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Words We Fear

BURNING TWEETS & THE POLITICS OF INCITEMENT

Rachel E. VanLandingham[†]

INTRODUCTION

A steady stream of U.S. officials, both elected and in the executive branch—Senators, Representatives, the FBI Director, and so forth—have loudly condemned terrorists’ use of social media.¹ And not just any use. The official red, white, and blue damning drumbeat has been loudest regarding terrorist groups’ use of social media to radicalize, recruit, and propagandize. Over the last decade and a half, the refrain that social media has been used as a proselytization tool has echoed throughout congressional and executive branch statements. It is a sentiment uttered in frequent congressional hearings and FBI press releases on the matter—this refrain has particularly echoed with growing frequency in the last five years.²

As demonstrated in the following short excerpts, U.S. officials occasionally, and appropriately, express concern specifically about terrorist groups’ tactical use of social media as a communication platform to plan and plot attacks. Yet that is not the sentiment most often expressed in countless congressional hearings

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¹ This article uses the following terms in this manner:

[T]errorists are those individuals who support or commit ideologically motivated violence to further political, social, or religious goals; radicalization is the process by which individuals enter into terrorism; and terrorism is an act that involves the threatened or actual use of ideologically motivated violence to further political, social, or religious goals.

ALLISON G. SMITH, NAT’L INST. OF JUSTICE, NCJ 250171, HOW RADICALIZATION TO TERRORISM OCCURS IN THE UNITED STATES: WHAT RESEARCH SPONSORED BY THE NATIONAL INSTITUTE OF JUSTICE TELLS US 1 n.1 (2018), <https://www.ncjrs.gov/pdffiles1/nij/250171.pdf> [<https://perma.cc/F4CN-Q5RL>] [hereinafter HOW RADICALIZATION TO TERRORISM OCCURS].

² See *infra* Section I.A.

and FBI press releases regarding terrorist content online. Instead, the government has focused on the use of social media by extremist groups to radicalize, recruit, and propagandize, a much broader, and largely protected, range of speech. In 2011, a Representative opened a congressional hearing with the statement:

One common theme throughout all of these hearings was that terrorist networks are spreading their message, recruiting sympathizers, and are connecting operationally on-line.

For years, terrorists have communicated on-line, sharing al-Qaeda propaganda or writing in on-line forums dedicated entirely to the prospect of Islamist terrorism. . . . The same place the average person posts photos and communicates with family and friends are being used by enemies to distribute videos praising Osama bin Laden.

Terrorists also disseminate diatribes glorifying the murder of innocents and even make connections with each other intentionally or internationally to plot attacks.³

Leapfrog to the January 2018 “Terrorist and Social Media: #IsBigTechDoingEnough?” Senate committee hearing. Senator John Thune stated: “Violent Islamic terrorist groups like ISIS have been particularly aggressive in seeking to *radicalize and recruit* over the Internet and various social media platforms. . . . Instances of Islamic terrorists using social media platforms to organize, instigate, and *inspire* are well documented.”⁴ His first example in support of such social media inspiration was the 2016 Orlando Pulse nightclub mass shooting, which he characterized as “reportedly inspired” by material posted on social media.⁵

Fast-forward again, this time to September 2019, to yet another Senate hearing during which officials from Facebook, Google, and Twitter were once again grilled regarding their companies’ efforts to remove terrorism-related content from their platforms.⁶ The Commerce, Science, and Transportation Committee Chairman opened the “Mass Violence, Extremism, and Digital Responsibility” hearing by describing the links

³ *Jihadist Use of Social Media—How to Prevent Terrorism and Preserve Innovation: Hearing Before the Subcomm. on Counterterrorism & Intelligence of the H. Comm. on Homeland Sec. & Intelligence*, 112th Cong. 1–2 (2012) (statement of Rep. Patrick Meehan, Chairman, H. Subcomm. on Counterterrorism and Intelligence).

⁴ *Terrorism and Social Media: #IsBigTechDoingEnough?: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 115th Congress 1 (2018) [hereinafter *Terrorism and Social Media 2018 Hearing*] (emphasis added) (statement of Sen. John Thune, Chairman, S. Comm. on Commerce, Sci. & Transp.).

⁵ *Id.* at 1–2.

⁶ Tony Romm & Drew Harwell, *Facebook, Google and Twitter Face Fresh Heat from Congress on Harmful Online Content*, WASH. POST. (Sept. 18, 2019), <https://www.washingtonpost.com/technology/2019/09/18/facebook-google-twitter-face-fresh-heat-congress-harmful-online-content/> [https://perma.cc/Y2ET-49NH].

between social media and several terrorist incidents, explaining that the August 2019 El Paso shooter had uploaded a “manifesto” of extremism prior to the attack, and then repeated the oft-cited example of the 2016 Orlando Pulse nightclub mass shooting perpetrator’s alleged social media-drawn inspiration.⁷

So what is the problem with such expressions of official concern? The problem with sustained U.S.-governmental attention to such peripheral, albeit serious, social media contributions to acts of terrorism is that the speech under the microscope is constitutionally protected from government action, yet government pressure often causes private entities to act. Terrorist proselytization, the type of speech Congress in particular is concerned with, is well within the First Amendment’s aegis. In protecting speech that glorifies violence and praises terrorism, the Constitution prohibits government suppression of much of the speech used to radicalize, recruit, and propagandize terrorism that so worries our elected and unelected government officials.

This article is not alarmed by governmental suppression, through criminal punishment or otherwise, of speech the First Amendment does *not* shield, such as that used to direct terrorist attacks using social media. The First Amendment does not protect speech that is integral to crime, nor other crime-enabling speech such as that used to solicit, conspire, conduct, plot, or to direct a terrorist attack, regardless whether said speech is communicated via social media, over the phone, or shouted from a rooftop.⁸ This article instead sounds the alarm regarding the considerable governmental pressure regularly directed at social media companies regarding their regulation of protected speech on their platforms, despite congressional—and seemingly some scholars’—protests to the contrary.⁹

⁷ *Mass Violence, Extremism, and Digital Responsibility: Hearing Before the S. Comm. on Commerce, Sci. & Transp.*, 116th Cong. (2019) (video statement of Sen. Roger Wicker, Chairman, S. Comm. on Commerce, Sci. & Transp.), <https://www.commerce.senate.gov/2019/9/mass-violence-extremism-and-digital-responsibility> [<https://perma.cc/YG2A-74ZV>].

⁸ See *infra* Section II.A (noting protected and unprotected categories of speech). Further, the federal material support to terrorism statute and the Supreme Court’s interpretation of the statute’s interplay with the First Amendment means the Constitution appropriately does *not* shield speech uttered by foreign terrorist groups themselves, nor speech disseminated on such groups’ behalf if the speaker is in coordination with such groups, even if such speech, without the connection, would otherwise be protected. See generally Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism, and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 43–44 (2017) [hereinafter *Jailing the Twitter Bird*] (noting that 18 U.S.C. § 2339B prohibits the knowing provision of a service to a terrorist group, such as money, a communications platform; and uttering helpful speech in coordination with such a group also passes constitutional muster).

⁹ Professor Alexander Tsesis, a leading scholar in this area, surprisingly claims that “[t]he First Amendment right to engage like-minded people, to express one’s views, and to disseminate information, even in statements supportive of violent political

For example, the Chairman of the House Committee on Homeland Security opened a June 2019 public congressional hearing on harmful social media communication linked to terrorism by noting that:

This Committee will continue to engage social media companies about the challenges they face in addressing terror content on their platforms. In addition to terror content, I want to hear from our panel about how they are working to keep hate speech and harmful misinformation off their platforms. I want to be very clear—Democrats respect the free speech rights enshrined in the First Amendment, but much of the content I am referring to is either not protected speech or violates the social media companies' own terms of service.¹⁰

Representative Thompson's words and the actions of his and other congressional committees starkly belie his claim that he and his party respect the First Amendment right to free speech. At least in this Committee, the First Amendment's free speech clause receives short shrift. In his statement, Representative Thompson admits that he and his colleagues want the leading social media companies to censor speech that the government cannot censor or suppress, at least not according to the Supreme Court's modern interpretation of the speech clause. Since Congress cannot directly suppress such speech by criminally punishing it, members of Congress want private actors in the form of the internet's largest social media platforms to act as the book-burners instead.

In other words, the House Committee on Homeland Security seemingly supports censorship, not the First Amendment; it seemingly supports the regulation and suppression of speech by private proxy, not respect for the "freedom to express 'the thought[s] that we hate.'"¹¹ Given the types of expression Representative Thompson and others want restricted, however, there is little political or other pushback, nor is there concern from domestic constituencies. This lack of attention is understandable, because who wants to stand up for speech that glorifies violence such as terrorism or expresses hate toward racial minorities and religious groups? Yet it is worth asking whether Congress should

action, does not extend to conduct that advances violent terrorist activities." Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 664 (2017).

¹⁰ *Examining Social Media Companies' Efforts to Counter Online Terror Content and Misinformation: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. (2019) (statement of Rep. Bennie G. Thompson, Chairman, Comm on Homeland Sec.), <https://homeland.house.gov/imo/media/doc/062619%20BGT%20Open%20Statement.pdf> [<https://perma.cc/PX6W-G8A-G>] [hereinafter *Examining Social Media 2019 Hearing Rep. Thompson Statement*].

¹¹ *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).

do what this article claims it is doing—engaging in *de facto* speech suppression by pressuring private companies (who are not bound by the First Amendment’s speech-protective rules¹²) to restrict speech that the Supreme Court has found worthy of First Amendment protection from direct governmental regulation.

That the July 2019 congressional hearing was meant to pressure social media¹³ companies to further restrict First Amendment-protected speech seems clear by how Representative Thompson described the committee’s concerns. The Chairman’s second broad social media speech category included speech that “violates the social media companies’ own terms of service,”¹⁴ which, by his own binary, is distinct from speech already *unprotected* by the First Amendment;¹⁵ it is speech *protected* by the First Amendment.¹⁶ The Representative and his Committee wanted to further pressure social media companies to continue enforcing their platforms’ own content restrictions regarding protected speech. In a nutshell, this article notes that these content restrictions were developed largely as a response to early congressional and government pressure and restrict speech the government cannot constitutionally regulate as contemplated; this article asks whether this suppression by proxy is functionally and normatively desirable.

Facebook’s¹⁷ restriction of social media content demonstrates that Representative Thompson’s demand that social media companies more strictly enforce their own content bans was a direct call to suppress First Amendment protected speech. Facebook, like other leading social media platforms, has banned numerous types of

¹² See *infra* note 32 and accompanying text.

¹³ The U.S. Department of Homeland Security defines social media as “web-based and mobile technologies that turn communication into an interactive dialogue in a variety of on-line fora.” *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy: Hearing Before the Subcomm. on Counterterrorism & Intelligence, H. Comm. on Homeland Sec.*, 112th Cong. 12 (2012) (joint statement of Mary Ellen Callahan, Chief Privacy Officer, Dept of Homeland Sec., and Richard Chávez, Dir., Office of Operations Coordination and Planning, Dep’t of Homeland Sec.).

¹⁴ *Examining Social Media 2019 Hearing Rep. Thompson Statement, supra* note 10

¹⁵ See *infra* Section II.B (discussing the Supreme Court’s categorical approach to speech under the First Amendment).

¹⁶ See *infra* Section II.B.

¹⁷ Facebook defines its platform as a way for people “to stay connected with friends and family, to discover what’s going on in the world, and to share and express what matters to them,” and has had 1.59 billion daily active users on average as of June 2019. *Company Info*, FACEBOOK: NEWSROOM, <https://newsroom.fb.com/company-info/> [<https://perma.cc/XD7Y-E7LY>]; see also Maryam Mohsin, *10 Facebook Stats Every Marketer Should Know in 2019*, OBERLO (June 6, 2019), <https://www.oberlo.com/blog/facebook-statistics> [<https://perma.cc/5YH5-BDFT>] (noting “Facebook is the leading social platform, reaching 60.6% of internet users” as of 2018).

First Amendment-protected speech, including hate speech.¹⁸ Facebook has defined hate speech as “a direct attack on people based on . . . protected characteristics—race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability.”¹⁹ This is speech that the Supreme Court has repeatedly said is protected by the First Amendment from government suppression, yet the government through its private proxies is seemingly trying to do just that.²⁰ Similarly, Facebook defines “attack” as “violent or dehumanizing speech, statements of inferiority, or calls for exclusion or segregation.”²¹ Facebook has also banned speech that, among other things, “glorifies violence or celebrates the suffering or humiliation of others,”²² as well as speech it refers to as “cruel and insensitive,” which it defines as “content that targets victims of serious physical or emotional harm”²³—all speech that falls within the First Amendment’s protective sweep against government suppression.

Continued congressional pressure on large social media companies to ban protected speech on their platforms is essentially a demand for private companies to regulate what Congress cannot directly ban. Filtering such pressure through private proxies does not remove the Constitutional and normative problems with such action. This article argues that Congress should have a more restricted role in moderating terrorism-related expression on social media. First, Congress lawfully can (and should) ensure that communication platforms are not themselves violating federal criminal law by providing material support to terrorism. If they were, those platforms would be guilty of violating 18 U.S.C. § 2339B by knowingly providing services in the form of communications platforms to foreign terrorist organizations.²⁴ And social media companies are not (and should

¹⁸ Facebook’s “Terms of Service” prohibit speech on Facebook that violates its “Community Standards”; users may have individual posts deleted if violative of these standards and may even have their accounts terminated if community standards are exceeded. *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> [<https://perma.cc/8TLR-JP5K>].

¹⁹ *Community Standards: Hate Speech*, FACEBOOK, https://www.facebook.com/communitystandards/hate_speech/ [<https://perma.cc/L8UE-MM2F>].

²⁰ See *infra* Part I

²¹ *Community Standards: Hate Speech*, *supra* note 19.

²² *Community Standards: Violent and Graphic Content*, FACEBOOK, https://www.facebook.com/communitystandards/graphic_violence [<https://perma.cc/4JVR-YPF3>].

²³ *Community Standards: Cruel and Insensitive*, FACEBOOK, https://www.facebook.com/communitystandards/cruel_insensitive [<https://perma.cc/7Z8P-H424>].

²⁴ See *Jailing the Twitter Bird*, *supra* note 8, at 43–44 for a discussion on how 18 U.S.C. § 2339B, the federal material support to terrorism statute, criminalizes conduct that supports foreign terrorist groups, such as the provision of funding to terrorist groups’ humanitarian or political wings, because of the fungibility of that aid; and how this statute would apply to social medial platforms in their provision of social media accounts to users linked to foreign terrorist organizations.

not be) otherwise shielded from criminal liability as they are from civil liability.²⁵ Second, Congress can and should attempt to ensure that social media platforms are not conduits for third-party criminality in the form of others committing speech crimes, such as posting obscenity or child pornography, or language constituting true threats, solicitation to crime, or incitement.

