. By making one set of ideas more visible and more apparent, a social media giant like TikTok could easily make an argument seem one-sided even though, in reality, there was an even divide.

This could be observed when TikTok acted at the behest of the Chinese Communist Party within China.<sup>52</sup> TikTok took part in the "Great Chinese Firewall," which prevents a variety of news from reaching the Chinese people.<sup>53</sup> This, of course, is an important system of control: How can the Chinese people object to the actions of their governing party if they never learn of them? In the United States, TikTok could not be compelled by law to take part in such a system of censorship, but no legal compulsion is necessary. The Chinese Communist Party is just as capable of pulling the strings on what TikTok shows to American viewers as it is on determining what Chinese citizens see and do not see on the application. That is the price of running a company in China: the knowledge that the government can always step in and regulate a social media giant's activities both within and outside of Chinese borders.

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<sup>51</sup> Michelle Santiago Cortés, *What is Shadow Banning & Why are TikTokers Complaining About It?*, REFINERY29 (July 17, 2020, 5:50 PM), <https://www.refinery29.com/en-us/2020/07/9901461/what-is-shadow-banning-tik-tok>.

<sup>52</sup> Jane Zhang & Minghe Hu, *Behind the Great Firewall, the Chinese Version of TikTok Is Worlds Apart in Terms of Political Content*, S. CHINA MORNING POST (Nov. 23, 2019, 2:30 AM), <https://www.scmp.com/tech/apps-social/article/3038958/behind-great-firewall-chinese-version-tiktok-worlds-apart-terms>.

<sup>53</sup> Elizabeth C. Economy, *The Great Firewall of China: Xi Jinping's Internet Shutdown*, THE GUARDIAN (June 29, 2018, 1:00 AM), <https://www.theguardian.com/news/2018/jun/29/the-great-firewall-of-china-xi-jinpings-internet-shutdown>.

C. *The March of Technology*

“No one can be told what *The Matrix* is. You’ll have to see it for yourself.”

—Morpheus, *The Matrix*<sup>54</sup>

TikTok and WeChat demonstrate how quickly and easily social media giants can shape the perception of reality for ordinary people. These applications—and their American and European counterparts—can be so “fun” to use that they become addictive.<sup>55</sup> When a user no longer receives his or her news, political opinions, and facts from any other source (or limits those other sources to a minimum), it should come as no surprise that these applications have the power to shape public opinion. After all, humans are social creatures, and their views can be changed by what they perceive to be the opinion of others. If that perception can be shaped via social media broadcasting—or rebroadcasting a set of particular opinions that they favor—the population can, in a sense, be controlled.

As Russian “trolls” demonstrated in the period leading up to the 2016 Presidential Election in the United States, perception can also be shaped by broadcasting messages with which the viewer does not agree. Particularly alarming messages to the viewer can actually drive them to the opposite political camp compared to what the message appears to inspire the viewer to believe.<sup>56</sup> This reverse psychology is certainly available for social media giants to use as well. New technologies perpetually create greater opportunities to manipulate minds, change opinions, and yes, influence everything from purchase decisions to election outcomes.

In order for any of this to be viable, though, social media giants must do more than an old-fashioned television station, which just broadcasts its advertisements and messaging to whomever tunes in, without knowing so much about the audience. Social media is so much more powerful because of the data it gathers on its users. This potentially pernicious ability to see into the minds of users is precisely why some politicians may seek to regulate social media and

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<sup>54</sup> THE MATRIX (Warner Bros. 1999).

<sup>55</sup> Yubo Hou et al., *Social Media Addiction: Its Impact, Mediation, and Intervention*, J. OF PSYCHOSOCIAL RSCH. ON CYBERSPACE, <https://cyberpsychology.eu/article/view/11562/10369> (last visited Oct. 8, 2022).

<sup>56</sup> See generally *Indictment, United States v. Internet Rsch. Agency L.L.C.*, 2018 WL 914777 (D.D.C. Feb. 16, 2018) (No. 1:18-cr-00032) [hereinafter *Indictment*]; Craig Timberg, Elizabeth Dvoskin, Adam Entous & Karoun Demirjian, *Russian Ads, Now Publicly Released, Show Sophistication of Influence Campaign*, WASH. POST (Nov. 1, 2017), [https://www.washingtonpost.com/business/technology/russian-ads-now-publicly-released-show-sophistication-of-influence-campaign/2017/11/01/d26aead2-bf1b-11e7-8444-a0d4f04b89eb\\_story.html?utm\\_term=.a4d2566e82a5..](https://www.washingtonpost.com/business/technology/russian-ads-now-publicly-released-show-sophistication-of-influence-campaign/2017/11/01/d26aead2-bf1b-11e7-8444-a0d4f04b89eb_story.html?utm_term=.a4d2566e82a5..)

could be the real reason why President Trump tried to ban TikTok and WeChat. The expression transmitted by these social media platforms is perhaps too effective, being able to essentially see into the mind of the receiver of information and use that to be more effective.<sup>57</sup> Politicians and political thinkers worry that, given enough power, social media could sway opinions, alter policy, and control elections.<sup>58</sup> Of course, politicians oppose such a power, unless they can be sure that social media would sway elections in their favor. Yet, there seems to be a limitless list of government regulations that have made society worse, not better. So should the government address this perceived threat, or should the people (and the social media giants) regulate it themselves?

### III. THE FREEDOM OF EXPRESSION

*“Nothing is true, everything is permissible.”*

*—Assassin’s Creed<sup>59</sup>*

To Americans, few things feel more natural than speaking one’s mind. This feeling has prevailed over the centuries since the enactment of the First Amendment, and—given the fiery speeches that led to the Revolutionary War—Americans may have felt expression to be their unalienable right even earlier, under the yoke of King George III. Freedom of Speech—and, specifically, Freedom of Political Speech—is one of the central reasons the Founding Fathers adopted the First Amendment.<sup>60</sup> The Founding Fathers relied on free expression to successfully raise a Revolutionary Army and, ultimately, reign free of imperial control.<sup>61</sup> Arguably, they intended to protect political speech most of all because it was so closely related to the rise of resistance against British tyranny and to the founding of the new nation itself. Moreover, political speech would directly relate to the promulgation of ideas that Congress would later pass as laws, the Executive Branch might include in its orders, and the Judiciary Branch may adopt in its jurisprudence. By ratifying the Bill of Rights, the Founding Fathers sought to ensure the preservation of the freedom of expression for future

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<sup>57</sup> Jefferson Graham, *What Is WeChat and Why Does President Trump Want To Ban It?*, USA TODAY (Aug. 7, 2020, 2:30 PM), <https://www.usatoday.com/story/tech/2020/08/07/what-is-wechat-why-trump-wants-ban-tencent/3319217001/>.

<sup>58</sup> See, e.g., Issie Lapowsky, *Here’s How Facebook Actually Won Trump the Presidency*, WIRED (Nov. 15, 2016, 1:12 PM), <https://www.wired.com/2016/11/facebook-won-trump-election-not-just-fake-news/>.

<sup>59</sup> ASSASSIN’S CREED (Ubisoft 2007) (quoting the creed of the Islamic Hashshashin sect, active between 1090 and through the end of the Third Crusade).

<sup>60</sup> Roger Pilon, *The First Amendment and Restrictions on Political Speech*, CATO INST. (May 5, 1999), <https://www.cato.org/testimony/first-amendment-restrictions-political-speech>.

<sup>61</sup> Martin Kelly, *The Root Causes of the American Revolution*, THOUGHTCO. (Feb. 17, 2020), <https://www.thoughtco.com/causes-of-the-american-revolution-104860>.



generations, along with the Freedom of the Press and the Freedom of Assembly, which proved so central to the spread of ideas like the emancipation of enslaved peoples, women's suffrage, and a litany of other important political movements in the late eighteenth century and well thereafter.<sup>62</sup>

Freedom of Speech has been examined by courts many times and has frequently protected citizens and non-citizens alike from government encroachments on free speech.<sup>63</sup> Though the First Amendment initially applied only to restrict federal encroachments on free speech rights, the United States Supreme Court began to apply the amendment to states, counties, and municipalities in a series of decisions that, piece by piece, incorporated the application of the First Amendment via the Due Process Clause of the Fourteenth Amendment.<sup>64</sup> This becomes important when some speech proved unpopular or controversial on a local level.<sup>65</sup> The First Amendment must protect the speaker most of all in such instances because it is the unpopular speech that usually attracts government censorship, with local officials, including law enforcement, frequently having greater motives to silence the unpopular.<sup>66</sup> Protecting this type of speech can be especially important since free expression of unpopular ideas may lead to the promulgation of unpleasant or previously unknown truths in the community, help educate the people about various political matters that the government might prefer remain unexamined, and ultimately lead to better decision-making as part of the democratic process.<sup>67</sup> For the same reasons, one of the most critical functions of the First Amendment should be to eliminate censorship of this type of speech, regardless of its origin.<sup>68</sup> For if speech helps American citizens and politicians reexamine, criticize, and improve their government, why should its source lead to censorship?

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<sup>62</sup> Doug Brooking, *The Role of the Press During the Revolutionary Period*, STUDYLIB, <https://studylib.net/doc/14335630/the-role-of-the-press-during-the-revolutionary-period-dou> (last visited Aug. 25, 2022).

<sup>63</sup> Ellada Gamreklidze, *Political Speech Protection and the Supreme Court of the United States*, NAT'L COMM'N ASS'N (Oct. 1, 2015), <https://www.natcom.org/communication-currents/political-speech-protection-and-supreme-court-united-states>.

<sup>64</sup> See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931); *Stromberg v. California*, 283 U.S. 359 (1931); *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>65</sup> Erwin Chemerinsky, *First Amendment's Role is to Protect Unpopular Speech*, ORANGE CNTY. REG. (Mar. 19, 2015, 12:00 AM), <https://www.oregister.com/2015/03/19/first-amendments-role-is-to-protect-unpopular-speech/>.

<sup>66</sup> *Id.*

<sup>67</sup> *Why Protect Offensive Speech?*, SHARE AM. (Aug. 14, 2017), <https://share.america.gov/why-protect-offensive-speech/>.

<sup>68</sup> See Artem M. Joukov & Samantha M. Caspar, *Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?*, 39 PACE L. REV. 43, 69 (2018).

The First Amendment, of course, preceded by more than two centuries the types of technological advances that allow speech on a macro level. Whereas in colonial times, an individual could share expressive activity, at most, by convincing a local publisher to distribute it in a pamphlet or newspaper, today's speakers are far more powerful. A message posted on YouTube, TikTok, WeChat, or any other social media site can spread around the world in seconds. This speech can inform, entertain, or, in rare cases, incite violence. Social media companies can stream such political speech worldwide with ease, affecting anything from public opinion to election coverage. This may seem annoying, or even alarming, for politicians whose agenda does not align with left-leaning social media platforms garner the support of social media giants (which generally lean to the left).<sup>69</sup> When one adds foreign social media to the spectrum, which are answerable to the ruling political party in China, one can see why politicians would want more control over the messaging.

Does the First Amendment stand in the way? One key question is whether the First Amendment can apply to speech by non-citizens (including social media giants) outside of the United States. It was the federal government's view, for example, that Freedom of Speech did not apply to Russian "trolls" who tried to manipulate the outcome of the United States election.<sup>70</sup> Yet the government's position may have been wrong, both under old precedent and under the precedent set forth in the litigation between WeChat, TikTok, and the Trump Administration. This is where the crucial questions about the First Amendment lie: How far does it reach beyond the borders of the United States, to what extent does it protect corporations, to what extent does it protect commercial speech, and can social media companies (and their users) rely on the First Amendment to ensure non-interference from government agencies both at the state and federal level?

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<sup>69</sup> See, e.g., Kurt Wagner, *Twitter is So Liberal That its Conservative Employees 'Don't Feel Safe to Express Their Opinions,' Says CEO Jack Dorsey*, VOX (Sept. 14, 2018, 11:06 AM), <https://www.vox.com/2018/9/14/17857622/twitter-liberal-employees-conservative-trump-politics>.

<sup>70</sup> Indictment, *supra* note 56.

A. *Who Does the First Amendment Protect?*

“When you tear out a man’s tongue, you are not proving him a liar, you’re only telling the world that you fear what he might have to say.”

—Tyrion Lannister, *A Clash of Kings*<sup>71</sup>

One of the crucial questions about any constitutional right is who is entitled to its protections. Do First Amendment protections extend beyond U.S. citizens within U.S. borders? Certainly. The First Amendment protects American corporations when they engage in political speech and also, to some extent, when they engage in commercial speech. What about legal residents? Undocumented immigrants? American citizens abroad? American citizens calling for insurrection in the United States? American citizens calling for insurrection abroad? Noncitizens seeking to influence an election? Noncitizens outside the United States calling for insurrection within the United States? What about corporations seeking to influence the opinion of American voters (and hence the results of elections)? Clearly, to even address whether TikTok, WeChat, and other social media companies, both foreign and domestic, publish protected speech, one must first examine whether these organizations and their users would qualify for the protections of the First Amendment.

Noncitizens, just like citizens, have an expansive range of rights under the Constitution.<sup>72</sup> The Bill of Rights applies (or at the very least should apply) to citizens and noncitizens within American borders.<sup>73</sup> In certain instances, these rights extend to citizens abroad, and, in the case of truly fundamental rights, the Constitution may even apply to noncitizens and nonresidents abroad.<sup>74</sup> This concept of extraterritoriality of various provisions within the U.S. Constitution

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<sup>71</sup> GEORGE R.R. MARTIN, *A CLASH OF KINGS* 122 (1998).

<sup>72</sup> “Foreign” Campaign Contributions and the First Amendment, *supra* note 11; Slate Explainer, *Do Noncitizens Have Constitutional Rights?*, SLATE (Sept. 27, 2001, 5:47 PM), <https://slate.com/news-and-politics/2001/09/do-noncitizens-have-constitutional-rights.html>; *see also* Ilya Somin, *The Constitutional Rights of Noncitizens*, LEARN LIBERTY (Apr. 30, 2017), <https://www.learnliberty.org/blog/t-he-constitutional-rights-of-noncitizens/>; Daniel Fisher, *Does The Constitution Protect Non-Citizens? Judges Say Yes*, FORBES (Jan. 30, 2017, 12:08 PM), <https://www.forbes.com/sites/danielfisher/2017/01/30/does-the-constitution-protect-non-citizens-judges-say-yes/?sh=19e6d93d4f1d>.