Instead of such appropriate measures, Congress remains preoccupied with constitutionally-protected speech that is tenuously linked to the radicalization of individuals to commit acts of violence.²⁶ Intellectual honesty demands that elected leaders such as Thune squarely acknowledge that the social media speech Congress spends most of its time pressuring social companies to regulate largely constitutes protected speech shielded from governmental suppression and censorship.²⁷ That admission would open the door to a healthy and comprehensive dialogue regarding why such speech is afforded First Amendment protection, and whether those reasons should have valence regarding private platform regulation—particularly regulation that these companies are under tremendous governmental pressure to impose.

Constitutionally impermissible government suppression of protected speech has historically taken the shape of regulatory and criminal legislation that the Supreme Court eventually deemed unconstitutional.²⁸ Congressional hearings lamenting the ills of

²⁵ Social media platforms are statutorily immune from civil liability for platform content through Section 230 of the Communications Decency Act, which shields internet providers from liability for their users' content, though with no effect on federal criminal law. Communications Decency Act, 47 U.S.C. § 230(c)(1) ("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.").

²⁶ Facebook claimed in a 2017 policy document that, "[a]lthough academic research finds that the radicalization of members of groups like ISIS and Al Qaeda primarily occurs offline, we know that the internet does play a role." Monika Bickert & Brian Fishman, *Hard Questions: How We Counter Terrorism*, FACEBOOK: NEWSROOM (June 15, 2017), <https://newsroom.fb.com/news/2017/06/how-we-counter-terrorism/> [<https://perma.cc/C5UX-B58H>]. *But see* HOW RADICALIZATION TO TERRORISM OCCURS, *supra* note 1, at ii, 9, 14 (noting "evidence that the internet played at least some role in individuals' radicalization in just under one-half of the cases" though warning that "individuals' processes of radicalization to terrorism may vary by the extremist ideologies and narratives they embrace, the time periods in which they radicalize, the groups or movements they join (or do not join, in the case of lone wolves), and/or their individual characteristics and experiences"). *See also* Max Fisher & Amanda Taub, *How Everyday Social Media Users Become Real-World Extremists*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/world/asia/facebook-extremism.html> [<https://perma.cc/T4U8-P8XT>] (describing how social media algorithms may contribute to extremist radicalization).

²⁷ "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I.

²⁸ *See* Cohen v. California, 403 U.S. 15, 15–18 (1971) (overturning a conviction because although the defendant wore clothing with obscene language, there was no evidence he would have acted with violence and thus was protected under the First Amendment); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)

various strains of protected speech have not, to date, been found to constitute unconstitutional speech regulation. Yet what is congressional pressure through public hearings but back-door suppression via threat of regulation of speech? Today's sustained congressional pressure resembles sub-rosa regulation that the First Amendment prohibits Congress from doing more overtly through regulation, and hence should be considered in the same light while weighing the costs of such suppression against the benefits.

This article builds off earlier scholarship that explored the federal material support to terrorism statute's application to social media platforms.²⁹ This article updates that work's recognition that social media companies' terms of service—the contractual provisions users agree to adhere to when signing up for social media services regarding types of permissible speech on these platforms—developed largely in response to governmental pressure that involved that terrorism statute.³⁰ This article argues that since the development of these original terms of service forbidding speech linked to terrorism and hate, Congress has specifically and regularly applied increasing pressure on social media companies to enforce such bans on speech linked to terrorist incidents and groups. This includes speech involving advocacy independent from coordination with any terrorist group, and other protected forms of speech.³¹

While congressional pressure in the form of hearings and veiled threats of criminal prosecution have never been held to constitute the type of statutory action prompting First Amendment constraints, such pressure is not copacetic.³² It is troublesome for the same reasons the First Amendment strictly limits the government's ability to censor: censorial pressure is

(wearing black armbands to school in protest of the Vietnam War is protected under the First Amendment because it is not likely to lead to disruptive conduct and it is merely a "silent, passive expression of opinion"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (noting unprotected categories of speech, concluding that "fighting words" are categorically exempted from First Amendment protection because these words are likely to produce aggressive behavior).

²⁹ See *Jailing the Twitter Bird*, *supra* note 8.

³⁰ *Id.*

³¹ See *id.* at 16–17.

³² The First Amendment typically does not regulate private actors, unless they are functioning as a quasi-state, defined as exercising "powers traditionally exclusively reserved to the State." *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974). Simply because private actors "hold out and operate their private property as a forum for expression of diverse points of view" does not mean they are transformed into "state actors subject to the First Amendment." *Prager Univ. v. Google*, No. 17-CV-06064-LHK, 2018 U.S. Dist. LEXIS 51000, at *24 (N.D. Cal. Mar. 26, 2018); see also VALERIE C. BRANNON, CONG. RESEARCH SERV., R45640, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 8 (2019) (noting that courts have rejected claims that social media companies are subject to the First Amendment because they "failed to meet the joint participation, nexus, and entwinement tests for state action").

often used to arbitrarily suppress disliked speech. And disliked speech is often speech with political value, thus weakening self-government as well as diminishing equality and liberty.³³ When Congress evades First Amendment strictures by getting private companies to regulate online speech that Congress cannot, it is worth interrogating whether similar concerns are implicated as if the government were itself doing the censoring.³⁴

Part I describes notable instances in which Congress and the executive branch have exerted influence and pressure on social media platforms regarding social media speech purportedly linked to terrorism. Part II explores incitement as a category of speech the Supreme Court considers constitutionally unprotected,³⁵ highlighting its political character. It traces how the Supreme Court has narrowed the definition of incitement by requiring causation and a specific intent mental state; such elements are required to prevent arbitrary government action by way of criminalizing disliked political speech that is only speculatively linked to actual physical harm or other illegality.³⁶

This article acknowledges that social media speech that falls below the Court's thresholds for incitement or crime-enabling speech is at times harmful. It questions whether such

³³ See generally NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP 4 (2018) (noting that viewpoint discrimination regulations threaten the First Amendment's core value of autonomy, "distort public debate . . . are . . . antithetical to our democratic political system . . . [and] violate quality principles").

³⁴ This article does not argue that social media platforms are subject to the First Amendment. Instead, it argues that similar concerns are raised by social media platforms' censorship activities as raised by government suppression because 1) the pressure to so censor largely flows from the U.S. government who has a history of political persecution of speech; and 2) the negative effects of speech suppression on self-government, individual autonomy, liberty, and equality are similar to those ills directly caused by government censorship. However, some scholars have so argued that the First Amendment should directly apply to these platforms. See, e.g., Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 128, 134 (2014) (proposing First Amendment regulation to social media platforms as protection against the companies' contractual censorship under an expansive state action doctrine).

³⁵ The Supreme Court has identified types of speech categorically unprotected by the First Amendment: obscenity, child pornography, incitement, threats, defamation, speech integral to crime, and fraud. See *United States v. Stevens*, 559 U.S. 460, 467–68 (2010). This Part notes how incitement is related to the "speech integral to crim[e]" exception to the First Amendment's ban on government speech suppression, *id.* at 468, and emphasizes both the pragmatic and principled reasons behind the narrow constructions of both incitement and speech integral to crime categories to argue that social media speech does not differ so greatly from other types of speech to justify more capacious interpretations of these categories.

³⁶ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding advocacy must be "directed to inciting or producing imminent lawless action," and "likely to incite or produce such action" before it can be criminalized); see also 18 U.S.C. § 2384 (requiring force as an element for federal crime of seditious conspiracy, including, *inter alia*, to "conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof").

speech is *sufficiently* harmful to justify suppression, despite the country's preference and functional need for expressive freedom.³⁷ The article concludes that words trading on and stirring up hate and amorphous desires for violence should be morally condemned, and that those that utter them, if political figures, should be challenged at the ballot box. However, state restriction of such speech, or analogous restriction at the state's instigation by private actors wielding power like that of states, should be avoided, primarily due to the inextricable linkage of such speech to political expression.

I. REGULATING THROUGH HEARINGS (AND SOME VEILED THREATS OF PROSECUTION)

Representative Thompson's opening salvo to the House Committee on Homeland Security is hardly unique in its explicit demands that social media companies do what the First Amendment, at least as currently construed by the Supreme Court, prevents Congress from doing directly.³⁸ Congress has conducted numerous hearings³⁹ over the last several years addressing harmful speech on social media and the use of these platforms by malign actors, including those addressing separate concerns about election interference.⁴⁰ Such hearings seemingly

³⁷ See generally Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321, 1321 (1992) (“[R]obust free speech systems protect speech not because it is harmless, but despite the harm it may cause.”).

³⁸ See *Examining Social Media 2019 Hearing Rep. Thompson Statement*, *supra* note 10.

³⁹ See, e.g., *DHS Monitoring of Social Networking and Media: Enhancing Intelligence Gathering and Ensuring Privacy: Hearing Before the Subcomm. on Counterterrorism & Intelligence, Comm. on Homeland Sec.*, 112th Cong. 1 (2012) (statement of Rep. Patrick Meehan, Chairman, Subcomm. on Counterterrorism and Intelligence) (“A common theme that has emerged among many of these is the groups’ use of social media and networking to recruit, to plan, to plot attacks against the homeland or U.S. interests abroad.”).

⁴⁰ See, e.g., Sam Dean, *Google CEO Sundar Pichai Says Yes to Privacy Laws, No to Political Bias, and Maybe to China*, L.A. TIMES (Dec. 11, 2018), <https://www.latimes.com/business/technology/la-fi-tn-google-congress-pichai-20181211-story.html> [<https://perma.cc/Y94P-TPVA>]; Steve Lohr et al., *Tech Hearings: Congress Unites to Take Aim at Amazon, Apple, Facebook and Google*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/technology/big-tech-antitrust-hearing.html> [<https://perma.cc/57KP-ZC9G>]; Richard Nieva, *Facebook and Twitter Face Senate over Accusations of Tech Censorship*, CNET (Apr. 10, 2019), <https://www.cnet.com/news/facebook-and-twitter-face-senate-over-accusations-of-tech-censorship/> [<https://perma.cc/3ZTV-AFPX>]; Mattathias Schwartz, *Watching Congress Try to Friend Mark Zuckerberg*, NEW YORKER (Apr. 11, 2018), <https://www.newyorker.com/news/news-desk/watching-congress-try-to-friend-mark-zuckerberg> [<https://perma.cc/4BM3-2T8G>]; Hamza Shaban et al., *Facebook, Google and Twitter Testified on Capitol Hill. Here's What They Said*, WASH. POST (Oct. 31, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/10/31/facebook-google-and-twitter-are-set-to-testify-on-capitol-hill-heres-what-to-expect/> [<https://perma.cc/HL6K-JG6C>]; Dustin Volz et al., *Justice Department to Examine Whether Social-Media Giants Are*

represent a concerted congressional effort to persuade and pressure these companies into suppressing speech on their platforms—restrictions that Congress cannot explicitly and directly require them to censor via statute. Congress cannot, because the First Amendment protects much of the speech that Congress wants social media companies to censor, and for very good reason, as explained in Part II.

This congressional pressure, reinforced by threatening comments by both representatives and Department of Justice officials regarding social media platforms' prosecutorial vulnerability to the federal material support to terrorism criminal statute, has directly resulted in concrete action by social media companies.⁴¹ As detailed below, these platforms implemented company-imposed restrictions on what kind of speech users can utter (post) on these platforms; if users violate these restrictions, social media platforms reserve the right to delete offending posts as well as kick offending users off their platforms. To put this congressional concern and the resultant speech-suppressive social media actions in context, one must go back to at least 2015.

A. *Social Media Speech and Terrorism*

The link between social media platforms and terrorism, along with privacy concerns, is one of the most concerning dynamics stemming from modern society's explosive utilization of social media communication technologies.⁴² Americans, along with the world, were shocked when the Islamic State in Iraq and Syria (ISIS) posted to YouTube its brutal beheading of reporter

Intentionally Stifling' Some Viewpoints, WALL STREET J. (Sept. 6, 2018), <https://www.wsj.com/articles/facebooks-sandberg-and-twitters-dorsey-to-face-questions-on-capitol-hill-about-russian-meddling-bias-1536145201> [<https://perma.cc/9K2J-VPKX>].

⁴¹ See *Jailing the Twitter Bird*, *supra* note 8, at 15–16 (detailing such threats).

⁴² See Luke Bertram, *Terrorism, the Internet and Social Media Advantage*, J. FOR DERADICALIZATION, Summer 2016, at 225, 225–56 (arguing that the advancement of social media has not only provided ease to a person's daily life, but also to terrorist groups by allowing them to interact regardless of their physical distance); see also Cristina Archetti, *Terrorism, Communication and the Media*, in TERRORISM AND POLITICAL VIOLENCE 134, 140 (Caroline Kennedy-Pipe et al. eds., 2015) (critiquing the extant literature as placing too great an emphasis on social media's role as a "platform for the spreading of radical content and extremist ideology," while failing to make the link between radicalization and terrorist acts); Lisa Blaker, *The Islamic State's Use of Online Social Media*, J. MIL. CYBER AFF., 2015, at 1, 3–4 (detailing the utilization of social media by one terrorist group and the effect on American youth in particular); Robin L. Thompson, *Radicalization and the Use of Social Media*, J. STRATEGIC SECURITY, 2011, 167, 168 (warning that "[t]errorists use the Internet to recruit and radicalize members for homegrown terrorism operations").

James Foley in 2014.⁴³ That year, a noted terrorism expert found that “Al-Qaeda, its affiliates and other terrorist organizations have moved their online presence to YouTube, Twitter, Facebook, Instagram, and other social media outlets.”⁴⁴ In early 2015, the Brookings Institution concluded that “[t]he Islamic State, known as ISIS or ISIL, has exploited social media, most notoriously Twitter, to send its propaganda and messaging out to the world and to draw in people vulnerable to radicalization.”⁴⁵ Because of the vast reach and rate of diffusion (sharing of information) of social media platforms, a consensus was seemingly reached that these platforms provided, and continue to provide, terrorist organizations with a superbly efficient (effective and cheap) method to recruit, propagandize, and radicalize.⁴⁶

The U.S. government not only noted but amplified this reported link between terrorism and social media in its battle to find effective means to combat foreign terrorist groups and the tactic of terrorism itself. In 2015, the FBI’s top counter-terrorism official concluded that social media, distinct from the internet, created a “paradigm shift” that greatly benefitted terrorist recruiting, and thus allowed terrorist groups to pose a greater threat to the United States.⁴⁷ To the FBI, “social media is a critical

⁴³ See Mark Townsend & Toby Helm, *Jihad in a Social Media Age: How Can the West Win an Online War*, GUARDIAN (Aug. 23, 2014), <https://www.theguardian.com/world/2014/aug/23/jihad-social-media-age-west-win-online-war> [<https://perma.cc/UHS3-YQ32>]; see also Lee Ferran & Rym Momtaz, *ISIS Trial of Terror*, ABC NEWS (Feb. 23, 2015), <http://abcnews.go.com/WN/fullpage/isis-trail-terror-isis-threat-us-25053190> [<https://perma.cc/8BNS-9CPV>] (outlining ISIS history and ideology).

⁴⁴ GABRIEL WEIMANN, WILSON CTR., NEW TERRORISM AND NEW MEDIA 1 (2014), https://www.wilsoncenter.org/sites/default/files/STIP_140501_new_terrorism_F.pdf [<https://perma.cc/G486-D2RR>].

⁴⁵ J.M. BERGER & JONATHON MORGAN, BROOKINGS INST., THE ISIS TWITTER CENSUS: DEFINING AND DESCRIBING THE POPULATION OF ISIS SUPPORTERS ON TWITTER 2 (2015), https://www.brookings.edu/wp-content/uploads/2016/06/isis_twitter_census_berger_morgan.pdf [<https://perma.cc/HQX2-SMT9>].

⁴⁶ See EXEC. OFFICE OF THE PRESIDENT, NATIONAL STRATEGY FOR COUNTERTERRORISM OF THE UNITED STATES OF AMERICA 9 (2018), <https://www.whitehouse.gov/wp-content/uploads/2018/10/NSCT.pdf> [<https://perma.cc/DS35-2TN3>] [hereinafter NATIONAL STRATEGY FOR COUNTERTERRORISM] (“ISIS is likely to remain the main inspiration for such attacks, particularly if the group can retain its prominence and use social and mainstream media coverage to promote its violent message.”); WEIMANN, *supra* note 44, at 3; see also *Going Dark: Encryption, Technology, and the Balance Between Public Safety and Privacy: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. 4 (2015) [hereinafter *Going Dark 2015 Joint Testimony*] (“With the widespread horizontal distribution of social media, terrorists can spot, assess, recruit, and radicalize vulnerable individuals of all ages in the United States either to travel or to conduct a homeland attack. As a result, foreign terrorist organizations now have direct access into the United States like never before.”).

⁴⁷ Brian Dodwell, *A View from the CT Foxhole: An Interview With Michael Steinbach, Assistant Director, FBI, CTC SENTINEL*, June 2015, at 5, 5–6, <https://ctc.usma.edu/app/uploads/2015/06/CTCSentinel-Vol8Issue612.pdf> [<https://perma.cc/493S-FV66>]. Mr. Steinbach states:

tool that terror groups can exploit.”⁴⁸ Then-FBI Director James Comey testified to Congress in mid-2016 that “ISIL continues to disseminate their terrorist message to all social media users—regardless of age,” recounting that the group “released a video, via social media, reiterating the group’s encouragement of lone offender attacks in Western countries, specifically advocating for attacks” against government targets.⁴⁹ Following suit, in late 2015 a congressional hearing titled “Radicalization: Social Media and the Rise of Terrorism” opened with a Representative lamenting the voluminous number of what he called “pro-ISIS tweets,” concluding that “ISIS’ use of platforms like Twitter is highly effective. YouTube videos depicting violent acts against Westerners are used to incite others to take up arms and wage jihad.”⁵⁰

The U.S. government’s emphasis on reported links between social media and violent acts of terrorism has continued unabated since 2015, despite the private initiatives largely implemented that year to limit terrorism-related content on such platforms. Senator Tom Udall, during a January 2018 Senate Commerce Committee hearing in which the three largest social media companies—YouTube/Google, Facebook, and Twitter—testified that: “Terrorism and social media is a challenging and, I think, pressing subject, and I recognize that technology companies cannot solve this alone. But they must do more, and I think that has been highlighted by the questioning you’ve seen here today.”⁵¹

Social media is fundamentally different than the “traditional” internet, because even though the previous sites could be anonymous, you still had to go to them, find the sites (some of them password-protected), and reach out, whereas jihadi users of social media, with its horizontal distribution model, actually reach into the United States.

Id. at 6–7.

⁴⁸ *ISIS Online: Countering Terrorist Radicalization and Recruitment on the Internet and Social Media: Hearing Before the Subcomm. on Investigations of the S. Comm. on Homeland Sec. and Gov’t Affairs*, 114th Cong. 52 (2016) (statement of Michael Steinbach, Exec. Assistant Dir., Nat’l Sec. Branch, Fed. Bureau of Investigation). In December 2015, FBI Director James B. Comey also stated: “Twitter works as a way to sell books, as a way to promote movies, and it works as a way to crowdsource terrorism — to sell murder.” Mike Isaac, *Twitter Steps Up Efforts to Thwart Terrorists’ Tweets*, N.Y. TIMES (Feb. 5, 2016), <http://www.nytimes.com/2016/02/06/technology/twitter-account-suspensions-terrorism.html> [<https://perma.cc/6GW8-WPKX>].

⁴⁹ *Counterterrorism, Counterintelligence, and the Challenges of “Going Dark”: Hearing Before the S. Select Comm. on Intelligence*, 114th Cong. 65 (2015) [hereinafter *Going Dark 2015 Hearing*] (statement of James B. Comey, Dir., Fed. Bureau of Investigation).

⁵⁰ *Radicalization: Social Media and the Rise of Terrorism: Hearing Before the Subcomm. on Nat’l Sec. of the H. Comm. on Oversight and Gov’t Reform*, 114th Cong. 1–2 (2015) (statement of Rep. Ron DeSantis, Representative Chairman, Subcomm. on Nat’l Sec. of the H. Comm. on Oversight and Gov’t Reform).

⁵¹ *Terrorism and Social Media 2018 Hearing*, *supra* note 4, at 37 (statement of Sen. Tom Udall).

Senator Bill Nelson, during that same hearing, remarked:

[T]hese platforms have created a new and stunningly effective way for nefarious actors to attack and to harm. It's startling that today, a terrorist can be radicalized and trained to conduct attacks all through social media. And then a terrorist cell can activate that individual to conduct an attack through the internet, creating an effective terrorist drone, in effect, controlled by social media.

So thank you to all our witnesses for being here and helping explain this and particularly explain what you're doing to rally to the common defense of our people and our country, because using social media to radicalize and influence users is not limited to extremists.⁵²

Much of congressional concern regarding social media's links to terrorism is often phrased in rather speculative ways. During a January 2018 hearing before the Committee on Commerce, Science, and Transportation, Senator John Thune's opening statement demonstrated the often ambiguous nature of these concerns. Senator Thune stated that the hearing's purpose was "to examine what social media companies are doing to combat terrorism, including terrorist propaganda and terrorist recruitment efforts, online."⁵³ After acknowledging the pluses of social media communication, he emphasized two primary ways terrorist groups use social media in harmful ways: to "radicalize and recruit."⁵⁴ The Senator then openly speculated that the murderer behind the 2016 Orlando Pulse Nightclub mass shooting in Orlando, Florida was "reportedly inspired by digital material that was readily available on social media."⁵⁵

The phrase "reportedly inspired" does not provide data regarding what and how this mass murderer was allegedly inspired by and how the supposed inspiration aids in the line-drawing of acceptable content. Members of Congress seem to assume that all online terrorist-related speech, as well as hate speech, contributes to the terrorist radicalization and recruitment process, and therefore should be banned. They do not question the likelihood that any one person will be radicalized and commit violence based on digesting online content.

The executive branch has likewise emphasized the inspirational and propagandist nature of the terrorist social media speech it fears and has not remained silent regarding its perceived

⁵² *Id.* at 3 (statement of Sen. Bill Nelson).

⁵³ *Id.* at 1 (statement of Sen. John Thune, Chairman, S. Comm. on Commerce, Sci. & Transp.).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1–2.

links. In the October 2018 “National Strategy for Counterterrorism of the United States of America,” the President remarked that “we will take action to limit [terrorists’] ability to recruit and radicalize online.”⁵⁶ This policy document later explained:

[T]his strategy prioritizes a broader range of non-military capabilities, such as our ability to prevent and intervene in terrorist recruitment, minimize the appeal of terrorist propaganda online, and build societal resilience to terrorism. This includes leveraging the skills and resources of civil society and non-traditional partners to diminish terrorists’ efforts to radicalize and recruit people in the United States.

. . . [W]e will thwart terrorists’ ability to exploit the Internet for directing, enabling, or inspiring attacks.⁵⁷

Relevant to this article, this strategy emphasizes the need to strengthen public-private partnerships, demanding that private partners “take a greater role in preventing and countering terrorism.”⁵⁸ This policy document also echoes congressional concerns through its emphasis on the predominant role social media plays in foreign terrorist groups’ successful radicalization and recruitment efforts, stating that groups such as “ISIS and al-Qa’ida have *inspired* people susceptible to their malign influence to conduct terrorist attacks inside the United States.”⁵⁹ It adds that ISIS, and other groups like it, will likely continue to inspire such violent acts if it “can retain its prominence and use social and mainstream media coverage to promote its violent message.”⁶⁰

The strategy document also states:

[W]e have not developed a prevention architecture to thwart terrorist radicalization and recruitment. *Unless we counter terrorist radicalization and recruitment*, we will be fighting a never-ending battle against terrorism in the homeland, overseas, and online. Our strategy, therefore, will champion and institutionalize prevention and create a global prevention architecture with the help of civil society, private partners, and the technology industry.⁶¹

Critically, this executive branch policy states that the U.S. government will:

⁵⁶ NATIONAL STRATEGY FOR COUNTERTERRORISM, *supra* note 46. This document later provides: “We must prevent terrorists from exploiting new technologies in today’s dynamic information environment, and we must counter terrorists’ ability to recruit and radicalize online and through other means.” *Id.* at ii.

⁵⁷ *Id.* at 2.

⁵⁸ *Id.* at 3, 5. The strategy also concludes that foreign terrorist groups utilize “high-quality media products to recruit extremists in the West. Future radical Islamist terrorists and other terrorists will continually adapt these and other tactics to their circumstances and the technological advances of the age.” *Id.* at 7.

⁵⁹ *Id.* at 8 (emphasis added).

⁶⁰ *Id.* at 9.

⁶¹ *Id.* at 21 (emphasis added).

COMBAT TERRORISTS' INFLUENCE ONLINE: We will combat terrorist use of cyberspace as a global stage to showcase their violent ideologies, to fundraise, and to radicalize, recruit, and mobilize individuals to violence. In concert with our partners, we will expand relationships with technology sector entities to empower them to combat violent extremism online and terrorists' abuse of their platforms. We will continue to expose and counter the flood of terrorist ideology online.⁶²

Michael McGarrity, the Assistant Director, Counterterrorism Division of the FBI, testified during a May 2019 hearing before the House Homeland Security Committee, that online inspiration and radicalization of what he called "home-grown violent extremists" presented significant concerns.⁶³

[W]e . . . face significant challenges in identifying and disrupting . . . terrorists who seek to perform terrorist attacks within the United States. This is due, in part, to the ease of [online] self-radicalization to violence and the corresponding lack of direct connections between unknown radicalized violent extremists and known terrorists or FTOs.

. . . .

Radicalization to violence of domestic terrorists is increasingly taking place [online], where violent extremists can use social media for the distribution of propaganda, recruitment, target selection, and incitement to violence. Through the Internet, violent extremists around the world have access to our local communities to target and recruit and spread their messages of hate on a global scale, as we saw in the recent attack in Christchurch, New Zealand. In recent years, we increasingly have seen domestic terrorists communicating with like-minded individuals overseas and the domestic terrorists traveling to meet with these individuals. The increasingly global nature of the threat has enabled violent extremists to engage other like-minded individuals without having to join organized groups.⁶⁴

This FBI sentiment echoes the findings of a late 2018 executive branch product called the "First Responders' Toolbox," jointly authored by the Department of Homeland Security (DHS), the National Counterterrorism Center (NCTC), and the FBI—a document that attempted to connect the dots and provide a causal link between social media imaging plus rhetoric and terrorist

⁶² *Id.* at 22.

⁶³ *Confronting the Rise of Domestic Terrorism in the Homeland: Hearing Before the H. Comm. on Homeland Sec.*, 116th Cong. 18 (2019) (statement of Michael C. McGarrity, Assistant Dir. for the Counterterrorism Div., Fed. Bureau of Investigations).

⁶⁴ *Id.* at 18–19 ("[N]o FBI investigation can be opened solely on the basis of First Amendment-protected activity. Thus, the FBI does not investigate mere association with groups or movements. In order to predicate a domestic terrorism investigation of an individual, the FBI must have information that the individual is perpetuating violent, criminal actions in furtherance of an ideology.").

violence.⁶⁵ This document “highlights examples of official media releases by designated foreign terrorist organizations, such as ISIS, and unofficial media releases by auxiliary news agencies and terrorist supporters.”⁶⁶ Specifically, its first title bullet warns: “Violent Extremists Likely Will Continue to Use Disinformation on Social Media Outlets to Instill Fear and Radicalize Others,” later explaining that “[t]errorist disinformation may be used to attract attention, harass people, drain public safety resources, and incite others to violence.”⁶⁷

Claiming that extremist groups “often use manipulated and fictitious images to enhance their messaging efforts,” it notes that groups such as ISIS tend “to feature aspirational threats using . . . quality imagery or infographics,” also noting that while “these images may not be indicative of an ongoing plot, they sometimes combine background images of actual US locations with unrelated images of terrorists, weapons, terrorist symbols, and attacks.”⁶⁸ One example of such dangerous terrorist messaging was a December 2017 video that it claims was released by “ISIS supporters . . . via social media during the holiday season and included pictures of the Statue of Liberty, the Eiffel Tower and a beheading of Santa Claus, which demonstrates aspirational threats towards US and Western targets.”⁶⁹

Interestingly, this executive branch “Toolbox” openly admits—unlike certain congressmen, such as Representative Thompson in his January 2019 hearing, who claim that they are only concerned with social media speech unprotected by the First Amendment⁷⁰—that the social speech media it identifies in the document as dangerous is legal, constitutional, and protected speech.⁷¹ It acknowledges that, “[s]ocial media messaging is a legal,

⁶⁵ JOINT COUNTERTERRORISM ASSESSMENT TEAM, FIRST RESPONDERS’ TOOLBOX (2018), https://www.dni.gov/files/NCTC/documents/jcat/firstresponderstoolbox/NCTC_DHS_FBI_First_Responders_Toolbox_-_Terrorist_Disinformation.pdf [<https://perma.cc/8DWW-LK5E>]. The product is self-described as “intended to promote coordination among intergovernmental authorities and the private sector in identifying, preventing, and responding to foreign terrorist activities in the US.” *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* Furthermore, this Toolbox directs those in law enforcement and the public to ask themselves certain questions regarding social media “messaging” that the reader thinks is linked to terrorism, such as: whether the speech is “attempting to mobilize others to violence,” whether it conveys “a fictional, vague, and/or aspirational threat”—finding that even “non-credible threats can also serve” terrorist ends—and whether “the message express[es] acceptance of violence as a necessary means to achieve ideological goals?” *Id.* (emphasis omitted).

⁷⁰ See *Examining Social Media 2019 Hearing Rep. Thompson Statement*, *supra* note 10.