<sup>73</sup> *Do Noncitizens Have Constitutional Rights?*, *supra* note 72; *see also* Somin, *supra* note 72; Fischer, *supra* note 72; Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C.L. REV. 1237 (2016) (urging for the extension of free speech protections to immigrants); Michael Kagan, *Do Immigrants Have Freedom of Speech?*, 6 CALIF. L. REV. 84 (2015).

<sup>74</sup> *See Do Noncitizens Have Constitutional Rights?*, *supra* note 72; *see also* Somin, *supra* note 72.

is not without its ambiguity and selectivity regarding which rights apply abroad.<sup>75</sup> However, when it comes to something as critical as the ability to express ideas, the First Amendment should apply extraterritorially.<sup>76</sup>

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<sup>75</sup> See generally *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 115 (2013) (“Respondents contend that claims under the ATS do not [reach actions outside of the United States], relying primarily on a canon of statutory interpretation known as the presumption against extraterritorial application. That canon provides that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”) (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)); *Small v. United States*, 544 U.S. 385, 388 (2005); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 287 (1949); *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 221 (2013) (holding speech restriction applied to international organizations violated the First Amendment); *Boumediene v. Bush*, 553 U.S. 723, 755–56 (2008); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274–75 (1990); *Ross v. McIntyre*, 140 U.S. 453, 464 (1891); *DKT Mem’l Fund Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275, 285 n.11 (D.C. Cir. 1989); LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE OPEN: A FREE PRESS FOR A NEW CENTURY (2010); RONALD J. KROTOSZYNSKI, JR., THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE: A COMPARATIVE LEGAL ANALYSIS OF THE FREEDOM OF SPEECH 222 (2006); GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009); RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY (1992); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004); Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 440 (2009); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM. L. REV. 225, 229 (2010); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 23 (1985) (citing *United States v. Belmont*, 301 U.S. 324, 332 (1937)); Ronald J. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659, 665–73, 678 (2015); Michael J. Lebowitz, “*Terrorist Speech*”: *Detained Propagandists and the Issue of Extraterritorial Application of the First Amendment*, 9 FIRST AMEND. L. REV. 573, 581–82 (2011); Jules Lobel, *Fundamental Norms, International Law, and the Extraterritorial Constitution*, 36 YALE J. INT’L L. 307, 312–16 (2011); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. CAL. L. REV. 259, 261 (2009); Christina D. Ponsa-Kraus, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 COLUM. L. REV. 973, 976–77 (2009); Su, *supra* note 11, at 1375; Zick, THE COSMOPOLITAN FIRST AMENDMENT, *supra* note 11; Zick, *First Amendment Cosmopolitanism, Skepticism, and Democracy*, *supra* note 11, at 720; Zick, *Falsely Shouting Fire in a Global Theater*, *supra* note 11, at 130, 140; Zick, *The First Amendment in Transborder Perspective*, *supra* note 11, at 944; Zick, *Territoriality and the First Amendment*, *supra* note 11, at 1579–80; Zick, *The First Amendment and the World*, *supra* note 11; “*Foreign*” *Campaign Contributions and the First Amendment*, *supra* note 11, at 1896; *Do Noncitizens Have Constitutional Rights?*, *supra* note 72; Somin, *supra* note 72; Nikolas Bowie & Leah Litman, *The First Amendment Belongs Only to Americans? Wrong*, TAKE CARE (Mar. 29, 2017), <https://takecareblog.com/blog/the-first-amendment-belongs-only-to-americans-wrong#:~:text=The%20First%20Amendment%20applies%20to,federal%20government%20with%20limited%20powers>.

<sup>76</sup> *Do Noncitizens Have Constitutional Rights?*, *supra* note 72; Bowie & Litman, *supra* note 75; Somin, *supra* note 72; Su, *supra* note 11, at 1426, 1429; ZICK, THE COSMOPOLITAN FIRST AMENDMENT, *supra* note 11; Zick, *First Amendment Cosmopolitanism, Skepticism, and Democracy*, *supra* note 11, at 706–07; Zick, *Falsely Shouting Fire in a Global Theater*, *supra* note

The First Amendment states, in part: “Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble.”<sup>77</sup> Nothing in the quoted language limits the right described therein to only Americans.<sup>78</sup> Rather, the language articulates a limit on what Congress can regulate through its laws when it comes to speech, even if the regulation would otherwise be permissible under Article I of the Constitution.<sup>79</sup> Reading the powers assigned to Congress under this article in light of the First Amendment means that Congress may regulate commerce with foreign nations, but it cannot regulate commerce while “abridging the freedom of speech.”<sup>80</sup> Congress may tax and spend, but it may not deprive citizens of their right to expression when doing so.<sup>81</sup> The First Amendment’s plain language does not allow abridgements of speech rights that affect only noncitizens or that are only exercised abroad; moreover, doing so would impose upon the government, and the taxpayer, the cost of regulating a potentially infinite amount of expression.<sup>82</sup> Because Congress does not have the power to abridge the freedom of speech, Congress cannot delegate the power to abridge speech to the executive branch. A political body cannot delegate a power which it itself does not have.

The Bill of Rights’ other limitations reinforce the First Amendment’s application to noncitizens and corporations abroad because they define more narrowly the classes of people who are entitled to other constitutionally protected rights.<sup>83</sup> By way of illustration, the Fifth Amendment states that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>84</sup>

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11, at 174–77; Zick, *The First Amendment in Transborder Perspective*, *supra* note 11, at 945; Zick, *Territoriality and the First Amendment*, *supra* note 11, at 1549–50; Zick, *The First Amendment and the World*, *supra* note 11; “Foreign” Campaign Contributions and the First Amendment, *supra* note 11, at 1897.

<sup>77</sup> U.S. CONST. amend. I.

<sup>78</sup> Bowie & Litman, *supra* note 75; Su, *supra* note 11, at 1392–93.

<sup>79</sup> Bowie & Litman, *supra* note 75; *see also* *Citizens United v. Fed. Election Comm’n*, 588 U.S. 310, 340 (2010) (“Premised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints . . .”); Su, *supra* note 11, at 1392.

<sup>80</sup> Bowie & Litman, *supra* note 75; Su, *supra* note 11.

<sup>81</sup> Bowie & Litman, *supra* note 75; Su, *supra* note 11, at 1425.

<sup>82</sup> Bowie & Litman, *supra* note 75; *see* Su, *supra* note 11, at 1393; *see also* *Citizens United*, 588 U.S. at 359 (“Reliance on a ‘generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.’”) (quoting *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 296 (2003) (Kennedy, J., concurring)). The text of the First Amendment does not limit its prohibition on speech-abridging laws by stating that such prohibitions can occur so long as they concern alien speech. The prohibition on anti-speech laws is absolute, regardless of the origin of speech, and any statute construed to illegalize foreign political speech should usually run afoul of this prohibition by the federal constitution. U.S. CONST. amend. I.

<sup>83</sup> U.S. CONST. amend. V.

<sup>84</sup> *Id.*

This Amendment employs the words “no person,” as opposed to “no citizen” or “no American”—and the Supreme Court has observed, “an alien is surely a ‘person’ in any ordinary sense of that term.”<sup>85</sup> The Court reasoned from this observation that important protections extend to unnaturalized and even undocumented residents of the United States.<sup>86</sup> *Citizens United v. Federal Election Commission*<sup>87</sup> suggests a company providing a venue for internet communication is also a “person” within the protection of the First Amendment.<sup>88</sup> Moreover, since online communications are still between people, any action against the company facilitating the communication encumbers the right of the people using its services for communications.<sup>89</sup> The textual argument that the First Amendment should extend extraterritorially is based on a reasonable consideration of the plain language of the U.S. Constitution.<sup>90</sup> The Constitution contains a few other provisions that make distinctions based on citizenship.<sup>91</sup> For example, only citizens may become president.<sup>92</sup> Moreover, only citizens have the right to vote.<sup>93</sup> But such limiting language is absent from the First Amendment, perhaps indicating an intent to extend its protections to foreigners as well. Another possible explanation for this absence is an intent to decrease the cost of the government to taxpayers by precluding it from engaging in activities the Founding Fathers believed to be net economic losses. Some may argue that “We the People” in the preamble of the U.S. Constitution limits the application of the First Amendment to individuals within the United States (also excluding corporations).<sup>94</sup> The First Amendment, however, forbids “We the

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<sup>85</sup> *Plyler v. Doe*, 457 U.S. 202, 210 (1982); see also *Bowie & Litman*, *supra* note 75.

<sup>86</sup> *Plyler*, 457 U.S. at 210.

<sup>87</sup> 588 U.S. 310 (2010).

<sup>88</sup> *Id.* at 310.

<sup>89</sup> *U.S. WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 928 (N.D. Cal. 2020).

<sup>90</sup> *Bowie & Litman*, *supra* note 75; *Su*, *supra* note 11.

<sup>91</sup> See, e.g., U.S. CONST. art. II, § 1; U.S. CONST. amend. XV.

<sup>92</sup> Article II, Section 1 of the U.S. Constitution provides:

[n]o person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

U.S. CONST. art. II, § 1.

<sup>93</sup> The Fifteenth Amendment of the U.S. Constitution provides: “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV.

<sup>94</sup> The proponents of this argument may state that the document intends to cover only those who would fall under the umbrella of “We the People,” which would certainly have excluded hired Russians sending online messages to unsuspecting American voters. See generally J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463 (2007) (arguing the Constitution does not apply extraterritorially).

People's" elected representatives in Congress from passing laws restricting speech both foreign and domestic, private and corporate.<sup>95</sup> In the alternative, the First Amendment can be viewed as a modification (which, after all, it was) to the Constitution that extended the protection from the federal government's attempts to criminalize speech. Either approach casts heavy doubt on the idea that an expansive prohibitory clause—such as the Free Speech Clause—only prohibits the government from engaging in prohibited acts toward U.S. residents or citizens.

Thus, the counterarguments in favor of limiting the First Amendment's reach cannot hold. The Supreme Court reaffirmed in 2016 that the First Amendment protections apply equally to noncitizens and citizens alike, although the court once more left the question of whether American citizens and foreigners receive the protection of the First Amendment extraterritorially.<sup>96</sup> It is not a long stretch, though, to apply these fundamental protections to the Political Speech of both citizens and noncitizens abroad, through internet communication mediums or otherwise.<sup>97</sup> This may be particularly true when foreign speakers direct their speech *at* Americans, who have the right to hear speech from abroad under the First Amendment too.<sup>98</sup> By extension, then, the locations of the headquarters of WeChat and TikTok lying outside of the legal jurisdiction of the United States hardly lessen the speech protections the U.S. Constitution affords them.<sup>99</sup> This should also be the case if the companies' main business is outside of American borders.<sup>100</sup> If the activities of these social media companies and their users fall within the realm of Political Speech, Freedom of the Press, and Freedom of Assembly, then the companies' presence outside American borders should not reduce or strip those protections away entirely.<sup>101</sup>

Sometimes, the best way to demonstrate why a right should be protected is to consider why some might oppose it. Politicians wishing to silence WeChat, TikTok, and their users may argue that speech from overseas may damage the

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<sup>95</sup> U.S. CONST. amend. I.

<sup>96</sup> *Heffernan v. City of Paterson*, 578 U.S. 266 (2016).

<sup>97</sup> See *Do Noncitizens Have Constitutional Rights?*, *supra* note 72; see also Bowie & Litman, *supra* note 75; Somin, *supra* note 72; Su, *supra* note 11; ZICK, THE COSMOPOLITAN FIRST AMENDMENT, *supra* note 11; Zick, *First Amendment Cosmopolitanism, Skepticism, and Democracy*, *supra* note 11; Zick, *Falsely Shouting Fire in a Global Theater*, *supra* note 11; Zick, *The First Amendment in Transborder Perspective*, *supra* note 11; Zick, *Territoriality and the First Amendment*, *supra* note 11; Zick, *The First Amendment and the World*, *supra* note 11; "Foreign" Campaign Contributions and the First Amendment, *supra* note 11.

<sup>98</sup> Su, *supra* note 11, at 1404 (citing *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965)).

<sup>99</sup> See *Do Noncitizens Have Constitutional Rights?*, *supra* note 72; see also Somin, *supra* note 72.

<sup>100</sup> See *Do Noncitizens Have Constitutional Rights?*, *supra* note 72; see also Somin, *supra* note 72.

<sup>101</sup> See *Do Noncitizens Have Constitutional Rights?*, *supra* note 72; see also Somin, *supra* note 72.

American political process, inspire disloyalty among American citizens, and even lead to opposition to U.S. governmental authority. The Trump Administration, for example, argued that foreign influence within American borders, American media, and American academia has a negative influence on how American citizens perceive their own country. Yet, there is plenty of speech from *inside* United States borders that has these effects already. This speech is completely legal, constitutionally protected, and entirely unfunded and unaffiliated with foreign companies or foreign governments. If speech coming from American residents and citizens themselves has not unhinged the nation, why would foreign speech (which may be viewed even more skeptically by listeners) cause any greater harm? If our politicians want to curtail speech fomenting rebellion, discontent, and insurrection, they should realize that the phone call is coming from inside the house.

Even if a worrying amount of speech, both foreign and domestic, tends to undermine the government of the United States in some indirect way, the Founding Fathers drafted the First Amendment with the inherent belief that the public could handle radical speech about radical ideas. One might consider that perhaps the actions of the American government are sometimes so brazen that they are deserving of criticism from both inside and outside of the country. The origin of the speech does not make the ideas expressed therein any more or less radical: we must extend to Americans the benefit of the doubt when parsing decent ideas expressed via social media from the rest. Either these ideas can be tolerated by American society or they cannot, but that determination must be based on an analysis of the ideas themselves, not on their origin. When stripped of its grander claims of protecting American ears from the influence of China (or any other country, for that matter), the argument against permitting TikTok and WeChat from operating in America is just a poorly veiled attempt at protectionism. Our government discriminates against speech from other nations purely because the speech comes from other nations. Even if there was no constitutional prohibition against this kind of discrimination, discrimination for discrimination's sake should not strike anyone as sound policy. It follows that social media companies should receive the benefits of constitutional protections regardless of their national origin.



B. *Defining the Limits of Protected Speech*

*“If nothing is true, then why believe anything? And if everything is permitted, why not chase every desire? . . . It might be that this idea is only the beginning of Wisdom and not its final form.”*

*—Edward Kenway, Assassin’s Creed IV: Black Flag*<sup>102</sup>

However, constitutional protections for political speech do have their limits.<sup>103</sup> The First Amendment has not been interpreted to preclude the government from regulating speech altogether.<sup>104</sup> A complete inability of federal, state, county, and municipal governments to silence speech at least some of the time would lead to chaos: Hence, reasonable time, place, and manner restrictions on speech, regardless of its content, are a must. Moreover, even though content-based restrictions are highly disfavored, they must also be necessary because of the inflammatory nature of some speech and because of the need to protect members of society from constant exposure to the obscene or highly unpleasant. Content-based restrictions commonly “restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>105</sup> The restriction is either motivated or justified by “reference to an audience’s responses to the content of the speech in question, where those responses are mediated in a sufficient way by the audience’s cognitive and emotional processes.”<sup>106</sup>

When evaluating whether speech regulations go too far, Justice Sandra Day O’Connor outlined the order of operations: “[t]he normal inquiry that [the Freedom of Speech Doctrine] dictates is, first, to determine whether a regulation is content based or content neutral, and then, based on the answer to that question, to apply the proper level of scrutiny.”<sup>107</sup> In most scenarios of content-based speech, the Supreme Court applies strict scrutiny: The Court will uphold the content-based restriction only if the restriction is necessary “to promote a compelling interest” and is the “least restrictive means to further the articulated interest.”<sup>108</sup> Generally speaking, the government can only impose such a restriction if it can show the regulated expressive activity constitutes obscenity, fighting words, and true threats. Another legitimate reason for government regulation is that the expression creates a clear and present danger of imminent

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<sup>102</sup> ASSASSIN’S CREED IV: BLACK FLAG (Ubisoft 2013).

<sup>103</sup> See Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONG. RSCH. SERV. (Sept. 8, 2014), <https://sgp.fas.org/crs/misc/95-815.pdf>.

<sup>104</sup> See R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

<sup>105</sup> *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>106</sup> Wright, *supra* note 104, at 333.

<sup>107</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 59 (1994) (O’Connor, J., concurring).

<sup>108</sup> *Sable Commc’ns of Cal., Inc. v. Fed. Commc’ns Comm’n*, 492 U.S. 115, 126 (1989).

lawless action, which by its definition can include statements such as fighting words and true threats.

Taken in light of the bans on social media companies, governments may be subject to strict scrutiny analysis if they ban or restrict social media companies out of a desire that these companies favor a particular subject matter. For example, if the government wishes to alter the balance of which content is recommended to a social media's customers by their social media company, that would be a content-based restriction. Even if the government is seeking to level the playing field, their regulation still requires social media companies to favor some speech more than the companies would of their own accord. This is exactly the type of restriction which First Amendment jurisprudence generally disfavors, as compelled speech or compelled alteration of speech is far from the intent of the First Amendment.

In the absence of a compelling interest, the government generally may not favor or suppress one type of content or idea by suppressing or encouraging another type of content or idea.<sup>109</sup> It is unconstitutional for a state to prevent a newspaper from publishing the name of a crime victim even if this is done to protect that victim.<sup>110</sup> As long as the newspaper lawfully obtained the victim's name, the paper is free to publish it.<sup>111</sup> On the other hand, "[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transport or the number and location of troops."<sup>112</sup> Hence, TikTok and WeChat can indeed be regulated if they ultimately become tools of espionage for the Chinese government, but espionage must be carefully distinguished from advocacy for a particular political action. The Supreme Court has protected speech even when it embraced the subject matter of military deployment.<sup>113</sup> Even when it comes to matters of national security, government authority to restrict speech is not absolute, as authorities discovered when trying to silence opposition to conscription during the Vietnam War era and to the Vietnam War itself.<sup>114</sup>

In *Tinker v. Des Moines Independent Community School District*,<sup>115</sup> public school students donned black armbands as part of a protest to the American participation in the Vietnam War.<sup>116</sup> The Supreme Court forbade silencing opposition to the war even when the speakers were children and the

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<sup>109</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995).

<sup>110</sup> *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *see also* Ruane, *supra* note 103.

<sup>111</sup> *Florida Star*, 491 U.S. at 541; *see also* Ruane, *supra* note 103, at 5.

<sup>112</sup> *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

<sup>113</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>114</sup> Thomas I. Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975 (1968).

<sup>115</sup> 393 U.S. 503 (1969).

<sup>116</sup> *Tinker*, 393 U.S. at 504.

expressive activity took place within a government building.<sup>117</sup> The Court noted that the freedom of speech does not stop at the schoolhouse door (and implicitly raising the question of whether it should stop at the border).<sup>118</sup> Government may implement content-based speech restrictions only when the restriction satisfies the highest level of scrutiny.<sup>119</sup> Since this level of scrutiny “is almost always fatal,”<sup>120</sup> courts should be highly vigilant and oppose high levels of government involvement in expressive activities.<sup>121</sup> This should also be the approach when it comes to mandating or restricting certain speech from social media companies, both foreign and domestic. The Court has not directly addressed whether content-based regulations should receive more deference if imposed by statute rather than executive order, but the less democratic nature of speech restrictions imposed by executive order should raise further doubts about that order’s constitutional legitimacy.

Content-based restrictions deserve strict scrutiny analysis because “content-based restrictions are especially likely to be improper attempts to value some forms of speech over others, or are particularly susceptible to being used by the government to distort public debate.”<sup>122</sup> Our Founding Fathers sought to avoid such censorship because healthy political debate cannot occur with the governing party always looking over the shoulder of the debaters.<sup>123</sup> Few people would be more incentivized to engage in heavy-handed censorship than the politicians whose policies receive scrutiny from the speakers.<sup>124</sup> Thus, “content-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others.”<sup>125</sup> Given President Trump’s statements concerning China during both of his election campaigns and his presidency, he might be correct in thinking that Chinese people and Chinese companies want him out of office. What he cannot do is use

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<sup>117</sup> *Id.* at 514.

<sup>118</sup> *Id.* at 506; *see also* N.Y. Times Co. v. United States, 403 U.S. 713 (1971).

<sup>119</sup> Ruane, *supra* note 103, at 5.

<sup>120</sup> Leslie Gielow Jacobs, *Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations*, 34 McGEORGE L. REV. 595, 596 (2003).

<sup>121</sup> *Id.*

<sup>122</sup> Glendale Assocs., Ltd. v. NLRB, 347 F.3d 1145, 1155 (9th Cir. 2003) (citing *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (O’Connor, J., concurring)).

<sup>123</sup> *See Great American Thinkers on Free Speech*, THE SATURDAY EVENING POST (Jan. 16, 2015).

<sup>124</sup> *See* P.A. Madison, *Original Meaning: Freedom of Speech or of the Press*, THE FEDERALIST BLOG (Oct. 18, 2008), [http://www.federalistblog.us/2008/10/freedom\\_of\\_speech\\_and\\_of\\_the\\_press/#:~:text=Summary%3A%20Freedom%20of%20Speech%20or,their%20affairs%20a%20seditious%20crime](http://www.federalistblog.us/2008/10/freedom_of_speech_and_of_the_press/#:~:text=Summary%3A%20Freedom%20of%20Speech%20or,their%20affairs%20a%20seditious%20crime).

<sup>125</sup> *Hill v. Colorado*, 530 U.S. 703, 735 (2000) (Souter, J., concurring).

his suspicion as a justification for censorship under our constitutional framework.

1. Advocacy for Illegal Action.

*“Stay my blade from the flesh of the innocent.”*

*–Shay Patrick Cormac, Assassin’s Creed: Rogue*<sup>126</sup>

The First Amendment has on many occasions protected speech that advocated for, or had a tendency to inspire, illegal action.<sup>127</sup> Even though illegal acts are of serious concern to the government, unless speech creates a clear and present danger of imminent lawless action, merely calling for conduct that violates the law is not enough.<sup>128</sup> Sometimes, the protected speech can be so flagrant that it simultaneously advocates for illegal conduct and actually serves to intimidate the potential victims of that conduct.<sup>129</sup> Yet, even there, the speaker should receive the benefit of the doubt, most of the time.<sup>130</sup> Even in cases where the First Amendment does not necessarily offer complete protections, the Supreme Court has sometimes essentially added elements of proof that the prosecution must establish at trial in order to hold the speaker or speakers criminally or civilly liable.<sup>131</sup>

It is sometimes difficult to properly classify where speech involving political advocacy stops and speech calling for violence related to political motives begins. To be sure, some writings by our Founding Fathers were not immune from this: calling for a revolution against the English Crown to establish an independent republic inherently involved a call for violence *and* a call for political action. Yet, even when classifying a particular type of expression is difficult, the Freedom of Speech continues to apply.<sup>132</sup> In general, the First Amendment permits government regulation of speech when such speech is calculated to produce “imminent lawless action” and when the speech is likely produce such action.<sup>133</sup> According to the Supreme Court in *Brandenburg v. Ohio*, the “constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except

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<sup>126</sup> ASSASSIN’S CREED: ROGUE (Ubisoft 2014).

<sup>127</sup> See, e.g., *Watts v. United States*, 394 U.S. 705, 706–08 (1969).

<sup>128</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

<sup>129</sup> *Watts*, 394 U.S. at 706–08.

<sup>130</sup> See *Brandenburg*, 395 U.S. at 447–48; see also *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>131</sup> *Watts*, 394 U.S. at 706–08.

<sup>132</sup> *Brandenburg*, 395 U.S. at 448–49.

<sup>133</sup> *Id.* at 447.

where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>134</sup>

The Court used the *Brandenburg* test in *Hess v. Indiana*<sup>135</sup> to reverse the conviction of a demonstrator who stated: “We’ll take the fucking street later.”<sup>136</sup> The statement, when overheard by police, led to the demonstrator’s arrest.<sup>137</sup> The Court found insufficient evidence on the record that the demonstrator planned to engage, or intended for others to engage, in *imminent* lawless action.<sup>138</sup> Rather, even if the demonstrator meant his statement literally, he intended lawless conduct at a future time, a distinction that forbade state regulation of his speech.<sup>139</sup> The Court applied the imminent lawless action test again in *NAACP v. Claiborne Hardware Company*,<sup>140</sup> which was a critical ruling that acknowledged the highly tense, discriminatory climate in the United States at the time.<sup>141</sup> In *Claiborne*, the NAACP created a list of African Americans who refused to take part in a boycott of businesses engaged in discrimination, reading the names aloud at NAACP meetings.<sup>142</sup> Agents of the NAACP stated: “If we catch any of you going in any of them racist stores, we’re going to break your damn neck.”<sup>143</sup> Likely understanding that the NAACP faced prosecution due to its political beliefs, and not out of genuine concern for African Americans that broke ranks with the boycott, the Supreme Court held that the statement was not a ratification of violence or a direct threat, which meant that the speaker was entitled to constitutional protection.<sup>144</sup>

*Brandenburg* and *Claiborne*, which articulate and apply the standard for First Amendment protections when speech calls for both violence and illegal action, are joined by a significant body of case law which shows how prevalent First Amendment protections truly should be.<sup>145</sup> By way of example, expressive activity which calls for violence against African Americans is protected by the

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<sup>134</sup> *Id.*

<sup>135</sup> 414 U.S. 105 (1973).

<sup>136</sup> *Id.* at 107–09.

<sup>137</sup> *Id.* at 107.

<sup>138</sup> *Id.* at 108–09.

<sup>139</sup> *Id.* at 108.

<sup>140</sup> 458 U.S. 886 (1982).

<sup>141</sup> *Id.* at 927–28.

<sup>142</sup> *Id.* at 903–04.

<sup>143</sup> *Id.* at 902.

<sup>144</sup> *Id.* at 926–29.

<sup>145</sup> *See, e.g.*, *Whitney v. California*, 274 U.S. 357 (1927); *Salvail v. Nashua Bd. of Ed.*, 469 F. Supp. 1269 (D.N.H. 1979); *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996 (W.D. Ark. 2003); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Interactive Digit. Software Ass’n, v. St. Louis Cnty.*, 329 F.3d 954 (8th Cir. 2003); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971); *Wooley v. Maynard*, 430 U.S. 705 (1977); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993).

First Amendment, even when such speech takes place with the specific intent of intimidating the victims, as long as illegal action is not imminent.<sup>146</sup> On at least two occasions, the Supreme Court upheld expression of this sort against legal punishment, raising the question of how the activities of Chinese social media companies, which were far easier to disregard, could be censored when the government cannot even prevent the burning of a cross on the front yard of an African-American family home.<sup>147</sup> Surely the First Amendment protects the speech broadcast by TikTok and WeChat if it protects speakers seeking to intimidate prospective victims and calling for violence against them at some future time.<sup>148</sup>

Despite these rulings, the Court has ruled repeatedly that the right to speak is not limitless.<sup>149</sup> One example is *Morse v. Frederick*,<sup>150</sup> better known as the “Bong Hits for Jesus” case.<sup>151</sup> The record showed a student attending a public school assembly and apparently advocating for the consumption of marijuana.<sup>152</sup> The Court held that this speech was not protected by the First Amendment, demonstrating that schools can regulate disruptive student speech.<sup>153</sup> However, the Court seemed to side with the school only because the speech disrupted a school function, not because it advocated for the illegal consumption of cannabis at some future time.<sup>154</sup> There may be some general argument that TikTok and WeChat are socially disruptive and therefore harmful to society because they

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<sup>146</sup> See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Virginia v. Black*, 538 U.S. 343 (2003).

<sup>147</sup> See *Brandenburg*, 395 U.S. 444; *Black*, 538 U.S. 343.

<sup>148</sup> *The ‘Brandenburg Test’ for Incitement to Violence*, FREE SPEECH DEBATE (Apr. 29, 2013), <https://freespeechdebate.com/case/the-brandenburg-test-for-incitement-to-violence> [hereinafter FREE SPEECH DEBATE]; Gabe Rottman, A “Foreign Policy Exception” to the First Amendment, AM. C.L. UNION (Sept. 28, 2012), <https://www.aclu.org/news/free-speech/foreign-policy-exception-first-amendment> [hereinafter Rottman].

<sup>149</sup> *Morse v. Frederick*, 551 U.S. 393, 410 (2007); FREE SPEECH DEBATE, *supra* note 148; Rottman, *supra* note 148.

<sup>150</sup> 551 U.S. 393.

<sup>151</sup> *Id.* at 405–06.

<sup>152</sup> *Id.* at 397.

<sup>153</sup> *Id.* at 410.