⁷¹ JOINT COUNTERTERRORISM ASSESSMENT TEAM, *supra* note 65.

constitutionally-protected activity and no single factor should be considered on its own to signify terrorism, but when observed in conjunction with violent extremist rhetoric and other cautionary behaviors, may provide warning of mobilization to violence.”⁷²

B. *Content Restrictions Follow Governmental Pressure: Facebook*

1. Original 2015 Shift to Content Restrictions

As outlined above, the serious concern in 2015 and since regarding extremist groups’ use of social media platforms to radicalize their audiences led members of Congress to explicitly call for these platforms to better police online content,⁷³ while also hinting that such companies were potentially violating federal criminal law.⁷⁴ The latter threats of federal prosecution were not subtle: Representative Ted Poe exclaimed during a 2015 speech on the floor of the House of Representatives that “[f]ederal law prohibits giving aid or helping a designated foreign terrorist organization. These FTOs use Twitter, an American company, as a tool and no one is stopping them Why are American companies and the U.S. government allowing social media platforms to be hijacked by terrorists?”⁷⁵ Members of Congress sent letters to Twitter containing references to the federal material support to terrorism statute⁷⁶ while simultaneously

⁷² *Id.*

⁷³ *See, e.g., Going Dark 2015 Hearing, supra* note 49, at 58 (statement of Sen. Diane Feinstein, Vice Chairman, S. Select Comm. on Intelligence) (“I believe that United States[] companies, including many founded and headquartered in my home State, have an obligation to do everything they can to ensure that their products and services are not allowed to be used to foment the evil that ISIL embodies.”); *see also* Eyragon Eidam, *President Calls Out Social Media’s Role in Evolution of Terrorism*, GOV’T TECH. (Dec. 7, 2015), <http://www.govtech.com/President-Calls-Out-Social-Medias-Role-in-Evolution-of-Terrorism.html> [<https://perma.cc/63ND-NHXM>].

⁷⁴ *See, e.g., Cristina Marcos, GOP Lawmaker: ISIS Shouldn’t Have Access to Twitter*, HILL (Feb. 24, 2015), <http://thehill.com/blogs/floor-action/house/233660-gop-lawmaker-isis-shouldnt-have-access-to-twitter> [<https://perma.cc/6HTE-G6YT>].

⁷⁵ *Id.*; *see also* Press Release, Rep. Brad Sherman, Poe, Sherman, Royce Engel: Shut down Terrorists on Twitter (Mar. 12, 2015), <https://sherman.house.gov/media-center/press-releases/poe-sherman-royce-engel-shut-down-terrorists-on-twitter> [<https://perma.cc/92CD-ME32>].

⁷⁶ *See* Press Release, *supra* note 75. The letter to Twitter CEO Dick Costolo states:

We are concerned that designated Foreign Terrorist Organizations (FTOs) and their supporters actively use Twitter to disseminate propaganda, drive fundraising, and recruit new members—even posting graphic content depicting the murder of individuals they have captured.

. . . [W]e urge Twitter to treat all terrorist activity in the same way it treats other objectionable content.

urging Twitter to engage in greater self-censorship: “[W]e urge Twitter to treat all terrorist activity in the same way it treats other objectionable content.”⁷⁷

While the U.S. government’s prosecutorial focus regarding speech on social media has in reality been on individual users, the government’s pressure on social media companies to police their users’ accounts for terrorist-related activity has resulted in the leading social media companies suppressing an ever-expanding swath of First Amendment-protected speech on their platforms.⁷⁸ Twitter announced in early 2016 that it had suspended over 125,000 accounts since 2015 for “threatening or promoting terrorist acts.”⁷⁹ Concomitantly Twitter stated that they “condemn the use of Twitter to promote terrorism,” noting that it had changed its policy so that internal review teams could have more latitude to censor online content.⁸⁰ It should be additionally acknowledged that increasing pressure was also brought civilly by families of victims of terror attacks who attempted, unsuccessfully, to sue social media platforms under civil anti-terrorism statutes; surely

Id.

⁷⁷ *Id.* No social media platform has faced criminal prosecution in the United States for hosting third-party terrorism-related content on their platforms, perhaps because of intelligence reasons (and perhaps because the platforms have caved to governmental pressure to restrict First Amendment-protected content on their platforms). For the former proposition, see Matt Egan, *Does Twitter Have a Terrorism Problem?*, FOX BUS. (Oct. 9, 2013), <http://www.foxbusiness.com/features/2013/10/09/does-twitter-have-terrorism-problem.html> [<https://perma.cc/6VQN-2N7L>] (citing U.S. counter-terrorism officials as confirming that “[l]aw-enforcement agencies occasionally ask social-media networks like Twitter and Facebook . . . not to delete the accounts of known terrorists because of the potential to glean valuable intelligence”).

⁷⁸ See *Going Dark 2015 Joint Testimony*, *supra* note 46, at 64–65 (statement of James B. Comey, Dir., Fed. Bureau of Investigation) (concluding that social media has allowed the growing gap between internet communication, the law, and technology used to lawfully intercept that communication to expand, requiring urgent responses); see also Requiring Reporting of Online Terrorist Activity Act, S. 2372, 114th Cong. (2015).

⁷⁹ *Twitter Suspends 125,000 ‘Terrorism’ Accounts*, BBC (Feb. 5, 2016), <http://www.bbc.com/news/world-us-canada-35505996> [<https://perma.cc/7M5P-SX2P>] (noting that Twitter’s announcement also came at a time when “[g]overnments around the world - including the US - have been urging social media companies to take more robust measure to tackle online activity aimed at promoting violence”); see Kaveh Waddell, *Twitter’s Account Suspensions Are Surprisingly Effective Against ISIS*, ATLANTIC (Feb. 19, 2016), <http://www.theatlantic.com/technology/archive/2016/02/twitters-account-suspensions-are-surprisingly-effective-against-the-islamic-state/463440/> [<https://perma.cc/HP65-ZTD2>].

⁸⁰ *Twitter Suspends 125,000 ‘Terrorism’ Accounts*, *supra* note 79. The Assistant Attorney General for National Security at the Department of Justice publicly suggested that the U.S. could prosecute “propagandists” who spread terrorist messages online for groups, such as ISIS, under 18 U.S.C. § 2339B. Shane Harris, *Justice Department: We’ll Go After ISIS’s Twitter Army*, DAILY BEAST (Feb. 23, 2015), <http://www.thedailybeast.com/articles/2015/02/23/justice-department-we-ll-go-after-isis-twitter-army.html> [<https://perma.cc/N4NG-3UUX>]. But see Tim Cushing, *Twitter, Facebook & Google Sued for ‘Material Support for Terrorism’ over Paris Attacks*, TECHDIRT (June 15, 2016), <https://www.techdirt.com/articles/20160615/07235434714/twitter-facebook-google-sued-material-support-terrorism-over-paris-attacks.shtml> [<https://perma.cc/WF2A-MUYH>].

such civil litigation also helped spur the platforms' increasingly severe content restriction policies.⁸¹

The new content restrictions social media companies have imposed on their users in response to (primarily) governmental pressure manifested themselves in changes to terms of service or user agreements. Social media platforms require that users agree to particular terms, including those requiring users to adhere to policies regarding acceptable content, in order to access the respective platform's online services.⁸² For example, Facebook's community standards changed in response to government pressure in 2015, when it began prohibiting so-called dangerous organizations from using its platform; in 2015, Facebook's terms of service changed to include, *inter alia*, that:

We don't allow any organizations that are engaged in the following to have a presence on Facebook: Terrorist activity, or Organized criminal activity. We also remove content that expresses support for groups that are involved in the violent or criminal behavior mentioned above.

⁸¹ However, congressional pressure was not applied in a vacuum. While social media companies' government-encouraged self-censorship accelerated in 2015 due to the governmental pressure to limit what the government considered as supporting terrorism, numerous civil lawsuits continue to attempt, unsuccessfully, at least in court, to hold social media providers responsible for terrorist attack (unsuccessful in the U.S. largely due to a federal statute that precludes civil liability in such instances). For example, U.S. victims of Hamas terrorist attacks in Israel sued Facebook based on claims that its provision of a communications platform to Hamas enabled the attacks; the appellate court agreed with the district judge who found that the Communications Decency Act of 1996 precluded civil liability for such claims. *See Force v. Facebook*, 93 F.3d 53, 57–59, 74–76 (2d Cir. 2019); *see also* Gwen Ackerman, *Facebook Accused in \$1 Billion Suit of Being Hamas Tool*, BLOOMBERG TECH. (July 11, 2016, 3:40 PM), <http://www.bloomberg.com/news/articles/2016-07-11/facebook-sued-for-1b-for-alleged-hamas-use-of-medium-for-terror> [<https://perma.cc/6Q9F-QRP3>] (alleging in the lawsuit, submitted to the U.S. District Court for the Southern District of New York on July 10, 2016, that Facebook has “knowingly provided material support and resources to Hamas,” thus making Facebook liable for the resulting violence against five Americans in the West Bank, Jerusalem, and Israel); Michael Bott, *Lawsuit: Twitter 'Knowingly Permitted' Terrorists to Use Social Media Network*, NBC: BAY AREA (Jan. 13, 2016, 11:26 PM), <http://www.nbcbayarea.com/investigations/Lawsuit-Twitter-Knowingly-Permitted-Terrorists-to-Use-Social-Network-365209861.html> [<https://perma.cc/H3LC-W4C7>] (alleging in a complaint filed on January 13, 2016, that Twitter allows extremists to spread their ideology as well as to recruit on its platform); Chris Dolmetsch, *Facebook Isn't Responsible as Terrorist Platform, Court Says*, BLOOMBERG TECH. (July 31, 2019, 3:31 PM), <https://www.bloomberg.com/news/articles/2019-07-31/facebook-wins-ruling-in-suit-claiming-it-aided-hamas-attacks> [<https://perma.cc/UKE4-773M>] (describing Facebook's successful defense against civil liability for terrorist acts by Hamas based on the Communications Decency Act); David Z. Morris, *Lawsuit Claims Twitter, Facebook, Google Liable for Terrorism*, FORTUNE (June 18, 2016), <http://fortune.com/2016/06/18/lawsuit-tech-giants-terrorism/> [<https://perma.cc/J3X8-B3TX>] (alleging in a complaint filed by Reynaldo Gonzalez on June 14, 2016, that Facebook, Twitter, and Google are liable for the Paris Attacks because those platforms provided “provision of material support to ISIS”).

⁸² *See* Nancy S. Kim & D. A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 747–49 (2015) (noting that such companies employ contracts to enforce and establish their own rules, laws, and regulations—similar to the government—with regard to their users).

Supporting or praising leaders of those same organizations, or condoning their violent activities, is not allowed. We welcome broad discussion and social commentary on these general subjects, but ask that people show sensitivity towards victims of violence and discrimination.⁸³

However, stated content restrictions do not work alone to suppress speech on social media platforms; how the social media platforms detect speech that violates its content policies is also an extremely important part of the suppression equation. In June 2017, Facebook released a policy document titled “*Hard Questions: How We Counter Terrorism*.”⁸⁴ This document details and demonstrates how social media companies, led by Facebook’s example and capacious purse-strings, use technology such as artificial intelligence to identify and remove what it labels “terror content” prior to the general user audience ever seeing said content.⁸⁵ For example, Facebook collaborates with other social media platforms such as YouTube and Twitter to maintain a “shared industry database of ‘hashes’—unique digital ‘fingerprints’—for violent terrorist imagery or terrorist recruitment videos or images.”⁸⁶ Yet, critically, Facebook did not explain what counts as “violent terrorist imagery” nor did it provide examples of what satisfies, or fails to satisfy, its “terrorist content” label.

In a similar non-transparent way, Facebook in the paragraph below focuses on the technology of image matching while failing to describe what qualifies as a “propaganda video”:

When someone tries to upload a terrorist photo or video, our systems look for whether the image matches a known terrorism photo or video. This means that if we previously removed a propaganda video from ISIS, we can work to prevent other accounts from uploading the same video to our site.⁸⁷

In contrast, Facebook stated that it employs “[l]anguage understanding” to “experiment with using AI to understand text

⁸³ *Jailing the Twitter Bird*, *supra* note 8, at 17–18 (quoting 2015 Facebook Community Standards).

⁸⁴ Bickert & Fishman, *supra* note 26 (outlining how Facebook uses technology such as artificial intelligence to ensure that “[t]here’s no place on Facebook for terrorism,” while also noting that “academic research finds that the radicalization of members of groups like ISIS and Al Qaeda primarily occurs offline”). This document also outlined the company’s use of “[c]ounterspeech,” noting that “challenging extremist narratives online is a valuable part of the response to real world extremism. Counterspeech comes in many forms, but at its core these are efforts to prevent people from pursuing a hate-filled, violent life or convincing them to abandon such a life.” *Id.*

⁸⁵ *Id.*

⁸⁶ *Partnering to Help Curb Spread of Online Terrorist Content*, FACEBOOK: NEWSROOM (Dec. 5, 2016), <https://newsroom.fb.com/news/2016/12/partnering-to-help-curb-spread-of-online-terrorist-content/> [<https://perma.cc/3CV7-MYWA>].

⁸⁷ Bickert & Fishman, *supra* note 26.

that might be advocating for terrorism. We're currently experimenting with analyzing text that we've already removed for praising or supporting terrorist organizations such as ISIS and Al Qaeda so we can develop text-based signals that such content may be terrorist propaganda."⁸⁸ At least this example of how Facebook removed terror content provides a glimpse into what Facebook considers terror content: pure praise of a group seems sufficient. But of course, the decision-making process of what is such content is greatly complicated by context, as the "Napalm Girl" photograph controversy demonstrated.⁸⁹ One of Facebook's former corporate officers, explaining the widely-condemned removal of said photo, stated:

These decisions aren't easy. In many cases, there's no clear line between an image of nudity or violence that carries global and historic significance and one that doesn't. Some images may be offensive in one part of the world and acceptable in another, and even with a clear standard, it's hard to screen millions of posts on a case-by-case basis every week.

Still, we can do better. In this case, we tried to strike a difficult balance between enabling expression and protecting our community and ended up making a mistake.⁹⁰

Transparency of social media platforms' content removal decisions, as well as accountability for removal or non-removal of material continues to be a hot-button topic on Capitol Hill and elsewhere.⁹¹ Advocacy groups such as the Electronic Frontier Foundation (EFF) increasingly sound the alarm that "in response to calls to remove objectionable content, social media companies and platforms have all too often censored valuable speech."⁹² EFF has found that only a few social media platforms, including Facebook, have a policy of "notifying users when any content is censored and specifying the legal request or

⁸⁸ *Id.*

⁸⁹ Aarti Shahani, *With 'Napalm Girl,' Facebook Humans (Not Algorithms) Struggle to Be Editor*, NPR (Sept. 10, 2016), <https://www.npr.org/sections/alltech/considered/2016/09/10/493454256/with-napalm-girl-facebook-humans-not-algorithms-struggle-to-be-editor> [<https://perma.cc/T7CB-Y7GS>] (describing the controversy that erupted after Facebook's human editors deleted the iconic "Napalm Girl" photograph taken during the Vietnam War and only allowed its posting after a global campaign was launched pressuring Facebook to allow it).

⁹⁰ Justin Osofsky, FACEBOOK (Sept. 9, 2016), <https://www.facebook.com/josofsky/posts/10157347245570231> [<https://perma.cc/YK7J-ALQ9>].

⁹¹ *Social Media Platforms Increase Transparency About Content Removal Requests, but Many Keep Users in the Dark When Their Speech Is Censored*, EFF Report Shows, ELECTRONIC FRONTIER FOUND. (June 12, 2019), <https://www.eff.org/press/releases/social-media-platforms-increase-transparency-about-content-removal-requests-many-keep> [<https://perma.cc/R2Q6-LNC5>].

⁹² *Id.*

community guideline violation that led to the removal.”⁹³ Interestingly, EFF also described a Twitter-specific terrorism exception that emphasized that terrorism is a “class of content that is difficult to accurately identify and can include counter-speech or documentation of war crimes.”⁹⁴

2. History Repeats Itself: More Government Pressure, More Facebook Censorship

As of September 2019, Facebook restricts even more speech than it did in 2015. Today Facebook also bans speech that, among other things, “glorifies violence or celebrates the suffering or humiliation of others,”⁹⁵ as well as speech it refers to as “cruel and insensitive, which [Facebook] define[s] as content that targets victims of serious physical or emotional harm.”⁹⁶ Specifically, Facebook claims that it “remove[s] terrorist content as soon as [it] become[s] aware of it;” Facebook has also stated that “[n]ow, more than [ninety-nine] percent of ISIS and al Qaeda propaganda that we remove from our service is content that we identify ourselves before anybody has flagged it for us. . . . We also want to do our part to stop radicalization and disrupt the recruitment process.”⁹⁷ Facebook claims that it also removes “any content that praises or supports terrorists or their actions whenever we become aware of it, and when we uncover evidence of imminent harm, we promptly inform authorities.”⁹⁸ These constitute broad content restrictions indeed, with little clarity as to who or what Facebook thinks constitutes a terrorist, and little consideration for free speech principles.

The 2015 cycle of governmental pressure followed by greater social media speech suppression and censorship has repeated itself frequently since that year. After numerous Capitol Hill hearings and FBI statements, Facebook released a document on November 8, 2018 titled, “*Hard Questions: What Are We Doing to Stay Ahead of Terrorists?*”⁹⁹ following its release of a similar document in June 2017.¹⁰⁰ The 2018 document highlighted how

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Community Standards: Violent and Graphic Content*, *supra* note 22.

⁹⁶ *Community Standards: Cruel and Insensitive*, *supra* note 23.

⁹⁷ *Terrorism and Social Media 2018 Hearing*, *supra* note 4, at 4–5 (statement of Monika Bickert, Head of Prod. Policy and Counterterrorism, Facebook).

⁹⁸ *Id.* at 6.

⁹⁹ Monika Bickert & Brian Fishman, *Hard Questions: What Are We Doing to Stay Ahead of the Terrorists?*, FACEBOOK: NEWSROOM (Nov. 8, 2018), <https://newsroom.fb.com/news/2018/11/staying-ahead-of-terrorists/> [<https://perma.cc/VB83-ZG2H>] [hereinafter *Hard Questions 2018*].

¹⁰⁰ Bickert & Fishman, *supra* note 26.

its capability to preemptively remove terror-related content—before users even saw and reported it—had been vastly improved by its machine-learning technology.¹⁰¹ In this response to governmental pressure, Facebook stressed how machine-learning has been critical “to reducing the amount of time terrorist content reported by [its] users stays on the platform from [forty-three] hours in Q1 2018 to [eighteen] hours in Q3 2018.”¹⁰² It noted that it had removed 9.4 million pieces of terror-related content, primarily that related to ISIS and al-Qaeda.¹⁰³

In fall 2019, the similar pattern of congressional pressure followed by seemingly enhanced Facebook content restriction of terrorist content was again on full display.¹⁰⁴ A bipartisan group of Representatives sent a letter¹⁰⁵ to Facebook, Twitter and YouTube outlining concerns that nearly every one of the sixty-eight State Department-designated Foreign Terrorist Organizations (FTOs) had some type of social media presence.¹⁰⁶ While the letter mentioned the March 2019 Facebook live-streaming of the terrorist attack that claimed the lives of fifty-one people in Christchurch, New Zealand and acknowledged that Facebook had announced in May 2019 that it was taking steps to prevent such streaming and improve take-downs of such videos once loaded, the letter seemed aimed at what the Representatives apparently considered disparate treatment among FTOs by the big three social media platforms to the benefit of terrorist groups Hamas and Hezbollah.¹⁰⁷

The same week as the congressional letter, and directly ahead of a September 18, 2019 Senate Commerce Committee hearing on harmful social media content,¹⁰⁸ Facebook announced changes it was making to better limit terrorist-related speech as

¹⁰¹ *Hard Questions 2018*, *supra* note 99.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See Davey Alba et al., *Facebook Expands Definition of Terrorist Organizations to Limit Extremism*, N.Y. TIMES (Sept. 18, 2019), <https://www.nytimes.com/2019/09/17/technology/facebook-hate-speech-extremism.html> [<https://perma.cc/43KF-SSBS>].

¹⁰⁵ Press Release, Rep. Josh Gottheimer, Joint Release: Bipartisan Group Probes for Answers on Terrorist Organizations Use of Twitter, Facebook, Youtube to Spread Extremist Propaganda (Sept. 17, 2019), <https://gottheimer.house.gov/news/documentsingle.aspx?DocumentID=1446> [<https://perma.cc/WW9L-X9Z8>].

¹⁰⁶ Letter from Rep. Josh Gottheimer, Rep. Tom Reed & Rep. Brian Fitzgerald to Social Media CEOs (Sept. 17, 2019), https://gottheimer.house.gov/uploadedfiles/9.17.19_bipartisan_letter_to_twitter_facebook_youtube_ftos_gottheimer_reed_fitzpatrick.pdf [<https://perma.cc/ETG5-RFMY>].

¹⁰⁷ *Id.* (highlighting that Hamas and Hezbollah are on the State Department list of Foreign Terrorist Organizations, and Hezbollah’s media supporter Al Manar has a Twitter feed and Hamas has a Twitter account).

¹⁰⁸ See *Mass Violence, Extremism, and Digital Responsibility*, *supra* note 7.

well as hate speech.¹⁰⁹ Facebook explained that not only was it enhancing its use of artificial intelligence to identify terror and hate content, it was also expanding its definition of terrorists: “[W]hile our previous definition focused on acts of violence intended to achieve a political or ideological aim, our new definition more clearly delineates that attempts at violence, particularly when directed toward civilians with the [sic] intent to coerce and intimidate, also qualify.”¹¹⁰

Finally, as further demonstration of the extreme congressional pressure on major social media companies to ban not only unprotected speech but constitutionally-protected speech as well, is the news that the House of Representatives is drafting legislation to “create a ‘national commission’ at the Department of Homeland Security to study the ways that social media can be weaponized — and the effectiveness of tech giants’ efforts to protect users from harmful content online.”¹¹¹ As the *Washington Post* and this article note, such legislation is the tip of the iceberg of the years-long effort by numerous members of Congress to address “online hate speech, disinformation and other harmful content online.”¹¹² The *Post* notes that Senators during their September 2019 hearing “questioned Facebook, Google and Twitter executives to probe whether their platforms have become conduits for real-world violence.”¹¹³ In his opening statement the Chairman of the Commerce Committee, while noting that “the First Amendment offers strong protections against restricting certain speech . . . [, which] undeniably adds to the complexity of our task,” also repeated the FBI’s claims that the 2016 “Orlando shooter was reportedly radicalized by ISIS and other jihadist propaganda through online sources.”¹¹⁴

C. *Content Restrictions Follow Governmental Pressure: Twitter*

Similarly, in 2015, Twitter, which had staked a greater public position as a protector of free expression, shifted from lauding its free speech bona fides to suppressing far greater user content, largely, argued as my previous scholarship noted, in

¹⁰⁹ *Combating Hate and Extremism*, FACEBOOK: NEWSROOM (Sept. 17, 2019), <https://newsroom.fb.com/news/2019/09/combating-hate-and-extremism/> [<https://perma.cc/L6VH-4Q3X>]; see also Alba et al., *supra* note 104.

¹¹⁰ *Combating Hate and Extremism*, *supra* note 109.

¹¹¹ Romm & Harwell, *supra* note 6.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Mass Violence, Extremism, and Digital Responsibility*, *supra* note 7 (video statement of Sen. Roger Wicker, Chairman, S. Comm. on Commerce, Sci. & Transp.).

response to government pressure.¹¹⁵ From 2009 through 2015, Twitter stated in its Terms of Service that “we do not actively monitor and will not censor user content, except in limited circumstances described below.”¹¹⁶ However, Twitter followed Facebook’s lead in 2015 and strengthened its policies against offensive speech by explicitly banning “excessively violent media.”¹¹⁷ That was the first time Twitter explicitly prohibited speech that is “threatening or promoting terrorism,” as well as banned speech “promot[ing] violence against others . . . on the basis of race, ethnicity, national origin, religion, sexual orientation, gender, gender identity, age, or disability.”¹¹⁸ It then declared, in late 2016, that it was “applying an even more aggressive strategy to eradicate violent extremism on its platform” by working with law enforcement, among other means.¹¹⁹

As of 2019, Twitter bans threats of violence or terrorism, as well as the glorification of violence, the promotion of terrorism, or violent extremism.¹²⁰ For example, its 2019 “Twitter Rules and policies” states that:

Under this policy, you can’t affiliate with and promote the illicit activities of a terrorist organization or violent extremist group. Examples of the types of content that violate this policy include, but are not limited to:

engaging in or promoting acts on behalf of a terrorist organization or violent extremist group;

recruiting for a terrorist organization or violent extremist group;

providing or distributing services (e.g., financial, media/propaganda) to further a terrorist organization’s or violent extremist group’s stated goals; and

¹¹⁵ See Elizabeth Dwoskin & Tony Romm, *Twitter Adds Labels for Tweets that Break Its Rules — A Move with Potentially Stark Implications for Trump’s Account*, WASH. POST (June 27, 2019), <https://www.washingtonpost.com/technology/2019/06/27/twitter-adds-labels-tweets-that-break-its-rules-putting-president-trump-companys-crosshairs/> [https://perma.cc/NUU2-5JU4] (explaining that Twitter has recently implemented a new policy where it labels tweets that violate its rules regarding hateful conduct); see also Sarah Jeong, *The History of Twitter’s Rules*, VICE (Jan. 14, 2016), <http://motherboard.vice.com/read/the-history-of-twitters-rules> [https://perma.cc/V3L9-6W68] (reviewing the changes Twitter made to its content rules through 2016).

¹¹⁶ Jeong, *supra* note 115 (emphasis omitted) (quoting the 2009-2015 Twitter rules).

¹¹⁷ *Id.* (quoting 2015 Twitter rules).

¹¹⁸ *Id.* (alterations in original).

¹¹⁹ Davey Alba, *Twitter Says It Suspended 360,000 Suspected Terrorist Accounts in a Year*, WIRED (Aug. 18, 2016), <https://www.wired.com/2016/08/twitter-says-suspended-360000-suspected-terrorist-accounts-year/> [https://perma.cc/VC53-DMVD].

¹²⁰ *The Twitter Rules*, TWITTER: HELP CTR., <https://help.twitter.com/en/rules-and-policies/twitter-rules> [https://perma.cc/FS5Y-MHWZ].

using the insignia or symbols of terrorist organizations or violent extremist groups to promote them.¹²¹

As these enhanced content restrictions reflect, social media platforms' progressively prohibitive content rules far exceed banning speech unprotected by the First Amendment, instead prohibiting much protected speech.¹²² Protected versus unprotected expression is a crucial distinction to which this article now briefly turns, after highlighting the traditionally political essence of incitement.

II. SPEECH WE ARE AFRAID OF: INCITEMENT

A. *Basic First Amendment Landscape*

This article turns now to investigate why incitement, as a type of dangerous speech, developed into a relatively narrow swath of expression that the government can constitutionally punish and hence suppress.¹²³ This review suggests that the high bar the Court set for governmental suppression (usually through criminal prosecution) of such speech in large measure rests on a recognition of the tendency of those wielding the censorial pen

¹²¹ *Terrorism and Violent Extremism Policy*, TWITTER: HELP CTR. (Mar. 2019), <https://help.twitter.com/en/rules-and-policies/violent-groups> [<https://perma.cc/9F4H-E265>]. It further states:

You may not threaten or promote terrorism or violent extremism.

There is no place on Twitter for terrorist organizations or violent extremist groups and individuals who affiliate with and promote their illicit activities. The violence that these groups engage in and/or promote jeopardizes the physical safety and well-being of those targeted. Our assessments in this context are informed by national and international terrorism designations. We also assess organizations under our violent extremist group criteria.

Violent extremist groups are those that meet all of the below criteria:

identify through their stated purpose, publications, or actions as an extremist group;

have engaged in, or currently engage in, violence and/or the promotion of violence as a means to further their cause; and

target civilians in their acts and/or promotion of violence.

Id.

¹²² See, e.g., Alba, *supra* note 119 (“Facebook has taken a hardline stance on terrorism and removes any and all posts that carry even a trace of suspicious content.”).

¹²³ Much of Section II.A and II.D are drawn from earlier work this author did tracing the development of the Court’s approach to criminalization of dangerous speech for a 2019 article on military speech crimes. See Rachel E. VanLandingham, *The First Amendment in Camouflage: Rethinking Why We Criminalize Military Speech*, 80 OHIO ST. L.J. 73 (2019).

to use such speech suppression to persecute disliked political speech and minorities.¹²⁴

This brief overview of the development of incitement law furthermore suggests that the Court's high bar for the regulation and suppression of dangerous speech also rests on a recognition that government control of ideas chills the vibrant type of discourse necessary for successful liberal democratic experimentation,¹²⁵ and that politically valuable speech will be thrown out as the proverbial baby with the bathwater. Even if speech suppression is conducted by private actors—here, powerful social media giants such as Facebook, Twitter, and Google—the suppression's potential chilling effect, its potential removal of valuable political speech from the marketplace of ideas, and its potential for abuse (that such speech suppression will be used to persecute disliked groups and ideas) seemingly remain. Perhaps such consequences are even greater, given the opaqueness of social media companies' discrete censorship decision-making process and the lack of democratic accountability of such institutions.

Let's begin with the "what" of the First Amendment: the Court has stated that the "bedrock principle underlying the First Amendment . . . is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹²⁶ This is a right "designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us."¹²⁷ The Court has also explained the free speech clause as meaning that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."¹²⁸

¹²⁴ See generally NADINE STROSSEN, HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP (2018).

¹²⁵ See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[I]n the United States there is] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

¹²⁶ *Texas v. Johnson*, 491 U.S. 397, 414 (1989); see also *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (describing circumstances when the government may punish speech).

¹²⁷ *Cohen v. California*, 403 U.S. 15, 24 (1971); see also *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (noting the guiding First Amendment principle is that the "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content"). The term "speech" includes verbal and written communication, as well as expressive conduct, which is often referred to as "symbolic speech." *Johnson*, 491 U.S. at 404–06.