<sup>154</sup> *Id.* at 408. In fact, the First Amendment would protect a very significant amount of speech far more disagreeable than what one can usually find on TikTok and WeChat. See *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (protecting unsavory speech, such as members of the Westboro Baptist Church celebrating the death of a marine outside of his funeral); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (striking down a statute used to prosecute racially motivated cross-burning); *Nat’l Socialist Party of Am. v. Skokie*, 432 U.S. 43, 44 (1977) (removing procedural barriers that would make Nazi marches in Chicago more difficult); *Gregory v. City of Chicago*, 394 U.S. 111, 113 (1969) (striking down a disorderly conduct law used to quell a demonstration by desegregation activists); *Terminiello v. City of Chicago*, 337 U.S. 1, 2, 4–6 (1949) (reversing the appellate court’s interpretation of Chicago’s disorderly conduct statute because it infringed on petitioner’s First Amendment rights).

reduce productivity and perhaps deliver information about American consumers into foreign hands. However true this might be, it would be a very speculative reason to justify expressive activity, apparently without precedent in almost 250 years of First Amendment jurisprudence.

WeChat and TikTok raise the additional concern of transmitting inaccurate information, perhaps even intentionally employing disinformation on some occasions. Yet, the Supreme Court has continuously extended First Amendment protections to falsehoods, even when these falsehoods were offered in place of the truth.<sup>155</sup> In *New York Times v. Sullivan*,<sup>156</sup> The New York Times included a one-page ad paid for by civil rights activists criticizing the police department in Montgomery, Alabama for its treatment of civil rights protestors.<sup>157</sup> Some of the advertisement's allegations were accurate, but some were not, and their presentation together could confuse a reader into believing the entire advertisement.<sup>158</sup> In response, The New York Times found itself in civil litigation for libel, because the advertisement it featured damaged Sullivan's reputation.<sup>159</sup>

Despite the fact that the technical elements of libel were met, and that a jury awarded damages to the plaintiff, the Supreme Court reversed.<sup>160</sup> It unanimously ruled in favor of The New York Times, holding that the First Amendment can protect the right to publish defamatory false statements under certain conditions.<sup>161</sup> The Court explained that a framework which allowed a party to be held liable for defamation was not constitutional if additional protections for the speaker were not considered.<sup>162</sup> When a public official was the plaintiff to such a suit, that public official must allege that the defendant engaged in defamation with "actual malice"—i.e., with knowledge the statement was false or with reckless disregard for the truth.<sup>163</sup> Since the plaintiff did not prove that the New York Times published the defamatory advertisement with actual malice, the Court held that the First Amendment protected the statements and disallowed the determination of liability and the award of damages.<sup>164</sup>

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<sup>155</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 256–57, 300 (1964).

<sup>156</sup> *See generally id.*

<sup>157</sup> *Id.* at 256–57, 300.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 265.

<sup>160</sup> *Id.* at 264–65.

<sup>161</sup> *Id.* at 272.

<sup>162</sup> *Id.* at 264–65.

<sup>163</sup> *Id.* at 279–280. Hence, plaintiffs have to meet all of the elements of common law or statutory defamation *and* meet the additional elements of proof required by the First Amendment. *Id.*

<sup>164</sup> *Id.* at 286.

The Supreme Court has stood fast by the First Amendment's protections of lies, even when the lies are promulgated in course of a political campaign.<sup>165</sup> On the one hand, the current political climate makes this almost necessary—where it might have been considered highly dishonorable for a politician to lie at the founding of our country—now it is almost a requirement. On the other hand, perhaps lying in the course of the political process can be particularly harmful and worthy of regulation since the matters involved may concern the development of the entire nation for decades to come. The Supreme Court encountered a case of moderate political dishonesty in *United States v. Alvarez*, where a candidate for the California water board, during his campaign, claimed that he had played hockey professionally, served in the Marines, received prestigious medals for his service, and even took part in the rescue of an American ambassador during the Iranian hostage crisis.<sup>166</sup>

In retrospect, it seems wonderous that these claims would be believed by the voters, or that they could have secured Alvarez the victory, but Alvarez did prevail over his opponents (though the Court seemed to doubt his boasts of grandeur helped).<sup>167</sup> Nevertheless, all of Alvarez's claims turned out to be false, and the federal government saw fit to investigate, and ultimately prosecute, Alvarez.<sup>168</sup> Because falsely claiming to be a professional athlete could not be construed by even the most adventurous prosecutor as a violation of the federal code (at least for now), the federal government could only proceed under the theory that Alvarez violated the Stolen Valor act by falsely claiming to have served in the military.<sup>169</sup> The prosecution argued that the First Amendment did not protect Alvarez's false claim that he was a 25-year Marine veteran who had received the Congressional Medal of Honor.<sup>170</sup>

The Stolen Valor Act permits criminal prosecution and imprisonment for any person who “falsely represents himself or herself . . . to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States,” so at least facially, the federal government had a case and could prove every statutory element beyond a reasonable doubt.<sup>171</sup> Alvarez was found guilty as charged by a jury of his peers, but the Ninth Circuit Court of Appeals set it aside on First Amendment grounds, suspecting that the Stolen Valor Act might not stand up to constitutional scrutiny.<sup>172</sup> The Supreme Court

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<sup>165</sup> See *United States v. Alvarez*, 567 U.S. 709, 724–29 (2012).

<sup>166</sup> *Id.* at 713.

<sup>167</sup> *Id.* at 713–14, 754.

<sup>168</sup> *Id.* at 714.

<sup>169</sup> *Id.* at 713–14, 754.

<sup>170</sup> *Id.* at 714.

<sup>171</sup> *Id.* at 715–16.

<sup>172</sup> *United States v. Alvarez*, 617 F.3d 1198, 1217–18 (9th Cir. 2009).



affirmed the Ninth Circuit's decision overturning Alvarez's conviction.<sup>173</sup> Applying strict scrutiny to the Stolen Valor Act led the Supreme Court to reiterate that content-based speech restrictions are usually unconstitutional, no matter how noble their purpose, and that includes restrictions on lies about military service, even if those lies can be used to gain political favor in the eyes of the voters.<sup>174</sup>

In *Alvarez*, the Court again rejected the position that false speech deserves no constitutional protections.<sup>175</sup> Allowing the government to punish false speech would have a chilling effect on expression because there is frequently dispute about whether certain speech is false.<sup>176</sup> If the government could punish any speech it could construe as inaccurate, ordinary people who could ill-afford to be charged with a state or federal speech offense would face costly, high-stakes litigation just to avoid a criminal conviction or even incarceration.<sup>177</sup> This possibility, even if slight, would place ordinary citizens in fear of making a statement the U.S. government, or the political party running the government at the time, could consider inaccurate.<sup>178</sup> Even if the accused speaker is later vindicated at trial, a state or federal indictment and prosecution can have a tremendously negative and prolonged economic and emotional impact on the citizen, causing many to avoid free speech at all for fear of this consequence.<sup>179</sup> Hence, Alvarez must be allowed to lie when running for office so that the rest of us can feel the confidence to speak debatable truths ourselves.

*Alvarez* is one of the Supreme Court's most "emphatic statements that false speech is generally protected by the First Amendment, and that it is for the marketplace of ideas, and not for the government, to decide what is true and what is false."<sup>180</sup> Although there may still be liability for defamation and false advertising (in the commercial context), the United States may not punish speech simply because it is false either in the criminal or civil context.<sup>181</sup> In fact, even providing a legal framework that would allow citizens to be civilly reprimanded for false speech must be done with First Amendment protections in mind.<sup>182</sup> "Put

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<sup>173</sup> *Alvarez*, 567 U.S. at 730.

<sup>174</sup> *Id.* at 715.

<sup>175</sup> *Id.* at 720.

<sup>176</sup> *Id.* at 721.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 723.

<sup>179</sup> *Id.*

<sup>180</sup> Erwin Chemerinsky, *The First Amendment and the Right to Lie*, A.B.A. J. (Sept. 5, 2012, 1:57 PM), [https://www.abajournal.com/news/article/the\\_first\\_amendment\\_and\\_the\\_right\\_to\\_lie](https://www.abajournal.com/news/article/the_first_amendment_and_the_right_to_lie).

<sup>181</sup> *Alvarez*, 567 U.S. at 730.

<sup>182</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

most simply, *Alvarez* stands for the proposition that there really is a First Amendment right to lie.”<sup>183</sup>

Going even further than *Sullivan* (where at least many of the statements published in the New York Times were true),<sup>184</sup> the Supreme Court protected solely false speech that could have directly influenced an election.<sup>185</sup> It is only logical, then, that these protections apply to social media companies and the content posted thereon (even if they engage in some editorial practice). A recent decision protected a cheerleader who posted vulgar speech on social media that broke school rules after failing to make the varsity squad.<sup>186</sup> It seems that the Court does not take a very different position on speech simply due to its internet origin, which, in turn, should protect both social media users and social media service providers.<sup>187</sup>

## 2. The Right of the People to Peaceably Assemble.

*“People come to the Oasis for all the things they can do, but they stay for all the things they can be.”*

*–Parzival, Ready Player One*<sup>188</sup>

The right to the freedom of expression leads naturally to the Freedom of Assembly, which is of critical importance for social media where platforms become virtual forums for this type of assembly, discussion, and exchange of ideas.<sup>189</sup> The right to assembly, specifically mentioned in the First Amendment, also encompasses the Freedom of Association,<sup>190</sup> which is also frequent in online domains, with one example being the formation of groups WeChat, Facebook, and WhatsApp. One could also argue that merely by joining a social media platform, a person inherently assembles and associates with other social media platform users. Assemblies, whether physical or virtual, are where quite a bit of expression takes place.<sup>191</sup> There is no textual limitation on assemblies occurring online, in online worlds, chat rooms, and via other social media outlets.

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<sup>183</sup> Chemerinsky, *supra* note 180.

<sup>184</sup> *Sullivan*, 376 U.S. at 256–57.

<sup>185</sup> *Alvarez*, 567 U.S. at 730.

<sup>186</sup> *Mahanoy Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038, 2048 (2021).

<sup>187</sup> *See id.*

<sup>188</sup> *READY PLAYER ONE* (Warner Bros. 2018); *see also Ready Player One Quotes*, IMDB, <https://www.imdb.com/title/tt1677720/quotes/qt3895452> (last visited Aug. 26, 2022).

<sup>189</sup> U.S. CONST. amend. I.

<sup>190</sup> *See NAACP v. Alabama*, 357 U.S. 449 (1958).

<sup>191</sup> *Freedom of Assembly*, NEW WORLD ENCYC., [https://www.newworldencyclopedia.org/entry/Freedom\\_of\\_Assembly](https://www.newworldencyclopedia.org/entry/Freedom_of_Assembly) (last visited Aug. 26, 2022).

Government officials do not have the power to prohibit a peaceful assembly (which the First Amendment expressly denies them), but the federal, state, and local governments may impose time, place, and manner restrictions on the assembly if the restrictions satisfy constitutional reasonableness standards.<sup>192</sup> Time, place, and manner restrictions must be “justified without reference to the content of the regulated speech . . . [and be] narrowly tailored to serve a significant government interest, and . . . leave open ample alternative channels for communication of the information.”<sup>193</sup>

For example, the Supreme Court permits the government to require permits in advance of physical assemblies.<sup>194</sup> The Constitution also does not forbid certain reasonable restrictions on assemblies taking place near major public events.<sup>195</sup> Similarly to the “clear and present danger of imminent lawless action” standard for content-based restrictions, First Amendment permits (but does not require) the regulation of assemblies where there is a “clear and present danger of riot, disorder, or interference with traffic on public streets, or other immediate threat to public safety or order.”<sup>196</sup> However, where there is no threat of such conduct, which would almost definitionally be the case where an assembly is virtual, the government must permit the assembly and cannot punish either its participants or its organizers.<sup>197</sup> Because forming friend groups and discussion groups in the digital world cannot lead to the type of riot or many other dangers associated with an assembly or the formation of an association, time, place, and manner restrictions should almost never survive constitutional scrutiny. During the COVID-19 pandemic, which appears to be continuing for the foreseeable future, a multitude of assemblies happened via WeChat, Skype, Zoom, and Teams; yet, few government officials would be able to point to any sign of Zoom riots threatening our national or even local security.<sup>198</sup>

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<sup>192</sup> Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

<sup>193</sup> *Id.* at 791. (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

<sup>194</sup> Cox v. New Hampshire, 312 U.S. 569, 571–72, 575–78 (1941).

<sup>195</sup> Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 551–52 (2009); see also Andrew M. Winston, *Right to Peaceful Assembly*, LIB. OF CONG. (July 17, 2020) <https://www.loc.gov/law/help/peaceful-assembly/us.php>.

<sup>196</sup> Winston, *supra* note 195.

<sup>197</sup> *Id.*

<sup>198</sup> John Case, *Zoom, Microsoft Teams, and Slack Have Exploded Due to the COVID-19 Pandemic. Can They Hold Onto This Growth?*, GLG (Apr. 1, 2020), <https://glginsights.com/articles/zoom-microsoft-teams-and-slack-have-exploded-due-to-the-covid-19-pandemic-can-they-hold-onto-this-growth/>; Ian Sherr, *Microsoft's Skype Sees Massive Increase in Usage as Coronavirus Spreads*, CNET TECH (Mar. 30, 2020, 8:30 AM), <https://www.cnet.com/tech/mobile/microsofts-skype-sees-massive-increase-in-usage-as-coronavirus-spreads/>; Tunde Simeon Amosun et al., *WeChat Usage During COVID-19 Pandemic Lockdown: The Mediating Role of Online Self-Disclosure on Quality of Friendship and Well-Being*, RESEARCHGATE (Mar. 2021), [https://www.researchgate.net/publication/349924518\\_Wechat\\_usage\\_during\\_COVID-](https://www.researchgate.net/publication/349924518_Wechat_usage_during_COVID-)

The protection of assemblies is critical to constitutional law, because at the time of its passage, that was an excellent way to distribute information quickly to a large number of people. The Declaration of Independence, for example, was read to large assemblies of colonists and soldiers of the Continental Army on or about July 4, 1776. These assemblies created an excellent conduit for swiftly transmitting information without the costly reproduction of documents. Speeches and readings at these assemblies also had the advantage of transmitting information to individuals who could not read. Today, our ability to gather online with people from all over the world serves a tremendously similar function. We can exchange information, this time via video and photograph as well as text and speech. We can share what we believe and also, quicker than ever before possible, hear what people might believe about the same event across the oceans.

The value of this technology and the ability to hear such a multitude of voices is incalculable, as is the value of keeping the government out of the business of regulating such speech. What people can do on social media, and even who they can pretend to be, seems easily within the protections of the Freedom to Assemble (though the Supreme Court of the United States has not reached this question yet). Online gatherings can spawn debates that range from the rights of transgender individuals to the origins of COVID-19 to the proper amount of tariffs the United States should place on imports. There is a reason why government officials want to govern what takes place on the internet: it affects their chances of reelection. But no matter how offensive someone's position may be, or how much misinformation it traffics, the First Amendment has long upheld the idea that the truth and falsehood of any particular statement should be open to public debate and that the public should have a right to gather to have such a debate. It is not up to the government to interject its opinion for how we conduct our assemblies, virtual or otherwise, and the case law prohibiting such regulation should apply all the stronger to social media.

The most obvious reason this should remain the case, even when it comes to social media companies, actually comes from COVID-19 and the discovery of its spread in China. A young doctor, who later succumbed to the disease, discovered that a new, deadlier, and more contagious strain of a coronavirus was affecting his patients.<sup>199</sup> In the United States, he would have been free to speak his mind concerning his findings. In China, he was repeatedly harassed into silence by a variety of public officials because, according to them,

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19\_pandemic\_lockdown\_the\_mediating\_role\_of\_online\_self-disclosure\_on\_quality\_of\_friendship\_and\_well-being.

<sup>199</sup> Amy Cheng, *Chinese Authorities Admit Improper Response to Coronavirus Whistleblower*, NPR (Mar. 19, 2020) <https://www.npr.org/sections/coronavirus-live-updates/2020/03/19/818295972/chinese-authorities-admit-improper-response-to-coronavirus-whistleblower>.

the doctor was causing a panic unnecessarily based on false scientific claims.<sup>200</sup> A single tweet about the seriousness of the virus, which could have saved millions, was not allowed because the right to assembly via Twitter is fully banned in China.<sup>201</sup> The information that could have been transmitted rapidly to a large crowd (which could then re-distribute the information elsewhere) was suppressed.

As it turned out, the doctor was right, and the government officials were wrong. By pressuring the doctor into silence, and violating what would have been his First Amendment rights in the United States, Chinese officials deprived him of the right to speak and deprived Chinese citizens and the world community of the right to listen. Had the doctor's warnings been heeded both inside China and worldwide, and had authorities acted earlier to prevent internal and external travel, the disease could have been contained far more effectively, potentially reducing casualties in China and abroad by hundreds of thousands. Instead, the government intervened, silenced the speaker, and permitted the virus to spread while denying its existence.

### 3. Limits on First Amendment Protections

*“To say that nothing is true is to realize that the foundations of society are fragile and that we must be the shepherds of our civilization. To say that everything is permitted is to understand that we are the architects of our actions, and that we must live with their consequences, whether glorious or tragic.”*

*—Ezio Auditore, Assassin's Creed: Revelation*<sup>202</sup>

The rights granted by the First Amendment are not absolute.<sup>203</sup> Freedom of Speech does not include the right to advocacy that creates a clear and present danger of imminent lawless action, nor does it shield “fighting words” from regulation (though the bar for proving that speech constitutes “fighting words” is rather high).<sup>204</sup> The First Amendment also does not protect obscenity or child pornography, and the state and federal governments would be more than within their rights to combat these types of speech.<sup>205</sup> Unfortunately, these are not the

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<sup>200</sup> *Id.*

<sup>201</sup> Chaitra Anand, *Why Twitter is Banned in China*, YAHOO! FINANCE (May 19, 2022) <https://au.finance.yahoo.com/news/why-twitter-is-banned-in-china-232110891.html>.

<sup>202</sup> ASSASSIN'S CREED: REVELATION (Ubisoft 2011); *see also* Ezio Auditore da Firenze, GOODREADS, <https://www.goodreads.com/quotes/7659667-to-say-that-nothing-is-true-is-to-realize-that> (last visited Aug. 26, 2022).

<sup>203</sup> *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>204</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–73 (1942).

<sup>205</sup> *New York v. Ferber*, 458 U.S. 747, 756, 765–66 (1982).

types of speech President Trump sought to regulate, nor are these the types of speech that seem to be at the forefront of the minds of many politicians seeking to increase social media regulations. Instead, these political actors are focusing on regulating social media companies that host opinions they do not like or gather a “dangerous” amount of data on users. It is highly uncertain how any of this relates to the exceptions the Supreme Court has crafted to the broad protections of the First Amendment. Generally speaking, anything falling outside of these exceptions should not be regulated by the governments of the individual states or of the United States. Thankfully, the TikTok and WeChat decisions reflect that.

Even before reaching the text of the decisions, it should be obvious that none of the limits to First Amendment protections apply in any obvious ways to the actions of WeChat and TikTok. If WeChat and TikTok were gathering data on Americans, just like American social media companies, few can point to anything that makes it inappropriate for social media giants to receive information so willingly communicated. If Americans wish to be parties to contracts that permits their speech to be heard by others, then who is to stop them? In fact, having one’s speech heard by others seems to be the main purpose of social media to begin with. Perhaps there may be additional “listeners” on the other end of the line, who might consider using information for nefarious purposes, but the belief that social media users are unaware of this risk is naïve. Many in the United States understand the risk fully and subject themselves to it willingly, and government intervention with this is not only improper but unconstitutional.

Furthermore, it should be noted just how flimsy First Amendment protections would be if the censorship of WeChat and TikTok could somehow fit within an exception to these protections. The government need only paint a vague picture of how someone might be harmed by certain expression in order to ban it, and an entire social media platform with tens of millions of users can receive a virtual death sentence. Creative government lawyers can probably think of dozens of harms associated with any speech the government finds undesirable. Allowing such “creativity” to serve as an exception to the First Amendment would create an exception so large that it swallows the rule. That is why it was so crucial that the federal district courts protected WeChat and TikTok, and by extension, dozens of their American counterparts.

## IV. THE WECHAT AND TIKTOK DECISIONS

*“For if Men are to be precluded from offering their Sentiments on a matter, . . . the freedom of Speech may be taken away, and, dumb and silent we may be led, like sheep to the Slaughter.”*

*—George Washington, Address to the Officers of the Army, March 15, 1783<sup>206</sup>*

Despite all of the aforementioned principles that should have placed the Presidency on notice concerning the illegality of heavy social media regulation, President Trump decided to issue executive orders banning TikTok and WeChat from operation within the United States.<sup>207</sup> The orders did specify that TikTok could, theoretically, survive by partnering with American companies contingent on approval by the federal government (without any similar contingencies for WeChat).<sup>208</sup> Needless to say, the Chinese social media companies and their millions of users felt compelled to fight back.<sup>209</sup>

A. *WeChat Strikes Back*

*“In the name of liberty, I will fight the enemy regardless of their allegiance.”*

*—Connor Kenway, Assassin’s Creed III<sup>210</sup>*

WeChat users formed the United States WeChat Users Alliance (“the Alliance”), an organization specifically designed to thwart federal efforts to regulate WeChat (and by extension, its users) within American borders.<sup>211</sup> They challenged Executive Order 13943, which President Trump issued to ban “transactions” relating to WeChat under the guise of promoting national

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<sup>206</sup> George Washington, Newburgh Address, (Mar. 15, 1783) in MOUNTVERNON.ORG, <https://www.mountvernon.org/education/primary-sources-2/article/newburgh-address-george-washington-to-officers-of-the-army-march-15-1783/> (last visited Aug. 26, 2022).

<sup>207</sup> *TikTok and WeChat: US to Ban App Downloads in 48 Hours*, BBC NEWS (Sept. 18, 2020), <https://www.bbc.com/news/technology-54205231>.

<sup>208</sup> Bobby Allyn, *Trump’s TikTok Deal: What Just Happened and Why Does it Matter?*, NPR (Sept. 21, 2020, 6:30 AM), <https://www.npr.org/2020/09/21/915043052/trumps-tiktok-deal-what-just-happened-and-why-does-it-matter>.

<sup>209</sup> Yifan Yu, *US-Based WeChat Users Sue Over Trump’s ‘Unconstitutional’ Ban*, NIKKEI ASIA (Aug. 22, 2020, 11:59 AM), <https://asia.nikkei.com/Politics/International-relations/US-China-tensions/US-based-WeChat-users-sue-over-Trump-s-unconstitutional-ban>.

<sup>210</sup> ASSASSIN’S CREED III (Ubisoft 2012).

<sup>211</sup> Edvard Pettersson, *WeChat Users Sue to Block Trump’s Ban of Messaging App*, BLOOMBERG (Aug. 21, 2020), <https://www.bloomberg.com/news/articles/2020-08-22/wechat-users-group-sues-to-block-trump-s-ban-of-messaging-app>.

security.<sup>212</sup> This order gave the Secretary of Commerce the authority to identify which “transactions” would be prohibited under this order.<sup>213</sup> Secretary of Commerce Wilbur Ross exercised the authority granted to him by his own branch of government by prohibiting distribution of the WeChat application via app stores, updating existing downloads of the application (causing it to run poorly and generating communication problems with updated versions of the app), using WeChat for money transfers, and a wide variety of services that used to permit WeChat to be compatible with other applications and software.<sup>214</sup> In short, the United States executive branch was doing everything in its power to make WeChat virtually unusable in the United States.<sup>215</sup>

The Alliance objected to this executive overreach by citing the First Amendment, the Fifth Amendment, and the Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb(1)(a), and argued that the executive branch misused its International Economic Emergency Powers under the International Economic Emergency Powers Act (“IEEPA”).<sup>216</sup> They also argued that the executive order should be struck down because it should have been promulgated following the Administrative Procedures Act (“APA”) guidelines, which would have given greater notice to WeChat and its users—perhaps permitting some democratic and administrative efforts to oppose the enactment of the order.<sup>217</sup>

Since the Alliance sought a preliminary injunction to prevent the enforcement of the executive order, their burden was particularly steep: in order to stop the order’s enactment, they had to demonstrate, before a full round of discovery and a trial on the merits, that they would likely prevail on the merits of their case.<sup>218</sup> The Alliance first argued that banning or otherwise constraining WeChat capabilities would have a greatly negative impact on Chinese-speaking individuals in the United States.<sup>219</sup> Chinese-speaking individuals in the United States, whether citizens, residents, or students, would suffer a great blow to their ability to speak, which constituted “a prior restraint on their free speech” that could not “survive strict scrutiny” review.<sup>220</sup> The Alliance anticipated that the federal government would argue these were permissible restrictions since they were content-neutral: after all, the federal government was not banning specific expressive activities on WeChat based on content, but rather all communications

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<sup>212</sup> U.S. *WeChat Users All. v. Trump*, 488 F. Supp. 3d 912, 916 (N.D. Cal. 2020) (citing Exec. Order No. 13943, 85 Fed. Reg. 48,641 (2020)).

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*; 50 U.S.C.A. § 1702(b)(1) (West 2022).

<sup>217</sup> *WeChat Users*, 488 F. Supp. 3d at 917; 5 U.S.C.A. § 533(b) (West 2022).

<sup>218</sup> *WeChat Users*, 488 F. Supp. 3d at 917.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*



on WeChat regardless of content.<sup>221</sup> In order to address this problem, they argued that this was an unreasonable restraint on speech that failed to meet the narrow tailoring requirement which would be necessary to address the government's concerns in maintaining national security.<sup>222</sup>

While the government argued that the plaintiffs were unlikely to succeed on the merits of their claim and that there would be no irreparable harm caused by shutting down WeChat's operations in the United States, the district court judge disagreed.<sup>223</sup> Specifically, the court focused on the Alliance's First Amendment argument as the primary ground for granting the injunction.<sup>224</sup> The judge noted that WeChat provided a communication platform for more than one billion people worldwide, with almost ten percent of these users living outside of the Chinese mainland.<sup>225</sup> More than five percent of the United States population used WeChat for a variety of expressive activities.<sup>226</sup> The use of WeChat instead of American social media apps for many Chinese-speaking individuals was caused, at least in part, by the ban on many western social media applications by the Chinese government.<sup>227</sup> The court concluded that the application's social and cultural reach was so important that it was practically indispensable for millions of users in the United States.<sup>228</sup> While being indispensable for a variety of activities should not be required for the First Amendment to protect a social media company, the court also noted that members of the United States WeChat Users Alliance would not be able to properly serve their consumers or beneficiaries with their services without ready access to the application.<sup>229</sup>

The interests of the United States, at least as expressed by the federal government, were of even greater importance.<sup>230</sup> The government claimed that American communications systems can be illegally disrupted by foreign agents, including social media corporations like WeChat.<sup>231</sup> The specific method of disruption was never quite clear from the government communications, but the executive branch nevertheless claimed that a state of national emergency existed with respect to communication technology in the United States, and tried to use

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<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 918.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 918–19.

<sup>230</sup> *See id.* at 919–20.

<sup>231</sup> *Id.* at 920.

this general state of emergency to justify restrictions against WeChat.<sup>232</sup> Citing concerns about improper data collection and espionage, the use of data to benefit the Chinese Communist Party, the access of Americans' personal information by the Chinese government, and the parallel moves of other governments to ban the application, President Trump sought to cripple WeChat's operations in the United States.<sup>233</sup>

The court then considered the relevance of President Trump's statements concerning the origins of COVID-19.<sup>234</sup> The court noted the plaintiffs' concerns that the President had made statements exhibiting racial animus toward individuals from China.<sup>235</sup> After taking a brief detour into President Trump's alleged racism, the court proceeded to list a variety of national security concerns voiced by United States government officials over the past decade with respect to China and the Chinese Communist Party.<sup>236</sup> Specifically, the court focused on concerns regarding the intertwining of Chinese and American technological infrastructure that could be influenced by the Chinese government.<sup>237</sup> Lastly, though perhaps most importantly for free speech purposes, the court mentioned the United States' concern that China would establish a foothold as "the strongest voice in cyberspace."<sup>238</sup>

Following a procedural discussion, the court addressed the heart of the matter: the First Amendment concerns cited by the plaintiffs.<sup>239</sup> Comparing *City of Ladue v. Gilleo*,<sup>240</sup> the federal district court agreed with the plaintiffs that the government's action appeared to be a present censorship or prior restraint on speech that was akin to a city banning all signs except for "for sale" and hazard signs.<sup>241</sup> The existence of other social media communications, according to the court, did not avail many WeChat users due to their community and cultural status and the ban on many social media substitutes within mainland China.<sup>242</sup> The court also noted that the government's claim of content-neutral regulation seemed unlikely in light of the evidence of animus toward the Chinese government, and perhaps even the Chinese people.<sup>243</sup> Even if the government's claim of content neutrality was true, content neutral restrictions still had to be

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<sup>232</sup> *Id.* at 920–21.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 921.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 922–23.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 923.