¹²⁸ *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)); see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); see also *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994) ("[T]he First Amendment, subject only to narrow and well-understood exceptions, does not countenance governmental control over the content of messages expressed by private individuals."); Elena Kagan, *Private Speech*,

Yet this absolute-sounding principle has never been absolutely true. Our government can and should lawfully and appropriately restrict speech through criminalization and other means because of its harm in contexts such as threatening or fraudulent speech.¹²⁹ While a continuum of low to high-valued speech seems to exist,¹³⁰ the Court's free speech schema is more broadly, and traditionally, viewed dividing speech into two classes: that protected by the First Amendment and that the government can restrict, with the unprotected category subdivided into specific unprotected categories.¹³¹ The Court in 2010 expressly listed five categories of unprotected speech—obscenity, defamation, fraud, incitement, and speech integral to crime¹³²—and explained that such categories have long been viewed as comprising a “few limited areas” in which the First Amendment permits speech restrictions based on content.¹³³

B. *Incitement in General*

What is incitement? It depends.¹³⁴ Per the *Stevens* Court cited above, it is one of the categories of speech unprotected by the First Amendment—unprotected meaning that the government can regulate and criminalize such speech based on

Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. 413, 443 (1996) (calling this a “keystone” of First Amendment doctrine).

¹²⁹ See David Crump, *Desecration, Is It Protected?*, 46 WAKE FOREST L. REV. 1021, 1023 (2011) (outlining the Court's categorical approach to the First Amendment); see also Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1770–71 (2004).

¹³⁰ See Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2170 (2015) (“Much of modern First Amendment jurisprudence is organized around a two-tier structure that in practice has devolved into more than two tiers.”).

¹³¹ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 975 (5th ed. 2015) (“The Supreme Court has declared that some types of expression are unprotected and may be prohibited and punished.”). Even protected speech can be regulated given that some laws may incidentally burden speech while having legitimate, non-speech purposes. *Id.*

¹³² The Court in *United States v. Stevens* listed these five categories as “historic and traditional,” while also noting that “[m]aybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law. . . . We need not foreclose the future recognition of such additional categories” *United States v. Stevens*, 559 U.S. 460, 468, 472 (2010); see also CHEMERINSKY, *supra* note 131, at 1053–54 (noting that “fighting words” have been considered their own unprotected category, but the Court has not upheld a fighting words conviction since its 1942 *Chaplinsky* decision).

¹³³ *Stevens*, 559 U.S. at 468–70 (“The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”).

¹³⁴ Professor David A. Anderson characterizes incitement in the tort law context as “neither a cause of action nor a defense—it is a rebuttal to a First Amendment defense.” David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957, 964 (2002).

its content.¹³⁵ According to Merriam-Webster's Dictionary, "incite" is a transitive verb meaning "to move to action : stir up : spur on: urge on."¹³⁶ Turning to U.S. criminal law, one finds that it contains no common law crime of incitement, while incitement *is* a distinct crime in British common law,¹³⁷ from which U.S. criminal law sprang; however, U.S. criminal law has long used the term "solicitation" (instead of incitement) to formally label the inchoate crime of encouraging, inducing, commanding, counseling, etc. someone else to commit a crime, with the mental state requirement that the speaker doing such counseling intend that the target crime will be committed.¹³⁸

While American criminal law uses the term solicitation to refer to the inchoate speech crime of counseling or encouraging the commission of a criminal act, it does include a particular construct called incitement. Broadly speaking, "incitement" in American law generally refers to the advocacy (praising the propriety) of illegal action or violence (violence being, of course, usually illegal as well).¹³⁹ It becomes criminal incitement when such advocacy is intended to cause imminent illegality and is reasonably likely to cause the same.¹⁴⁰

The line between *advocacy* of illegal action and *encouragement* of the same—the latter being criminal solicitation even without likelihood of immediacy of harm—often seems thin. It is seemingly maintained by the nature of the term

¹³⁵ *Stevens*, 559 U.S. at 468–69.

¹³⁶ *Incitement*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/incitement> [<https://perma.cc/DMJ6-376F>].

¹³⁷ See generally L.M. Clements, *Incitement and Impossibility - Do We Need a Statutory Definition of Incitement?*, 48 J. CRIM. L. 102 (1984) (U.K.) (describing the British crime of incitement). Incitement is part of international criminal law as well. For the most comprehensive and normatively-compelling analysis of modern international criminal law speech crimes, see generally GREGORY S. GORDON, *ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION* (2017).

¹³⁸ See JOSHUA DRESSLER & STEPHEN GARVEY, *CRIMINAL LAW: CASES AND MATERIALS* 817 (8th ed. 2019) (describing the crime of solicitation); Herbert Wechsler et al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 621 (1961). However, there are numerous statutory crimes called "incitement to riot" that criminalize what is essentially solicitation to commit property damage or other violence when the target act is imminent. See, e.g., 18 U.S.C. § 2101(a)(1) (criminalizing, *inter alia*, those who "incite a riot"); CAL. PENAL CODE § 404.6.

¹³⁹ Violence is typically illegal, yet the Court used language seemingly bifurcating illegality from the use of force, hence this article occasionally does as well. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (forbidding the state prohibition of "advocacy of the use of force or of law violation" unless intended and likely to imminently produce it (emphasis added)); see generally Eugene Volokh, *The Speech Integral to Criminal Conduct Exception*, 101 CORNELL L. REV. 981, 989–90 (2016) (noting distinction between advocacy and criminal solicitation of illegal conduct, without distinguishing illegal conduct from violent illegality).

¹⁴⁰ See *Brandenburg*, 395 U.S. at 447–48.

“advocacy” as referring to more abstract, doctrinal-type praise, versus a one-on-one, direct call to action of encouragement or counseling.¹⁴¹ The latter direct counseling or encouragement would typically constitute solicitation, and therefore fall under the separate speech integral to crime exception to the First Amendment if it requests or encourages “a specific criminal act at a specific place or time.”¹⁴² The separate unprotected category of incitement, and its requirement of a likelihood of imminent harm, need not be applied.

Most specifically, incitement as a strict legal term in U.S. law today is used to describe the act of advocating criminal behavior through speech, with the actual criminality of said speech—and hence whether or not it constitutes incitement—hinging on the nexus to immediate harm.¹⁴³ The Supreme Court’s requirement of a close temporal nexus between such advocacy-type speech and harm is the seminal *Brandenburg* case’s contribution to the First Amendment’s intersection with criminal law, with only advocacy that is intended to, and likely to produce, imminent illegality constituting incitement.¹⁴⁴ According to a leading First Amendment scholar, “[o]ne of the most respected principles of U.S. constitutional law is that the First Amendment does not prevent the government from enforcing criminal laws against speech aimed at inciting or likely to lead to an imminent harm.”¹⁴⁵

C. *Incitement’s Domestic Political Pall*

Before going further, it is important to note that the term “incitement” is a loaded one—a term historically, as well as today, employed in situations heavily freighted with political baggage.¹⁴⁶

¹⁴¹ See Volokh, *supra* note 139, at 993–95 (dissecting the fuzziness of this line between solicitation and protected advocacy of illegal action or violence).

¹⁴² *Id.* at 991. The “speech integral to criminal conduct” category of unprotected speech, which includes speech that constitutes crimes such as solicitation and conspiracy, has a long lineage, with Justice Holmes stating in 1919 that he didn’t think the Founding Fathers would have “ever supposed that to make criminal the counselling of a murder . . . would be an unconstitutional interference with free speech.” *Id.* at 989 (quoting *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (Holmes, J., dissenting)).

¹⁴³ See CHEMERINSKY, *supra* note 131, at 1039 (describing incitement as advocacy illegality); see also KENT GREENAWALT, *SPEECH, CRIME, & THE USES OF LANGUAGE* 206 (1989) (discussing the Supreme Court’s treatment of subversive advocacy, or speech “intended to encourage illegal action”).

¹⁴⁴ See *Brandenburg*, 395 U.S. at 447.

¹⁴⁵ Alexander Tsesis, *Foreword: Terrorist Incitement on the Internet*, 86 *FORDHAM L. REV.* 367, 369 (2017).

¹⁴⁶ See CHEMERINSKY, *supra* note 131, at 1039–40; see also Tsesis, *supra* note 9, at 663 (noting the use of incitement law in U.S. history to suppress “subversive but nonviolent speech” during the Red Scare).

The very development of incitement as a category of speech unprotected by the First Amendment occurred in a cauldron of volatile politics, from opposition to World War I, to the Red Scare, McCarthyism, racial bigotry, and anti-Semitism.¹⁴⁷ Before this article overviews incitement's ultimate development into advocacy of illegality or violence requiring imminency of the advocated action, it is interesting to note that incitement today often carries similar political baggage that has freighted it in the past. Today's accusations of "incitement" by prominent politicians (and pundits) against other politicians provides a strong reminder why the Supreme Court's narrow construction regarding when incitement can be punished by the state is a normatively valuable one.

What is the strongest example of incitement as closely linked to politics today? One need not look any further than the White House. President Trump's provocative and baiting use of words provides a good example of the political tint that colors modern claims of incitement. He continues to be regularly accused of "inciting" certain behavior.¹⁴⁸

Claims of incitement started before Trump was elected: During a March 2016 campaign rally, then-candidate Trump yelled multiple times to "[g]et them out of here," referring to various hecklers who later sued Trump and others.¹⁴⁹ The lawsuit claimed that crowd members assaulted the hecklers due to Trump's "incitement."¹⁵⁰ The month before, candidate Trump told a campaign crowd that "[i]f you see somebody getting ready to throw a tomato, knock the crap out of them, would you?

¹⁴⁷ GEOFFREY R. STONE, *PERILOUS TIMES, FREE SPEECH IN WARTIME* 5, 12–13 (2004) ("Time and again, Americans have allowed fear and fury to get the better of them. Time and again, Americans have suppressed dissent, imprisoned and deported dissenters . . .").

¹⁴⁸ And understandably so. See Elie Mystal, *Donald Trump Isn't Playing Games with Ilhan Omar—He's Inciting Violence*, *NATION* (Apr. 16, 2019), <https://www.thenation.com/article/trump-inciting-violence-ilhan-omar/> [<https://perma.cc/MR99-DBET>] (describing "Trump's established pattern of exhorting his followers to violence").

¹⁴⁹ Avi Selk, *The Violent Rally Trump Can't Move Past*, *WASH. POST* (Apr. 3, 2017, 1:29 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/04/03/the-violent-rally-trump-cant-move-past/> [<https://perma.cc/6AAG-5MNP>]. The lawsuit alleged that Trump "incited a riot," a misdemeanor crime under Kentucky state law that is also actionable per Kentucky tort law. *Nwanguma v. Trump*, 903 F.3d 604, 607–08 (6th Cir. 2018).

¹⁵⁰ Aaron Blake, *A Judge Rules Trump May Have Incited Violence . . . and Trump Again Has His Own Mouth to Blame*, *WASH. POST* (Apr. 2, 2017, 9:58 AM), <https://www.washingtonpost.com/news/the-fix/wp/2017/04/02/a-judge-rules-trump-may-have-incited-violence-and-trump-again-has-his-own-mouth-to-blame/> [<https://perma.cc/8AWR-U9ZT>]; see also Mystal, *supra* note 148 (describing other campaign rally events during which Trump seemed to encourage violence against attendees). The lawsuit against Trump was later dismissed due to the Court of Appeals for the Sixth Circuit finding that Trump's language did not violate the Kentucky statute at issue and was protected by the First Amendment. *Nwanguma*, 903 F.3d at 613; see Josh Gerstein, *Court Hands Trump Victory in Lawsuit by Campaign Rally Protesters*, *POLITICO* (Sept. 11, 2018, 4:00 PM), <https://www.politico.com/story/2018/09/11/trump-legal-victory-campaign-rally-protesters-815482> [<https://perma.cc/AQ38-CWJH>].

Seriously, OK? Just knock the hell . . . I promise you I will pay for the legal fees. I promise, I promise.”¹⁵¹ At yet another campaign rally he referred to a protestor, saying, “[g]et him out . . . Try not to hurt him. If you do, I’ll defend you in court. Don’t worry about it.”¹⁵² Trump was also roundly criticized for seemingly inciting gun violence on the campaign trail against his opponent Secretary Hillary Clinton when he commented that the “Second Amendment people” could possibly do something (something seemingly violent) about Clinton’s potential ability to nominate Supreme Court justices.¹⁵³

The accusations of incitement did not stop when Trump took office. An April 2019 *New York Times* opinion piece titled “Trump’s Anti-Abortion Incitement,” argued that the president’s public comments regarding non-viable pregnancies would cause violence against doctors: “Abortion providers are regular targets of domestic terrorism, and Trump’s lies serve as incitement.”¹⁵⁴ The writer used the term incitement to describe the president’s speech because the president’s words had the “potential to inspire violence.”¹⁵⁵

The list goes on. In May 2019, Democratic presidential candidate Beto O’Rourke accused President Trump of inciting violence against Representative Ilhan Omar, an American citizen and a Muslim.¹⁵⁶ Again, Trump’s social media speech was at issue; he tweeted a video depicting the World Trade Center towers

¹⁵¹ Meghan Keneally, *A Look Back at Trump Comments Perceived by Some as Encouraging Violence*, ABC NEWS (Oct. 19, 2018, 10:55 AM), <https://abcnews.go.com/Politics/back-trump-comments-perceived-encouraging-violence/story?id=48415766> [<https://perma.cc/J23S-JHB9>].

¹⁵² *Id.*

¹⁵³ Nick Corasaniti & Maggie Haberman, *Donald Trump Suggests ‘Second Amendment People’ Could Act Against Hillary Clinton*, N.Y. TIMES (Aug. 9, 2016), <https://www.nytimes.com/2016/08/10/us/politics/donald-trump-hillary-clinton.html> [<https://perma.cc/Z2NK-PJ4F>] (“If she gets to pick her judges, nothing you can do, folks,” Mr. Trump said, as the crowd began to boo. He quickly added: ‘Although the Second Amendment people — maybe there is, I don’t know.’”).

¹⁵⁴ Michelle Goldberg, *Trump’s Anti-Abortion Incitement*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/opinion/trump-wisconsin-abortion.html> [<https://perma.cc/B8FT-56MA>] (stating further that “thrilling self-righteousness and justified hatred is the effect incitement is supposed to produce”).