<sup>239</sup> *Id.* at 926.

<sup>240</sup> 512 U.S. 43 (1994).

<sup>241</sup> *WeChat Users*, 488 F. Supp. 3d at 926–27.

<sup>242</sup> *Id.* at 927.

<sup>243</sup> *Id.*

narrowly tailored, serve significant government interests unrelated to the content of the speech, and leave open adequate channels for communication.<sup>244</sup>

The court noted that the government's national-security interest was significant, but clarified that the government could not demonstrate WeChat's connection to the national security risk posed by the People's Republic of China or the Chinese Communist Party.<sup>245</sup> This meant the ban was not narrowly tailored, especially since other countries had already demonstrated a less restrictive way to address the data security and privacy concerns raised by Chinese social media companies.<sup>246</sup> Despite the fact prior federal cases had permitted similar bans, on a credit company selling consumer data and on a distributor of copyright-infringing PDF files, the court reasoned that banning WeChat altogether was a different story—one that involved far more government overreach into the space of free expression.<sup>247</sup>

After finding the plaintiffs' arguments were only likely to succeed on their First Amendment claims, the court denied the motion for preliminary injunction on all grounds save the freedom of expression.<sup>248</sup> The judge did note, importantly, that even a brief termination of WeChat's operations would cause irreparable harm, since infringing on the First Amendment for even a brief time is highly problematic.<sup>249</sup> This recognition was important because it underscored the judge's understanding that even brief intermissions in the functioning of a social media application or other internet communication apparatus could be fatal for users.<sup>250</sup> The court also engaged in a "balance of equities," noting that the government did raise important points on whether the preliminary injunction would unduly limit President Trump in addressing national security concerns, though ultimately deciding this would not be enough to thwart the motion for a preliminary injunction.<sup>251</sup>

Although the United States government lost its argument on First Amendment grounds, it did raise a particularly important point that will require some discussion.<sup>252</sup> It seems counterintuitive to determine the degree to which Chinese individuals in the United States rely on WeChat based on the fact that the Chinese government censors many other competing sources of

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<sup>244</sup> *Id.* (internal quotations and citations omitted).

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 927–28 (citing *Trans Union Corp. v. Fed. Trade Comm'n*, 267 F.3d 1138, 1142–43 (D.C. Cir. 2001) and *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1132 (N.D. Cal. 2002)).

<sup>248</sup> *Id.* at 928–29.

<sup>249</sup> *Id.* at 929 (internal citations omitted).

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

communication.<sup>253</sup> As the government pointed out, it would be a “reward” to the Chinese Communist Party’s repressive regime, since Chinese authorities apparently made WeChat’s case stronger by rendering it one of the few methods of legal communication between individuals in the United States and individuals in China.<sup>254</sup> This, combined with the “closed system” that WeChat forms for Chinese citizens, might make it more equitable to permit its ban, and thereby encourage Chinese students, residents, and immigrants to unplug from the state-sponsored content, and to consider sources of communication that are less appealing to the Chinese government.<sup>255</sup> Nevertheless, the court appeared mostly unphased by these concerns and reached the ultimate conclusion that the WeChat ban would be, at the very least, postponed.<sup>256</sup>

*B. TikTok Follows Suit*

*“Whoever would overthrow the liberty of a nation must begin  
by subduing the freeness of speech . . . .”*

*—Benjamin Franklin<sup>257</sup>*

Like WeChat, TikTok did not sit idly by when the President of the United States sought to silence its users.<sup>258</sup> It faced a similar situation when the President banned its use via Executive Order 13942 (WeChat faced its ban under Executive Order 13943).<sup>259</sup> President Trump seemed to invoke the same sources of constitutional power to enact this ban, and relied on similar reasoning for designating TikTok a threat to national security.<sup>260</sup> Interestingly, even though WeChat was essentially a “full service” social media company that allowed its users a wide variety of functions, TikTok had more than five times the number of users in the United States.<sup>261</sup> Given its reach to over 100 million Americans, this application had an even deeper involvement in communication within the United States.<sup>262</sup> The executive branch cited that TikTok’s data-gathering activities, including search histories, user location, and browsing data, posed a

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<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 930.

<sup>257</sup> ANDREW M. ALLISON, WILLARD CLEON SKOUSEN, M. RICHARD MAXFIELD & BENJAMIN FRANKLIN, *THE REAL BENJAMIN FRANKLIN* 15 (1982), <https://www.azquotes.com/quote/364616>.

<sup>258</sup> *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73 (D.D.C. 2020).

<sup>259</sup> *Id.* at 76–77 (citing Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020) *revoked by* Exec. Order No. 14034, 86 Fed. Reg. 31,423 (June 9, 2021)).

<sup>260</sup> *Id.* at 76–80.

<sup>261</sup> *Id.* at 77.

<sup>262</sup> *Id.*

large risk of interception by the Chinese government and/or the Chinese Communist Party.<sup>263</sup> Moreover, the government cited the possibility that TikTok may be used “for espionage, whether electronically or via human recruitment,” implying, perhaps, that videos posted on TikTok might in some way persuade individuals in the United States to engage in anti-American espionage or sabotage by other means.<sup>264</sup>

The federal government seemed to argue that TikTok could be used for corporate espionage and blackmail, as well as tracking the locations of federal employees and contractors.<sup>265</sup> Ironically, the United States government objected to the fact that TikTok might censor certain content the Chinese Communist Party deems disadvantageous, even while they pushed to censor TikTok for content the American Republican Party deemed disadvantageous.<sup>266</sup> The President sought not only to silence TikTok, but also to strip its parent company, ByteDance, of ownership therein.<sup>267</sup> This essentially put a gun to the head of TikTok: sell the company to an American firm, or cease operations altogether.<sup>268</sup> Just like with WeChat, the government sought to cripple the company by forbidding its distribution via Android and Apple app stores, forbidding updates, and eliminating TikTok’s ability to use American internet networks.<sup>269</sup>

The court concluded that TikTok’s gathering of information was “substantial” because it spanned profile information, user generated content, correspondence, and survey participation.<sup>270</sup> Interestingly, users would not even have any of this information in the first place but for the existence of TikTok and similar social media companies. In fact, users are generally informed by social media companies’ terms of service that the corporation, naturally, would have access to messages, uploaded content, profile information, etc., uploaded by the user on the app.<sup>271</sup> Nevertheless, the executive branch considered this free exchange of information between users on American soil and the Chinese corporation to cross a line.<sup>272</sup> Somehow, government officials must have determined similar information sharing by Facebook, Google, YouTube, and a variety of other companies with United States ties to be more innocent, though why that would be seems difficult to explain.

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<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 78.

<sup>265</sup> *Id.* at 77.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *See id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 78–79.

<sup>271</sup> *See, e.g., Terms of Service, TIKTOK* (Feb. 2019), <https://www.tiktok.com/legal/terms-of-service-us?lang=en>.

<sup>272</sup> Exec. Order 13942, 85 Fed. Reg. 48,637 (2020).

Proposed government intervention in TikTok’s business would come in several stages, addressing certain risks immediately, while permitting TikTok and its owner ByteDance opportunity to remedy the remaining defects in their services or risk full shutdown.<sup>273</sup> The first stage would mostly target business-to-business transactions, forbidding the provision of business-to-business services unless and until TikTok cut its ties with ByteDance and essentially became subsidiary of an organization not affiliated with the Chinese Communist Party or the Chinese Government.<sup>274</sup> Specifically, President Trump seemed intent upon having TikTok sold to an American company by November of 2020, permitting it to continue operation, but isolating it from the control of the Chinese Communist Party.<sup>275</sup>

When evaluating TikTok’s motion for preliminary injunction to prevent the execution of the executive order, the Federal District Court of the District of Columbia took a different approach compared to the court in California that decided the WeChat matter.<sup>276</sup> Instead of resting its decision on First Amendment grounds, this court focused on whether President Trump had the authority to impose any bans on TikTok’s activities in the first place.<sup>277</sup> The court reached the conclusion that the President could not use the IEEPA because the Act specifically prohibited the regulation of “importation or exportation of ‘information or information materials.’”<sup>278</sup> Moreover, the Act specifically prohibited the executive branch from regulating “personal communication[s], which do[ ] not involve a transfer of anything of value.”<sup>279</sup> The court agreed that President Trump’s exercise of his power violated the express provisions of the IEEPA.<sup>280</sup> It also brushed aside the idea that information transmitted over TikTok was likely to constitute espionage that would permit its regulation under the Espionage Act.<sup>281</sup>

The parties also engaged in some notable arguments about the value of information included in personal communications.<sup>282</sup> This was relevant because the federal government has much more authority to govern communications of economic value compared to communications without such value.<sup>283</sup> The argument was curious in the context of an application that indirectly pays content

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<sup>273</sup> *TikTok Inc.*, 490 F. Supp. 3d at 78–79.

<sup>274</sup> *Id.* at 77–79.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 80.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 82.

<sup>281</sup> *Id.* at 82–83.

<sup>282</sup> *Id.* at 83.

<sup>283</sup> *Id.*

creators for the number of views their content receives based on the amount of advertising dollars TikTok can receive for running advertisements. Remarkably, perhaps because sending and receiving these communications over TikTok was technically free for the users, the court reached the conclusion that many of these communications lacked economic value altogether.<sup>284</sup> This is despite the fact that TikTok is in open competition with social media giants like YouTube over content creators and their videos specifically *because* those videos create value. Whatever the court concluded about the economic value of these communications, the quasi-free market in which our economy operates has certainly determined many of these communications to be worth lucrative sums of money.

Interestingly, the district court never reached the First Amendment arguments raised by TikTok that drove the WeChat preliminary injunction.<sup>285</sup> Unlike its California counterpart, which was unconvinced by almost anything save arguments for freedom of expression, the Federal District Court for the District of Columbia essentially concluded that exceeding the IEEPA's grant of authority was more than enough to grant the preliminary injunction.<sup>286</sup> TikTok could demonstrate irreparable harm from being shut down in the same way that WeChat could: for a social media giant, being down for just a few hours, not to mention several days, weeks, and months, could result in the loss of millions and even billions of dollars in revenue and the diversion of hundreds of thousands of consumers.<sup>287</sup> It could, theoretically, be entirely fatal to the business.<sup>288</sup> Though the court did not enumerate the pecuniary losses to the company, mainly focusing on the loss of future and current users and avoiding a discussion of exact revenue reductions, it seems clear that anyone reviewing the case would know there were massive amounts of money at stake.<sup>289</sup>

In September, TikTok succeeded in having the first step of the Trump plan to limit its capabilities halted via injunction on the grounds enumerated above.<sup>290</sup> In December, the Federal District Court for the District of Columbia expanded the injunction to halt the rest of the measures the outgoing Trump Administration sought to impose.<sup>291</sup> The Biden administration came to power in late January of 2021, halting any talks of forcing ByteDance to sell TikTok to an

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 73–86.

<sup>286</sup> *Id.* at 83–85.

<sup>287</sup> *Id.* at 84.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 84–85.

<sup>290</sup> *Id.* at 73–86.

<sup>291</sup> *TikTok Inc. v. Trump*, 507 F. Supp. 3d 92, 115 (D.D.C. 2020).

American corporation.<sup>292</sup> In June of 2021, President Biden's administration went even further in subverting the aims of its predecessor and abandoned all efforts to restrict the speech promulgated by both TikTok and WeChat.<sup>293</sup>

V. THE FIRST AMENDMENT AND INTERNET COMMUNICATIONS, FOREIGN AND DOMESTIC

*Ezio Auditore da Firenze: "Respect? After all that's happened? Do you think he would have shown either of us such kindness?"*  
*Mario Auditore: "You have killed Vieri, do not become him. . . . Requiescat in pace."*

—*Assassin's Creed II*<sup>294</sup>

Applying case law from the Supreme Court of the United States, along with the decisions of the federal district courts with respect to WeChat and TikTok, it seems clear that even as old as the First Amendment is, it should have a strong bite when protecting social media companies and other companies facilitating internet communications from government interference. Almost by definition, everything that happens on the internet involves sending coded signals from one computer to another, making it a form of communication and a form of expression. Almost by definition, individuals are exercising their right to speak and their right to listen. Individuals even engage in religion on these platforms, being able to post videos of sermons, philosophical arguments for (and against) the existence of God, which became particularly relevant with the shuttering of churches during the COVID-19 pandemic.<sup>295</sup> Government interference with these activities would have been one of the things that our Founding Fathers would have feared most, especially given the fact that the desire to interfere was, and is driven, by ill-disguised political motivations.

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<sup>292</sup> Julie Gerstein, *ByteDance is Walking Away from its TikTok Deal with Oracle Now That Trump Isn't in Office, Report Says*, BUS. INSIDER (Feb. 15, 2021, 4:42 AM), <https://www.businessinsider.com/bytedance-ending-oracle-deal-because-trump-is-out-scmp-2021-2>.

<sup>293</sup> Jeanne Whalen & Ellen Nakashima, *Biden Revokes Trump's TikTok and WeChat Bans, But Sets Up a Security Review of Foreign-Owned Apps*, WASH. POST (June 9, 2021, 1:33 PM), <https://www.washingtonpost.com/technology/2021/06/09/tiktok-ban-revoked-biden/>.

<sup>294</sup> ASSASSIN'S CREED II (Ubisoft 2009).

<sup>295</sup> See Rebecca Heilweil, *Religious Leaders Are Becoming Content Creators to Keep Their Followers Engaged*, VOX (Sept. 18, 2020, 4:39 PM), <https://www.vox.com/recode/2020/9/18/21443661/religion-logging-off-online-engagement-content-creators>.



Politicians could cite a variety of ambiguous reasons for social media regulation.<sup>296</sup> Yet almost no matter what reason a politician cites for regulation, such as data collection, the banning of certain content creators, etc., it is almost always difficult to see why a private corporation should not be able to do what WeChat and TikTok did. If a person does not like a particular social media giant, the person can go to another, and another, until they find the right level of privacy and/or censorship. The most “understandable” objection that politicians raise is that social media tends to favor one political position over another.<sup>297</sup> This objection is not “understandable” in the sense that anyone should agree with it; rather, it is “understandable” in that this is how one should expect profit-minded politicians to act when facing down ideas that may threaten their chances at reelection.

Today, social media companies may tend to skew to the left of the political aisle, and naturally, it is the politicians on the right of the aisle that are making the biggest fuss about social media companies, call sessions to discuss them, subpoena the Chief Executive Officers of these corporations to appear, and employ other political weapons to demonize their opposition. My hope is that voters and judges see through this ploy. First, I have no doubt that if social media skewed to the right, it would be left-wing politicians that would oppose its activities and seek to regulate it out of existence. This seems to be the natural inclination of politicians: if someone or something presents a criticism of a politician’s position, that politician naturally views the elimination of this political threat as the most expedient approach. The results, almost inevitably, are both veiled and unveiled threats from that politician to the speaker or listener, a threat that the Founding Fathers could recognize from 250 years away.

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<sup>296</sup> See Abbie Alford, *Activists Push for Government to Regulate Social Media Platforms*, CBS8 (Jan. 8, 2021, 5:16 AM), <https://www.cbs8.com/article/news/politics/push-to-regulate-social-media-platforms/509-b9a8c589-5ba2-480f-a33a-e202c2a2da98>; see also Staff, *Governor Ron DeSantis Signs Bill to Stop the Censorship of Floridians by Big Tech*, RON DESANTIS, 46TH GOV. OF FL. (May 24, 2021), <https://www.flgov.com/2021/05/24/governor-ron-desantis-signs-bill-to-stop-the-censorship-of-floridians-by-big-tech/>.

<sup>297</sup> James Clayton, *Social Media: Is it Really Biased Against US Republicans?*, BBC NEWS (Oct. 27, 2020), <https://www.bbc.com/news/technology-54698186>.

A. *Lessons from the WeChat and TikTok Litigation*

*“Despite the constant negative . . . covfefe”*

*—President Donald J. Trump*<sup>298</sup>

Since TikTok’s plight was arrested by non-constitutional means, it makes the most sense to focus on what the WeChat decision can teach us about the right approach to protect social media companies. However, the fact that the Federal District Court for the District of Columbia did not apply the First Amendment to the TikTok case is also notable.<sup>299</sup> It teaches us that, for whatever reason, free expression principles may not be at the forefront of federal judges’ minds, even when a government regulation clearly implicates free speech principles. Nevertheless, it was the WeChat decision that led with the Constitution, which is where we should begin.<sup>300</sup>

First and foremost, the Federal District Court for the Northern District of California should be commended: by applying the First Amendment to regulations that clearly involve expression, the court framed the issue exactly as it should be examined when politicians attempt to regulate any internet communications company. The district court correctly concluded that, in regulating social media companies foreign and domestic, the United States government inherently violates the expression rights of those who use the social media platform to communicate to others. Since we live in a world where communication is probably easier, cheaper, and more facilitated than at any other time in human history, the WeChat decision helps assure individuals within American borders that they still have the right to both send and receive information even if the sources of the information may be affiliated with foreign governments or organizations of which the United States disapproves.

This ruling should theoretically apply to protect both individuals within American borders and individuals outside of them. While much ink has been spilled over the application of constitutional rights to individuals outside of the United States, the debate almost ceases to make sense in the context of social media or other internet communications. Users can post and receive messages all over the world, sometimes even using Virtual Private Networks (“VPNs”) to “virtually” appear in a different area of the world if that would grant them access to websites and communications unavailable within their country. The virtual world now allows individuals to communicate in highly simulated environments

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<sup>298</sup> Jessica Estepa, *Covfefe, One Year Later: How a Late-Night Trump Tweet Turned into a Phenomenon*, USA TODAY (May 31, 2018, 12:16 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2018/05/31/covfefe-one-year-anniversary-donald-trumps-confusing-tweet/659414002/>.

<sup>299</sup> *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73 (D.D.C. 2020).

<sup>300</sup> *See U.S. WeChat Users All. v. Trump*, 488 F. Supp. 912 (N.D. Cal. 2020).

that have their own maps, such as Massive Multiplayer Online Role-Playing Games, where individuals from literally everywhere can meet up to talk, exchange ideas (whether political or otherwise), and even engage in a variety of interactions like wearing themed “clothing,” playing music together, and having their virtual representations dance step-for-step with one another. When virtual reality headsets and sensor technology develop further, people will be able to sit together in a virtual room, see each other, and approach one another to shake hands, give hugs, etc. in ways that could be *physically* felt without any consideration from how far away two people are from one another. Hence, it would make little sense that protection for speech via social media and other electronic communications should be subject to whims of the United States government.

Moreover, it would seem strange for the United States to engage in operations that prohibit speech in other parts of the world. Our country certainly has the capability to cripple the servers of a whole variety of websites, social media applications, multiplayer video games, and other forms of internet communications if the government deemed the information communicated via these networks to be unpleasant. Yet, is that what the government should be doing? Should our taxpayer dollars go towards the federal government establishing a variety of hacker-centers that would be employed to shut down worldwide communications the United States deemed harmful? The text of the First Amendment specifically forbids Congressional action that enables regulations on speech, press, and assembly. It does not say that Congress may engage in extraterritorial regulation while avoiding such regulation on the home front. Instead, *all* restrictions on the freedom of expression are forbidden, and given the worldwide reach of the internet, it makes the most sense to apply the literal text of the First Amendment rather than carving out endless exceptions that would permit the United States to randomly restrict the speech of some foreigners without a compelling reason to do so.

Another important implication of the *WeChat* decision is that merely pointing to data-gathering by social media companies from willing participants will not be enough for the government to justify regulation. The mere fact that what Americans are posting to social media could, in theory, be used to gather information by a foreign nation should do little to alter First Amendment protection. If American citizens want to broadcast to the world that they are spending their time taking a kayak down concrete stairs, that is entirely within their prerogative.<sup>301</sup> If the Chinese government can glean some information from watching an American teenager accidentally tase himself, that is a risk we are going to have to take.<sup>302</sup> Perhaps a video of this sort might reveal that the

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<sup>301</sup> See Esther Bell, *TikTok Loves These 3 Kids Who Kayak Down Concrete Stairs*, DAILY DOT (May 20, 2021, 1:15 AM), <https://www.dailydot.com/unclick/tiktok-kayak-down-stairs-meme/>.

<sup>302</sup> Alexandra Schröder, *Guy Accidentally Tazes Himself While Fooling Around Video*, YOUTUBE (Apr. 18, 2015), [https://www.youtube.com/watch?v=pT9GQCo6T\\_o](https://www.youtube.com/watch?v=pT9GQCo6T_o).

American education system is lagging behind, given the teen's inability to anticipate that metal conducts electricity when pointing his taser at a metal bracelet in his other hand. Yet, the discovery that the education system fails to dissuade Americans from doing unadvisable things is hardly espionage: it could be readily observed or inferred without any technological intervention.

Some less encouraging implications can also be gleaned from the *WeChat* decision. One is the court's focus on the apparently indispensable nature of the WeChat application for Chinese users to communicate to users abroad as well as its cultural impact and unification it brought to the Chinese community.<sup>303</sup> The court stressed these factors throughout its opinion, making it at least appear critical to the decision.<sup>304</sup> Yet, if this is indeed a requirement in order to receive First Amendment protections, it is a poor one. The text of the First Amendment itself does not require speech to be culturally central to receive protections. If such a requirement could be imposed, then it would actually be possible for some communities to receive more First Amendment protections than others.

Consider a situation where a social media application, of either foreign or domestic origin, becomes popular throughout the United States but *is not* indispensable due to the availability of other communication methods. Let us also posit that the application is not predominantly used by any particular minority group and does little to preserve culture. Should the government be able to regulate this application more than WeChat? This would be a surprising outcome in light of the plain meaning of the First Amendment and the Supreme Court's interpretation thereof. After all, the Ku Klux Klan was able to receive the protection of the First Amendment, even though the Klan was directly opposed to the presence of minorities in the United States.<sup>305</sup> To be sure, the Klan actually received protection for the specific anti-minority speech in which it engaged, even though few would argue that burning the cross is a crucial, indispensable form of culture.<sup>306</sup>

The Westboro Baptist Church likewise received the protection of the First Amendment, as did the Stolen Valor warrior, as did the students protesting the Vietnam War, as did the pornographers, as did a large number of individuals making a large number of offensive and disquieting remarks and other forms of

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<sup>303</sup> *WeChat Users*, F. Supp. 3d at 928.

<sup>304</sup> *Id.*

<sup>305</sup> See *Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992).

<sup>306</sup> See cases cited *supra* note 305. It may be, of course, that members of the Ku Klux Klan would argue that this is a crucial form of expression. But the thought that our Supreme Court gave great consideration to the cultural preferences of the Ku Klux Klan when evaluating their activities is both disquieting and not represented in the text of the opinion.

expression.<sup>307</sup> It seems that WeChat and other social media companies should receive First Amendment protections regardless of minority status or cultural significance. Moreover, when courts confront the almost inevitable regulation attempts of other social media companies, this decision leaves the door open for them to potentially deny protections on the grounds that a particular application is not culturally important or that it protects those who do not need the protection because they are non-minorities. The First Amendment does not draw this distinction, and courts should avoid doing so, too.

Perhaps the cultural importance distinction should have more weight when it comes to the government's first justification for its restriction: that they are content-neutral time, place, and manner restrictions. Indeed, restrictions of this sort draw less scrutiny, and perhaps some could argue that the unavailability of alternate methods of communication should play a role in this type of analysis. In many instances, the existence of alternatives should be considered by the courts, and there is a historical basis for why such consideration may be necessary in *most* cases. In the past, there were limited public forums in many towns: i.e., few places where individuals could literally stand to express their opinions and where expressing opinions loudly (like in a protest) could disturb other citizens if it took place during the night. Time, place, and manner restrictions in this context would be indispensable. Yet in the context of social media, volume, space, and exposure are entirely in the control of the listener. The content does not disturb anyone who does not willingly expose himself or herself to it. Hence, the justification for *any* time place and manner restrictions evaporates and any restrictions the government designates as such should be considered as suspect *a priori* when it comes to the internet communications space.

The beauty of social media companies, multiplayer video games, and other media through which online messaging can be shared is that it really should not disturb anyone. That is because, unlike a protester with a loudspeaker in a residential community at midnight, social media cannot reach out from cyberspace and disturb anyone. If a person wishes to avoid something he or she saw on Twitter, he or she can simply avoid visiting the website and/or uninstall the application on his or her phone. Messages from other applications, like Facebook, WeChat, YouTube, TikTok, Parler, and so many more can cause no disturbance whatsoever because anyone can simply avoid them by doing little or nothing. YouTube will not intrusively upload videos to a person's phone to watch. Its employees will not stop anyone on the street and hand that individual pamphlets.

Because this is well-known to politicians seeking to regulate social media, regulations disguised as time, place, and manner restrictions should be

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<sup>307</sup> See *Snyder v. Phelps*, 562 U.S. 443 (2011); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

viewed with a highly skeptical eye. Indeed, in the case of TikTok and WeChat, President Trump was such a prominent user of Twitter that he should have known very well its reach and limitations. Surely the President understood, on a personal level, that he could avoid Twitter's influence on his own life by simply putting the phone down. Given the number of "tweets" on a variety of subjects the President posted prior to and during his presidency (until his account was suspended for allegedly starting a small *coup d'etat*), President Trump displayed technological savvy and awareness of social media not frequently displayed by politicians his age. He should have known better than anyone that time, place, and manner restrictions on WeChat and TikTok could not be justified under almost any standard due to the users' ability to never expose themselves to content from these sources.

Failure to point out the nonsensical nature of the time, place, and manner restriction argument is another flaw in the otherwise sound WeChat decision. The court initially accepted the federal government's assertion that these restrictions were content neutral and proceeded to demonstrate that they were not narrowly tailored.<sup>308</sup> Only toward the end of its decision did the court note that, to the extent that the restrictions sought to curtail speech based on content, they were all the more unconstitutional.<sup>309</sup> Instead, when politicians try to package their restrictions as time, place, and manner restrictions, courts should scrutinize that argument from the very start because of just how inconsistent it is with reality. It seems difficult to imagine that politicians would use their power to curtail any online communications unless the content of these communications troubled them. In fact, they might be willing to deplatform a wide variety of content they find non-offensive so long as it results in silencing something particular of which they do not approve.

For example, I am sure President Trump found nothing offensive with WeChat or TikTok posts about how to solve the Pythagorean Theorem or apply the Quadratic Formula.<sup>310</sup> These videos exist and would arguably be helpful to many Americans (despite the low view counts). President Trump himself might have found these quite educational. Nevertheless, he was perfectly fine with depriving WeChat and TikTok users of access to these communications so long as he deprived Chinese companies of the ability to gather willingly communicated information from their users and/or spread political messages antithetical to the President. I am confident that President Trump was fine

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<sup>308</sup> *WeChat Users*, 488 F. Supp. 3d at 927–28.

<sup>309</sup> *Id.* at 928.

<sup>310</sup> Math Guy (@your.bummy.math.tutor), TikTok (Oct. 4, 2021), [https://www.tiktok.com/@your.bummy.math.tutor/video/7015354122991832326?is\\_from\\_webapp=v1&item\\_id=7015354122991832326&lang=en](https://www.tiktok.com/@your.bummy.math.tutor/video/7015354122991832326?is_from_webapp=v1&item_id=7015354122991832326&lang=en); Hannah Kettle (@hannahkettlemaths), TikTok (Jan. 2020), [https://www.tiktok.com/@hannahkettlemaths/video/7055394207405460741?is\\_from\\_webapp=1&sender\\_device=pc&web\\_id=7133575130256639534](https://www.tiktok.com/@hannahkettlemaths/video/7055394207405460741?is_from_webapp=1&sender_device=pc&web_id=7133575130256639534).

silencing content creators that posted videos of their cats to ensure that political propaganda did not harm the United States or his reelection chances.<sup>311</sup>

*B. Premonitions of Future Restrictions*

*“All you have accomplished is to delay the inevitable.”*

*—Assassin’s Creed: Unity*<sup>312</sup>

The future seems grimly clear for social media: it faces a plethora of politicians seeking to regulate it in ways that would be advantageous to these politicians. These proposed regulations take a number of “flavors.” Some politicians are calling for direct regulation of social media.<sup>313</sup> They argue for the passage of laws requiring social media companies to be neutral, at least when it comes to the regulation of political speech.<sup>314</sup> These politicians, presumably, would still consider it fine if Facebook censored pornographic content but would strenuously object to the banning of individuals like former President Donald Trump from a variety of platforms. To do this, they seek to have social media companies declared as “common carriers” (either via statute or by the courts), which would permit government regulation of private enterprises.<sup>315</sup>

Others call for social media to be exposed to regulation via litigation.<sup>316</sup> Traditionally, social media companies received a variety of legal protections that allowed them to function profitably. When social media companies first became popular, and when online communication mediums began to permit comments

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<sup>311</sup> It is somewhat ironic that President Trump may have tried to silence Chinese social media applications to help his reelection chances when silencing himself on Twitter might have been the greatest boost his campaign could have received in the months prior to the 2020 Presidential Election (and the 2016 Presidential Election).