¹⁵⁵ *Id.*

¹⁵⁶ Michael Burke, *O’Rourke: Trump Inciting Violence Against Omar by Sharing Video*, HILL (Apr. 14, 2019), <https://thehill.com/homenews/campaign/438821-orourke-trump-inciting-violence-against-omar-by-sharing-video> [<https://perma.cc/2453-HTHX>]; see also Julia Conley, *Trump Denounced for ‘Incitement to Violence’ Against Ilhan Omar After Latest Racist Attack on Congresswoman*, COMMON DREAMS (July 15, 2019), <https://www.commondreams.org/news/2019/07/15/trump-denounced-incitement-violence-against-ilhan-omar-after-latest-racist-attack> [<https://perma.cc/8FLL-4V8S>] (citing Historian Kevin Kruse) (“Trump’s racist rhetoric targeting women of color in Congress could carry serious and dangerous consequences for the lawmakers, noting that Omar has already been subjected to threats on her life.”).

burning with an excerpt of Congresswoman Omar's 2019 speech to the Council on American-Islamic Relations.¹⁵⁷ O'Rourke called this tweet "an incitement to violence against Congresswoman Omar, against our fellow Americans who happen to be Muslim. This is part and parcel of what we've seen from an administration that has described Mexican immigrants as rapists and criminals . . ." ¹⁵⁸ The next month, Trump also faced accusations of inciting racism toward Representative Omar and three of her colleagues, first by posting tweets that "urged her and three other nonwhite freshman congresswomen to return to their countries to fix their ineffective governments,"¹⁵⁹ and then by prompting a crowd at a rally to express the same – through chants of "send her back" in an apparent reference to deport all four American congresswomen.¹⁶⁰

President Trump is not the only American politician accused of incitement in 2019. In a strange twist, two of the Congresswomen President Trump was accused of inciting harmful action against were themselves accused of incitement, albeit by a foreign politician. Israeli Prime Minister Benjamin Netanyahu called U.S. Congresswomen Omar and Rashida Tlaib (the first Muslim women elected to Congress), who were seeking to travel to Israel in late summer 2019, "leading activists in promoting the legislation of boycotts against Israel in the American Congress. The itinerary of the two congresswomen reveals that their sole purpose is to harm Israel and increase incitement against it."¹⁶¹

¹⁵⁷ Burke, *supra* note 156 (referencing the video that depicted the part of Omar's speech where she said "'some people did something' and Muslims 'were starting to lose access to our civil liberties.'").

¹⁵⁸ *Id.*

¹⁵⁹ Aaron Blake, *Trump's Incitement on Ilhan Omar Marries Two of His Nastiest Tactics, with Familiar Results*, WASH. POST (July 18, 2019), <https://www.washingtonpost.com/politics/2019/07/18/send-her-back-trumps-incitement-ilhan-omar/> [<https://perma.cc/HGS9-AFPV>] (claiming that President Trump knowingly caused a crowd to disturbingly chant "send her back," referring to the deportation of a Muslim-American congresswoman originally from Somalia).

¹⁶⁰ Jeff Mason, *'Lock Her Up!' But No 'Send her Back!' Chant at Trump Rally in Ohio*, REUTERS (Aug. 1, 2019), <https://www.reuters.com/article/us-usa-trump/lock-her-up-but-no-send-her-back-chant-at-trump-rally-in-ohio-idUSKCN1US02V> [<https://perma.cc/TB7F-C3WS>]. Such a phrase carries with it reverberations of Nazi incantations against German Jews. See Chemi Shalev, *Trump's 'Go Home' Invective Echoes Nazi Incitement Against Jews*, HAARETZ (July 17, 2019) (Isr.), <https://www.haaretz.com/us-news/premium-trump-s-go-home-invective-echoes-nazi-incitement-against-jews-1.7536063> [<https://perma.cc/RFP9-L8YB>].

¹⁶¹ Raf Sanchez & Harriet Alexander, *Netanyahu Bars Democrat Congresswomen Ilhan Omar and Rashida Tlaib from Entering Israel*, TELEGRAPH (Aug. 15, 2019) (internal quotation marks omitted), <https://www.telegraph.co.uk/news/2019/08/15/netanyahu-bars-democrat-congresswomen-ilhan-omar-rashida-tlaib/> [<https://perma.cc/J744-8WYL>].

D. *Why We Care That We Have Brandenburg*

Yet President Trump's above-described rhetoric fails to fall into a category of speech that could be criminally punished. It fails to clear the high hurdle the *Brandenburg* court set for what constitutes incitement as speech that can be criminally punished. The propaganda and radicalization types of speech that Congress has found helps recruit future terrorists and inspire terrorist acts, and that Congress has pressured social media companies into censoring, likewise fail *Brandenburg*. Why? Because the feared harm regarding Trump's speech is not clearly imminent, and the speaker's intent is not clear either; the feared harm in the social media propaganda and inspirational speech Congress rails against likewise lacks a reasonable likelihood of imminent harm.¹⁶²

Simply because the 2016 Orlando Pulse nightclub shooter was inspired (assuming the government claims are true) by speech he viewed on social media does not transform all such inspirational social media speech—such as that praising earlier acts of terrorism and/or encouraging the random public to engage in similar type acts—into speech that will usually lead others to commit eventual violence. Causation, a critical element of American criminal law for a reason, is not met by most such speech. And, critically, both instances—terror propaganda and President Trump's rhetoric—involve speech with political value, as uncomfortable as that accurate label feels. Praising terrorist acts, glorifying them, and generally advocating for their propriety often demonstrates support for the ideological goals of the terrorist or their group. And, of course, President Trump's comments are political given the context in which they were uttered. Hence, if causation is not met because of the lack of imminent harm, why is the speech being punished? Is it being punished for its disliked content—content that may contain political value?

Interestingly, the Trump Administration's failure to more clearly condemn the August 2019 El Paso shooting—a shooting based on racial animus, according to a manifesto the shooter posted online—demonstrates the essentially political nature of

¹⁶² The future harm from speech glorifying acts of terrorism, for example, is quite speculative. Ben Wizner from the ACLU recently captured the issue when he stated, with regard to deleting speech linked to future acts of terror, that “[t]he problem with that is we don't yet have the tech to determine pre-crime, *Minority Report* notwithstanding. We need to understand that even if all mass shooters have said X, the vast majority of people who have said X don't become mass shooters.” Rani Molla, *Trump Wants Social Media to Detect Mass Shooters Before They Commit Crimes*, VOX: RECODE (Aug. 5, 2019, 5:30 PM), <https://www.vox.com/recode/2019/8/5/20754790/trump-social-media-detect-shooter-crime> [<https://perma.cc/QG7M-4JYV>].

pre-incident speech: that is, speech that propagandizes, inspires, and radicalizes but is not likely to result in imminent violence. Regarding the shooting and its purported motivation, a DHS official, frustrated that the Trump Administration refused to condemn the murders as terrorism, stated:

This is a clear manifestation of the political discourse that has taken place in the country over the past two years or so It cannot be blamed on mental health. This is an ideology-driven hate crime. This is terrorism and the White House has trouble labeling it as such.¹⁶³

Pre-incident speech, even if linked to later acts of violence, is often political, and hence at the core of First Amendment protection.

The reasons why *Brandenburg* exists should give us pause when speech that is protected from governmental suppression is restricted by proxy. The Supreme Court's holdings prior to *Brandenburg* allowed great swaths of disliked political speech to be suppressed. Those holdings also permitted criminal law to be used against disliked groups, such as anarchists and Communists.¹⁶⁴ And speech suppression by social media platforms risks doing something similar.

The *Brandenburg* court found that that the First Amendment only allows “a State to forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁶⁵ *Brandenburg's* strict imminency and intent requirements were instituted for a reason: to safeguard against government suppression of disliked speech, and disliked people. They represent the culmination of the Court's experimentation with earlier, elastic formulations as to what constitutes dangerous speech that could be criminalized without violating the First Amendment. These earlier formulations gave, time and time again, the government and states huge leeway to punish and hence suppress disliked speech, using the excuse that such speech was potentially dangerous.¹⁶⁶ It is worth briefly reviewing the criminal law aspects undergirding the final and current *Brandenburg* incitement recipe in order to appreciate that when speech that fails to meet its intent and imminency prongs can be or is suppressed—by private social media companies

¹⁶³ Betsy Woodruff, *DHS Official: Trump Can't Admit 'This Is Terrorism,'* DAILY BEAST (Aug. 6, 2019, 1:27 PM), <https://www.thedailybeast.com/dhs-official-on-el-paso-and-dayton-trump-cant-admit-this-is-terrorism> [https://perma.cc/4824-C3E8].

¹⁶⁴ See STONE, *supra* note 147, at 5, 12–13.

¹⁶⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

¹⁶⁶ See generally STONE, *supra* note 147, at 549 (detailing the cyclical nature of such suppression in U.S. history).

pressured by the government into restricting such speech online—the same vulnerabilities exist to suppress speech with political salience and only speculative, third or fourth-order harm.¹⁶⁷

*E. Why Brandenburg? Earlier Approaches Allowed
Persecution of Politically Valuable Speech That Was
Only Speculatively Harmful*

Prior to early twentieth century Espionage and Sedition Acts prosecutions and the resultant development of the Supreme Court's First Amendment jurisprudence, the federal courts utilized what is called the "bad tendency" test, to evaluate claims that speech the government deemed harmful was being unconstitutionally punished.¹⁶⁸ If the speech had a bad tendency (arbitrarily decided by the courts) to produce harm, it could be constitutionally suppressed without running afoul of the First Amendment.

The bad tendency test, borrowed from common law attempt crime jurisprudence, had two prongs: a specific intent to commit a crime and an act sufficient to show that the criminal result of whatever the target crime (that charged as being attempted) was the natural outcome.¹⁶⁹ Translated to speech cases, attempt law's acts became speculative and remote tendencies of harm (stretching the already ambiguous attempt law natural outcome), meaning that the feared resultant harm of the speech may be and often was highly doubtful.¹⁷⁰ In other words, the causal link between supposedly harmful speech and the feared harm was tenuous at best or practically non-existent. Furthermore, the requisite specific intent (to commit the target crime) inferentially merged with that same tendency. As a result, the test collapsed into a judicial guess as to whether the speech at

¹⁶⁷ Section II.E draws from my article on military speech crimes in which I trace the evolution of the Court's approach to dangerous speech. See VanLandingham, *supra* note 123, at 73.

¹⁶⁸ DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS 2* (1997); see also Patterson v. Colorado, 205 U.S. 454, 463 (1907) (upholding newspaper journalist's contempt conviction for articles and cartoons criticizing judges in a pending case, explaining that the First Amendment did not prohibit criminal punishment of speech already uttered based on its tendency to cause harm because "if a court regards, as it may, a publication concerning a matter of law pending before it, as *tending toward* such an interference, it may punish it as in the instance put" (emphasis added)); STONE, *supra* note 147, at 171–73 (explaining the embrace of the bad tendency test by federal courts to uphold Espionage Act convictions during World War I).

¹⁶⁹ See David R. Dow & R. Schott Shiedes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217, 1222–23 (1998); STONE, *supra* note 147, at 174–76 (noting how the courts skirted common law attempt's specific intent requirement by allowing "constructive intent").

¹⁷⁰ See generally STONE, *supra* note 147, at 179, 215 (detailing how bad tendency applied to speech truncated attempt law's requirement of proximity of harm).

issue could potentially—speculatively—cause the particular harm the statute at issue was trying to prevent. And in times of great public national security fear, such as pre-World War I paranoia of anarchists, McCarthyism, and the like, it was relatively easy for courts to find tendency of harm, thus intent, and thus criminal speech.¹⁷¹

To demonstrate how pre-incitement speech was criminalized prior to *Brandenburg*, and hence why the Supreme Court set *Brandenburg's* high standard, it is helpful to review several famous First Amendment cases. In the World War I era, the federal courts applied the collapsed “bad tendency” test to Espionage Act convictions by requiring proof that the defendant both possessed a non-express criminal intent *and* their language had “a natural and reasonably probable tendency” to cause unlawful harm.¹⁷² For example, the Ninth Circuit Court of Appeals in *Shaffer v. United States* upheld an Espionage Act conviction for mailing a book critical of the war by asking “whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by statute.”¹⁷³ While the Ninth Circuit acknowledged that disapproval of the war was not criminal, the court reasoned that criticizing the war could weaken patriotism and the desire to serve in the military, so criminalizing the publication of a book critical of the war shockingly posed no constitutional issues.¹⁷⁴

Furthermore, courts of that era employed no temporal or other limitation to determine tendency of harm—the likelihood of speech leading to a criminal outcome. Instead courts simply rubber-stamped convictions involving speculative and remote harm,

¹⁷¹ *Id.* at 191–95.

¹⁷² Brief for the United States at 77, *Debs v. United States*, 249 U.S. 211 (1919) (No. 714). Espionage Act convictions required proof both that the defendant possessed a “specific, willful, criminal intent” and that his language had “a natural and reasonably probable tendency” to cause unlawful harm. *Id.*

¹⁷³ *Shaffer v. United States*, 255 F. 886, 887–88 (9th Cir. 1919) (upholding conviction for mailing a book containing several “treasonable, disloyal and seditious utterances,” explaining that “[t]o teach that patriotism is murder and the spirit of the devil, and that war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war”); *see also* *Goldstein v. United States*, 258 F. 908, 910 (9th Cir. 1919) (explaining that in certain circumstances a piece of writing or a “picture to the public” may “be calculated to foment disloyalty or insubordination”); *Masses Publ’g Co. v. Patten*, 246 F. 24, 38 (2d Cir. 1917) (“If the natural and reasonable effect of what is said is to encourage resistance to a law, and the words are used in an endeavor to persuade to resistance, it is immaterial that the duty to resist is not mentioned, or the interest of the persons addressed in resistance is not suggested.”).

¹⁷⁴ *Shaffer*, 255 F. at 887.

convictions—based on war hysteria and bias.¹⁷⁵ The lack of a temporal requirement—such as *Brandenburg’s* imminency requirement—was of course linked to causation; if the feared resultant harm did not have to be reasonably imminent, it was easier to criminalize speech that would likely never cause any harm; the causal link was essentially buried. And once a speculative harm was established, the requisite intent was then easy to find by using the natural and probable consequences presumption, one that allowed juries to presume that defendants intended the natural and probable consequences of their actions, instead of requiring the government to prove intent to commit the crime at issue.¹⁷⁶ This presumption conflated attempt law’s two prongs, hence ensuring convictions once speech’s tendency to harm was established. And since a tendency to harm had no temporal or remoteness limitations, speakers could be punished for unrealized third-party action that could possibly (speculatively) be caused by their speech.¹⁷⁷

1. Bad Tendency Dressed as Clear and Present Danger

In 1919, the Supreme Court in *United States v. Schenck*, the Court’s first and most famous Espionage Act case, uncritically adopted the bad tendency approach to determine whether speech was sufficiently harmful as to allow its constitutional criminalization.¹⁷⁸ Justice Holmes’s “clear and present danger” test to determine whether speech can be criminalized consistent with the First Amendment was the bad tendency test dressed up in a fun metaphor. In upholding petitioners’ convictions for conspiracy to distribute pamphlets

¹⁷⁵ The *Shaffer* rationale highlights the speculation necessary to meet the bad tendency test; in concluding that unpatriotic speech has a tendency to harm the draft or troop loyalty, it found that:

Printed matter may tend to obstruct the recruiting and enlistment service, even if it contains no mention of recruiting or enlistment, and no reference to the military service of the United States.

. . . To teach that patriotism is murder . . . and that the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war.

Id. at 888.