<sup>312</sup> ASSASSIN’S CREED: UNITY (Ubisoft 2014).

<sup>313</sup> Will Oremus, *Want to Regulate Social Media? The First Amendment May Stand in the Way*, WASH. POST (May 30, 2022, 6:00 AM), <https://www.washingtonpost.com/technology/2022/05/30/first-amendment-social-media-regulation/>.

<sup>314</sup> Mark MacCarthy, *Senator Klobuchar “Nudges” Social Media Companies to Improve Content Moderation*, THE BROOKINGS INST. (Feb. 23, 2022), <https://www.brookings.edu/blog/techtank/2022/02/23/senator-klobuchar-nudges-social-media-companies-to-improve-content-moderation/>.

<sup>315</sup> See *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S.Ct. 1220, 1224 (2021) (Thomas, J., concurring); see, e.g., Tunku Varadarajan, *Opinion, The ‘Common Carrier’ Solution to Social-Media Censorship*, WALL ST. J. (Jan. 15, 2021, 12:39 PM), <https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343>.

<sup>316</sup> Anthony Izaguirre, *GOP Pushes Bills to Allow Social Media ‘Censorship’ Lawsuits*, ASSOCIATED PRESS (Mar. 7, 2021), <https://apnews.com/article/donald-trump-legislature-media-lawsuits-social-media-848c0189ff498377fbfde3f6f5678397>.

by users on articles, videos, and reports, companies needed protection for liability based on comments by their users.<sup>317</sup> Facebook, for example, could not conceivably monitor and control all of the posts made by its hundreds of millions of users in the 2000s. Hence, without protections, it was possible for individuals who were defamed, whose privacy was violated, and/or who were otherwise harmed by the postings of a Facebook user to attempt to involve Facebook in the lawsuit.<sup>318</sup> If the law permitted this, Facebook and similar social media companies would be eternally in litigation over the acts of people they did not control.

Social media companies brought their objections to Congress, and Congress created an exception for these profitable corporations with scores of lobbyists: so long as social media companies did not act as an editor for users' posts, these internet giants could not be held liable for the content of these posts.<sup>319</sup> Yet now, politicians note that social media companies *do* engage in editorial work.<sup>320</sup> According to them, when social media companies ban content on the suspected origin of COVID-19, for example, they are acting as editors. If these companies act as editors with respect to at least some topics, perhaps they have now gained the artificial intelligence capability to actively editorialize their entire platforms. And if that is the case, the justification for the protection they once received disappears: these giants have now grown large enough to fend for themselves in the event of lawsuits.

The efforts to strip social media companies from protections appear to be generally advanced by Republicans.<sup>321</sup> This is to be expected: social media giants seem to lean quite heavily to the left, and the Republican party is offended that these platforms silence conservative voices. This is ironic, since the Republicans generally argue that government should not interfere with private enterprise. Yet, the moment private enterprise does something the Republicans despise, they are first in line to interfere with it. The Democrats are no better, of course. You can be assured that if social media companies banned Democratic voices, or promoted voices that were pro-Republican, Democratic lawmakers would be holding a variety of hearings on how to regulate or ban those social

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<sup>317</sup> Ashley Johnson & Daniel Castro, *Overview of Section 230: What It Is, Why It Was Created, and What It Has Achieved*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021) <https://itif.org/publications/2021/02/22/overview-section-230-what-it-why-it-was-created-and-what-it-has-achieved/>.

<sup>318</sup> *Id.*

<sup>319</sup> 47 U.S.C.A. § 230(c)(1) (West 2022) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

<sup>320</sup> See, e.g., Dan Patterson, *What Is “Section 230,” and Why Do Many Lawmakers Want to Repeal It?*, CBS NEWS (Dec. 16, 2020, 10:59 AM), <https://www.cbsnews.com/news/what-is-section-230-and-why-do-so-many-lawmakers-want-to-repeal-it/>.

<sup>321</sup> *Id.*



media platforms. One need only look to a platform like Parler, which seems to be an attempt by conservatives to copy Twitter without the censorship. The platform began to receive popular acclaim, and Democrats took every opportunity to try to discredit it.<sup>322</sup> In fact, when Parler became deplatformed after Amazon refused to continue to host the app and website on its servers, many Democrats argued that the deplatforming was well-deserved.

This only highlights the reason that the First Amendment must be applied apolitically. That was likely one of the reasons the Founding Fathers put it first on the list of rights to be protected. They understood only too well that in a democratic republic, politicians would be greatly incentivized to silence their opposition, no matter how fair or truthful. Hence, the choice was lifted directly out of the hands of politicians because they were hardly the best-positioned people to determine which speech was best. What is happening now is an onslaught of politicians apparently jumping at the opportunity to engage themselves in the affairs of internet communication companies under the thinly-veiled guise of fairness.

What many argue is that the internet seems to be greatly controlled by one party. Citing Parler's deplatforming as an example, politicians point out that server space is controlled by a relatively concentrated block of players.<sup>323</sup> Among these players is Amazon Web Services ("AWS"), the very party culpable of taking Parler offline. These companies can determine which social media companies stay up and which social media companies disappear. Without regulation, according to some politicians, these organizations have a quasi-monopoly on speech, perhaps similarly to the control of their own rails by railroad companies, which made competition highly impractical.<sup>324</sup> After all, to compete on a free market, a market entrant in the railroad space would have to set up its own rails, and in the event of failure, these rails would become a huge sunk cost. This, in turn, drove competitors out of the market, making the surviving railroad companies in need of regulation as common carriers.<sup>325</sup>

It is uncertain whether the government was justified in controlling railroad companies as common carriers: there seem to be good arguments on both

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<sup>322</sup> Press Release, James Comer, Representative, House of Representatives, *Comer: Parler Response to Democrats' Baseless Probe Exposes Overreach*, JAMES COMER (Mar. 26, 2021), <https://comer.house.gov/2021/3/comer-parler-response-to-democrats-baseless-probe-exposes-overreach>.

<sup>323</sup> Vanessa Page, *What is Amazon Web Services and Why is it So Successful?*, INVESTOPEDIA (Aug. 12, 2021), <https://www.investopedia.com/articles/investing/011316/what-amazon-web-services-and-why-it-so-successful.asp>.

<sup>324</sup> See *Interstate Commerce Act (1887)*, Nat'l Archives (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/interstate-commerce-act>.

<sup>325</sup> See *Biden v. Knight First Amend. Inst.* at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring); Gabe Rottman & Niko Letsos, *Justice Thomas Suggests Social Media Platforms Qualify as 'Common Carriers'*, THE REPS. COMM. FOR FREEDOM OF THE PRESS (Apr. 19, 2021), <https://www.rcfp.org/justice-thomas-knight-v-trump/>.

sides. What we can be sure of is that the government would not be justified in controlling social media companies, or other internet communication companies, on this basis. Despite a concentration of cyberspace control, we live in a world where access to the internet is still largely de-centralized. Almost anyone can start a website these days for little to no cost. Individuals and corporations can use these websites, and even set up their own private servers, to broadcast whatever message they please.

Parler's case is hardly a counterexample. First, Parler did not have to host its website on AWS, which is an error that other social media companies risking deplatforming will not make. This alone will economically punish AWS while rewarding server providers who are more open to free speech. If content creators believe there is even the slightest chance that their content results in deplatforming from AWS (a stop in business that courts recognized could have been fatal for TikTok and/or WeChat), they will err on the side of caution and go to its competitors. The free market will properly resolve this problem without our brilliant politicians chiming in. After all, we should not seek to burden their superior intellect with issues such as this.

Moreover, Parler is actually a great example of just how *unlike* railroad lines the internet actually is: the website is back, it is operational, it is available for access via browser or application, and it is hosting a wide variety of conversations from popular conservative voices as I write this line. It is joined by other "freer" services, such as Gab, Discord, Telegram, etc., which provide users with the ability to discuss an endless amount of potential subjects. Even former President Donald Trump, after his Twitter ban, found a way to broadcast his ideas to the world by starting a blog.<sup>326</sup> If, for some reason, someone wanted to know what was on former President Trump's mind, the person could access the blog via URL, through a search engine, or even sign up for e-mail updates.<sup>327</sup> That's right, if you didn't get enough of Trump on Twitter, guess what: you could have him stream into your work or academic e-mail two to four times a day on issues where he wished to record an opinion.

Then, as if this was not enough, President Trump deleted his blog and started an entire social media platform directly competing with Twitter: Truth Social.<sup>328</sup> The platform has millions of users, and while it may not rival Twitter or Facebook with the number of users, it still provides an important platform where users can access the thoughts of President Trump and many other conservative thinkers at any time in a format almost identical to that of Twitter. It is difficult to see how private censorship is so evil when the availability of

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<sup>326</sup> Tina Nguyen & Meridith McGraw, *Trump's Blog Failed, Bigly. His Next Online Venture Won't Be Any Easier.*, POLITICO (Jun. 2, 2021, 7:58 PM), <https://www.politico.com/news/2021/06/02/donald-trump-blog-fail-491667>.

<sup>327</sup> *Id.*

<sup>328</sup> Donald J. Trump, (@realDonaldTrump), TRUTH SOCIAL. <https://truthsocial.com/@realDonaldTrump>.

communications from one of the most censored Americans in history is so great! Moreover, recent developments saw Elon Musk's attempt to purchase the entire platform of Twitter in an effort to take it private and render it more open to communication from different sides of the political aisle. While Musk later pulled out of the deal, and a court will have to decide whether Musk is legally required to proceed with the multi-billion dollar purchase of Twitter, his actions show that a large and widely used social media platform can be purchased and made more open by anyone willing to spend the money. Hence, another outlet for free speech in the private space can include the purchase of social media companies by activist investors, which can then make the platform more open.

The First Amendment has long stood as a barrier that, with some exceptions, turned government agents away from controlling speech, assembly, and association. Historically, Americans have had the ability to believe, think, and say almost anything that they want. The WeChat and TikTok decisions expanded this right to foreign companies that provide platforms for this speech, regardless of vague government suspicions that espionage and data-gathering may be the true aims of these platforms. These decisions should remind government agents to remain confined in their tasks and to avoid spending taxpayer resources to control media in which the taxpayers willfully engage. If Americans wish to communicate with the world in ways that may be monitored by foreigners, the government should have as little power to stop such expression and association as possible.

## VI. CONCLUSION

*The most skilled general takes the enemy without even fighting,  
takes the city without a siege, and defeats the enemy nation  
without a long drawn-out conflict.*

—Sun Tzu, *The Art of War*<sup>329</sup>

This Article has demonstrated at least two things: first, that President Trump's ban of TikTok on WeChat was plainly unconstitutional, and second, that regulation of social media in the United States, whether foreign or domestic in origin, is unlikely to survive First Amendment scrutiny. The rulings of the federal district courts upholding the rights of foreign corporations to operate as facilitators of expressive activity within the United States rest well within the jurisprudence of the United States Supreme Court. Even though President Biden's administration is unlikely to pursue the legal fight concerning the bans to the appellate courts, the growing political movement to regulate social media cyberspace will likely lead to increased litigation about the rights of internet

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<sup>329</sup> SUN TZU, *THE ART OF WAR*, ch. 3 (Lionel Giles trans., 1910), <https://www.litcharts.com/lit/the-art-of-war/chapter-3>.

communication companies, their users, and their smaller competitors to connect users to the ideas of others.

Given the philosophical, political, and social underpinnings of the First Amendment, it seems incontrovertible that politicians seeking to regulate social media are wasting their time. Congressional hearings show that our elected leaders rarely understand the technology involved in social media.<sup>330</sup> The general tendency of legislators at the state and federal level to spread speech regulations where they do not belong seems to indicate a willing misunderstanding of the First Amendment. Taken together, regulatory approaches are unlikely to meet with success unless state and federal judges cannot be convinced that social media companies provide a crucial service for the spread of ideas, even if these ideas are unpopular or biased.

This article does not stop at social media posts. Rather, it discusses the many ways that the flow of code over the internet permits protected communications that 50 years ago would have seemed incomprehensible. Government regulation into the expressions of individuals in virtual online worlds and even the expression of artificial intelligence engines should bear the protections of the First Amendment. The language our Founding Fathers used in the First Amendment still looms poignantly today. The amendment is not so much an articulation of a positive right of every individual but an express denial of governmental authority to regulate speech. Perhaps our Founders, who so cleverly utilized the printing press and provided for a post office to ensure long-range communication, foresaw that human ingenuity would lead to more.

What we should know for certain, in light of the TikTok and WeChat “experience,” is that regulation of our online communication lies prowling at the door. It seems so tempting just to curtail a little free speech here and a little free speech there. Let us have just a little less propaganda from the People’s Republic of China. Let us have just a little less exposure of our youth to potentially addicting social media applications. Maybe if we limit data gathering on our citizens just a tad, we will be somewhat safer. All of these thoughts should be purged from the mind of free people. The Founding Fathers understood where the regulation of speech by government ends, and so should we. It is no wonder that the Chinese government seeks such strong control of speech. That is because if people spoke freely, government officials would have to answer for what they have done.

Consequently, then, perhaps the Chinese Communist Party views it as an American weakness to allow speech, seeking to use it as a weapon. If we have faith in our democratic republic, we should not fear it but embrace then we should embrace rather than fear it. The beauty of free speech is the ability to truly debate the merits of our respective systems, and Chinese social media giants do us a

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<sup>330</sup> Cecilia Kang, Congress, *Far From ‘a Series of Tubes,’ Is Still Nowhere Near Reining in Tech*, N.Y. TIMES (Dec. 11, 2021), <https://www.nytimes.com/2021/12/11/business/congress-tech-regulation.html>.

favor by exposing us to a greater range of ideas and the Chinese people to the openness of American thought. They allow us to relate to people across the world in ways previously impossible. In the end, two populations of two great nations should have the opportunity to speak to one another freely and form bonds, friendships, business relationships, romantic connections, political groups, and philosophical circles. When politicians restrict these potential benefits by regulating communication, our first thought should be: “Would these actors benefit from strife between the citizens of these countries?” Because the answer is frequently yes, our Founding Fathers had the foresight to keep the reins of public communication away from all politicians.