¹⁷⁶ Dow & Shieldes, *supra* note 169, at 1222. The speaker “must be presumed to have intended the natural and probable consequences of what he knowingly did.” *Shaffer*, 255 F. at 889. This presumption drew upon common law “natural and probable consequences” doctrine. See Dow & Shieldes, *supra* note 169, at 1222–23.

¹⁷⁷ See Dow and Shieldes, *supra* note 169, at 1222–23 (noting that the bad tendency approach treated speech as an act, and evaluating speech effects was simply a matter of asking “whether it was reasonable to assume that certain ill effects would follow”); see also STONE, *supra* note 147, at 215 (“[F]ederal courts routinely conflated these two elements and allowed juries to infer criminal intent from bad tendency.”).

¹⁷⁸ See *Schenck v. United States*, 249 U.S. 47, 52 (1919).

“calculated to cause . . . insubordination” in the military and obstruction of the draft,¹⁷⁹ Holmes allowed the inference of the requisite intent to cause insubordination and obstruction. He speculated that the petitioners’ pamphlet might influence men subject to the draft to refuse their order; since that was a possible effect, the defendants must have intended that possible effect—that effect was contradicted by the fact that the supposedly-criminal pamphlet expressly called only for lawful draft repeal.¹⁸⁰

Schenck included Holmes’s famous false cry of fire metaphor, ostensibly laying out a “clear and present danger” approach that could have, if applied seriously, narrowed the bad tendency test to speech that caused not merely speculative harm, but likely harm in the near-term.¹⁸¹ Yet the *Schenck* court made the illogical leap that like a panic-inducing false cry of fire in a crowded theater would not be protected by the First Amendment, the defendants’ pamphlet was likewise not protected, demonstrating that clear and present danger was merely the bad tendency test by another name.¹⁸²

Soon after *Schenck*, Justice Holmes again wrote for a unanimous Court in *Frohwerk v. United States* and *Debs v. United States*, summarily upholding these Espionage Act convictions for dissenting speech.¹⁸³ In *Frohwerk*, the defendant’s

¹⁷⁹ *Schenck*, 249 U.S. at 48–50. Charles T. Schenck, the secretary general of the Socialist Party, and Elizabeth Baer were convicted of three counts of violating the Espionage Act in that they “willfully conspired to have printed and circulated to men . . . called . . . for military service . . . a document set forth and alleged to be calculated to . . . cause . . . insubordination and obstruction” and for conspiracy to mail, and actually mailing, the same. *Id.*

¹⁸⁰ *Id.* at 51 (“[T]he document would not have been sent unless it had been intended to have some effect, and we do not see what effect it could be expected to have upon persons subject to the draft except to influence them to obstruct the carrying of it out.”); see also STONE, *supra* note 147, at 192–93 (highlighting the irrationality of this logic).

¹⁸¹ See *Schenck*, 249 U.S. at 52. The Court stated:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

Id.

¹⁸² See STONE, *supra* note 147, at 194–95 (discussing the lack of danger in *Schenck*, and pointing out the fallacy even if there was such a danger, given that there may be value to speech that outweighs any danger created); Dow & Shieldes, *supra* note 169, at 1222–23 (describing the bad tendency test) (“If the act of speech will tend to cause ill effects, then the speech is subject to punishment. . . . [I]n measuring the potential ill effects of certain speech, the proper test was to ask simply was it was reasonable to assume that certain ill effects would follow.”).

¹⁸³ See *Frohwerk v. United States*, 249 U.S. 204, 206 (1919) (“[T]he First Amendment while prohibiting legislation against free speech as such cannot have been,

conviction for conspiracy and attempt to cause “disloyalty, mutiny and refusal of duty in the military and naval forces” was based merely on newspaper articles protesting the draft and the war.¹⁸⁴ In *Debs*, the Socialist Party’s candidate’s conviction for inciting “insubordination, disloyalty, and mutiny and refusal of duty in the military” as well as for recruitment and enlistment obstruction were based on a public speech in which he paid homage to three jailed war opponents.¹⁸⁵ The speech at issue in both cases, primarily about the virtues of socialism, were merely anti-war, again highlighting how when specific intent that speech will bring about imminent illegality as a material element of a crime is not vigorously required, nor is likelihood of imminent harm, even if such harm is clearly intended, it is easy for suppression of disliked political speech to occur.¹⁸⁶

2. *Brandenburg*: Robust Clear and Present Danger

Justice Holmes tried to give his clear and present danger test teeth, but it took fifty more years for the Supreme Court to fully place the clear and present danger approach on its present *Brandenburg* footing.¹⁸⁷ The Court’s march from *Schenk* to *Brandenburg* is well-worn, and highlights the susceptibility of national security speech crimes—speech made criminal because of a feared negative impact on national security—to enormous governmental overreach through prosecution of speech based on fear, dislike, and paranoia instead of real harm. The path to *Brandenburg* also reveals how the criminal law concepts of the mental state of intent and the separate element of causation (causation as operationalized through imminence of likely harm resulting from the speech requirement) can help ensure an appropriate balance between expressive freedom and freedom from harm.

and obviously was not, intended to give immunity for every possible use of language.”); *Debs v. United States*, 249 U.S. 211, 216 (1919). The *Debs* Court continued the lower courts’ habit of ostensibly requiring specific intent, while allowing the jury to infer intent from tendency: “[I]f in that speech he used words tending to obstruct the recruiting service he meant that they should have that effect.” *Id.*

¹⁸⁴ *Frohwerk*, 249 U.S. at 205. Given the derogatory nature in which appellant’s articles portrayed the U.S. war efforts, and despite an acknowledgement there was no special attempt to reach draft-age men, the Court upheld the convictions based on the mere possibility that the articles could negatively affect the military. *Id.* at 209–10.

¹⁸⁵ *Debs*, 249 U.S. at 212.

¹⁸⁶ See STONE, *supra* note 147, at 208 (“[T]he ‘bad tendency’ test . . . enables the government to eliminate almost all criticism.”).

¹⁸⁷ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (finding that the First Amendment does not “permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

This article will not have space to retread all that ground, but it will highlight the famous dissent in *Abrams v. United States* that set the stage for clear and present danger's eventual *Brandenburg* definition.¹⁸⁸ Five defendants in *Abrams* were convicted for tossing two leaflets out of New York City windows denouncing U.S. troops in Russia and urging stoppage of weapons productions and were sentenced to twenty years for violating the Espionage Act.¹⁸⁹ Justice Holmes, joined in dissent by Justice Brandeis, revisited *Schenk's* clear and present danger metaphor to find that the defendants' pamphlets were constitutionally-protected speech. He argued that, unlike the bad tendency version of his test, the government needed to prove actual intent to cause the anticipated harm, and not simply allow an inference of intent from a reasonable tendency to produce such harm.¹⁹⁰ Additionally, Holmes required imminency of the clear and present danger: "[i]t is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion."¹⁹¹

The Supreme Court after World War I upheld the constitutionality of state criminal anarchy and syndicalism statutes laws, and by doing so, slowly began to modify the bad tendency approach that was being called the clear and present danger test.¹⁹² It first strengthened the approach by acknowledging that anarchy laws only criminalized the *express* advocacy of illegality, hinting that the advocacy of lawful opposition and change, such as that penalized in the Espionage Act cases, would be constitutionally protected.¹⁹³

¹⁸⁸ *Abrams v. United States*, 250 U.S. 616 (1919).

¹⁸⁹ STONE, *supra* note 147, at 205. The pamphlets ridiculed President Wilson; decried capitalism as the enemy; urged the "Workers of the World" to wake up; and warned munitions workers that "you are producing bullets . . . to murder not only the Germans, but also your dearest, best, who are in Russia." *Abrams*, 250 U.S. at 620, 625–26.

¹⁹⁰ *Abrams*, 250 U.S. at 627–29 (Holmes, J., dissenting). He also highlighted that "the principle of the right to free speech is always the same" whether in war or peace, though "war opens dangers that do not exist at other times." *Id.* at 628.

¹⁹¹ *Id.* at 627–28 (noting that the government can "punish speech that produces or is intended to produce a clear and *imminent* danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent" (emphasis added)); see also *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis J., dissenting); *Pierce v. United States*, 252 U.S. 239, 255 (1920) (Brandeis, J., dissenting).

¹⁹² See, e.g., *Gitlow v. New York*, 268 U.S. 652, 664–65 (1925) (upholding conviction under New York anarchy statute for publications advocating strikes to bring about the end of the state). The *Gitlow* Court reasoned that the statute may be appropriately applied to specific speech "if its natural tendency and probable effect was to bring about the substantive evil which the legislative body might prevent," and that since New York had already decided that advocacy prohibited by its statute would tend to have bad effects, no further inquiry, such as a clear and present danger test, was necessary. *Id.* at 671.

¹⁹³ See *id.* at 664–65 ("[The statute] does not restrain the advocacy of changes in the form of government by constitutional and lawful means. What it prohibits is language advocating, advising or teaching the overthrow of organized government by

Justices Holmes and Brandeis disagreed, arguing that even if such advocacy is express, the resulting danger must also be imminent before criminality attaches.¹⁹⁴ Justice Brandeis's famous concurrence in *Whitney v. California* echoed Holmes's dissent in *Abrams* by stressing the need for an imminency requirement:

[T]he incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.¹⁹⁵

This Holmes-Brandeis clear and immediate danger approach gained steam in the years preceding World War II, with the Court largely sustaining First Amendment challenges to convictions because of lack of express intent and immediate danger.¹⁹⁶ By 1942, the bad tendency test was replaced, in large measure, by the *Gitlow/Whitney* Holmes-Brandeis clear and present danger standard for determining when speech could be criminally suppressed.¹⁹⁷ Cases including *Herndon v. Lowry* as well as *Bridges v. California* indicate that the bad tendency approach was gone, and seriousness of the harm was added: "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely

unlawful means."). For the discussion that this acknowledgment of express advocacy resembles Judge Learned Hand's famous approach in *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), an Espionage Act case in which, as trial judge, Judge Hand found the speech at issue protected because it did not expressly advocate criminal conduct, see STONE, *supra* note 147, at 237.

¹⁹⁴ Noting that there was no imminent danger of a violent government overthrow in *Gitlow*, Justice Holmes famously exclaimed that, "[e]very idea is an incitement . . . Eloquence may set fire to reason," and hence the dividing line for the First Amendment must be imminent danger. *Gitlow*, 268 U.S. at 673 (Holmes, J., dissenting).

¹⁹⁵ *Whitney v. California*, 274 U.S. 357, 376–77 (1927) (Brandeis, J., dissenting) (upholding a state syndicalism conviction for the formation of a local chapter of the national communist party), *overruled in part* by *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

¹⁹⁶ See, e.g., *Stromberg v. California*, 283 U.S. 359, 369 (1931); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (finding that speech can only be restricted when there is "a clear and present danger to a substantial interest of the State"); *Thornhill v. Alabama*, 310 U.S. 88, 105–06 (1940); *Bridges v. California*, 314 U.S. 252 (1941); *West Virginia Bd. Of Educ. v. Barnette*, 319 U.S. 624, 639 (1943); *Craig v. Harney*, 331 U.S. 367, 376 (1947) (in overturning a contempt conviction stating that "[t]he danger must not be remote or even probable; it must immediately imperil").

¹⁹⁷ See STONE, *supra* note 147, at 269, 396 ("In the years between 1920 and 1950 . . . the Court had increasingly moved toward the Holmes-Brandeis 'clear and present' danger test."); *id.* at 272 (highlighting in 1942) ("[C]riminal prosecutions for expression of the sort that were commonplace during World War I were now of doubtful constitutionality, if not downright unthinkable. . . . [T]he prosecutions in *Schenck*, *Frohwerk*, *Debs*, and *Abrams* were no longer thought consonant with the [C]onstitution.").

serious and the degree of imminence extremely high before utterances can be punished.”¹⁹⁸

But there was a quick detour back to allowing the criminalization of speculatively harmful speech during the Cold War. In 1951, the Supreme Court temporarily jettisoned its requirement for immediate danger in a decision upholding charges of conspiracy to advocate for the forceful overthrow of the government under the anti-communism 1940 Smith Act.¹⁹⁹ The *Dennis* plurality adopted the appellate court’s weakened version of the clear and present danger test first crafted by Judge Learned Hand: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”²⁰⁰ This new approach worked as a sliding scale, one subject to “ideological manipulation” that seemed to try to balance the value of the First Amendment against an unclear “danger to society.”²⁰¹ Under this new test for harmful speech, “threat of a great evil, even of a non-imminent one, would justify suppression of speech.”²⁰² This approach seems to be the approach to propaganda, recruitment, and radicalization pre-incident type speech social media platforms have been pressured into censoring. As long as the great evil—a terrorist act—could possibly be aided by the speech, the social media platforms have decided (thanks to years of sustained pressure from the U.S. government) to ban it.

Simply put, the McCarthy-era *Dennis* detour lacked the Brandeis-Holmes emphasis on both immediate and substantive

¹⁹⁸ *Bridges v. California*, 314 U.S. 252, 263 (1941) (overturning a contempt conviction); see *Herndon v. Lowry*, 301 U.S. 242, 263–64 (1937) (overturning conviction under a state anti-insurrection statute that “amounts merely to a dragnet which may enmesh anyone who agitates for a change of government if a jury can be persuaded that he ought to have foreseen his words would have some effect in the future conduct of others”).

¹⁹⁹ *Dennis v. United States*, 341 U.S. 494, 497 (1951). The Smith Act, passed in 1940, was another sedition act; it required resident aliens to register with the federal government and prohibited persons “knowingly or willfully” to “advocate, abet, advise or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence.” *Id.* at 496.

²⁰⁰ *Dennis*, 341 U.S. at 510 (alteration in original) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)).

²⁰¹ STONE, *supra* note 147, at 409; see Martin H. Redish, *Advocacy of Unlawful Conduct and the First Amendment: In Defense of Clear and Present Danger*, 70 CALIF. L. REV. 1159, 1171, 1173 (1982) (noting that the *Dennis* version of clear and present danger was a “dramatic alteration in the test’s scope” and referring to the *Dennis* Court’s adoption of “Hand[s] sliding-scale test”); see also Redish, *supra*, at 1171 n.60 (“[T]he Hand-Vinson formula . . . seems to emasculate the clear and present danger test.” (quoting T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 114 (1970))).

²⁰² Redish, *supra* note 201, at 1172, 1180 (highlighting that “[u]ltimately, however, the *Dennis* Court’s test effectively deleted the requirements that the danger be either clear or present when the potential harm was severe”).

seriousness of harm; by deleting the requirement for a tight temporal connection between speech and harm—that is to demonstrate likelihood of causation, the speech at issue likely would cause the feared harms—the Court welcomed and condoned speech suppression based on dislike of message.²⁰³ While no prediction of future harm is infallible, the requirement of immediacy of the harm improves predictive odds of causation, plus helps indicate that it is actually the danger likely to be caused by the speech that is animating the government (or social media) suppression, and not simply dislike of the ideas expressed in that speech.

Fortunately, the *Brandenburg* Court in 1969 corrected its McCarthy-era deviation.²⁰⁴ While the *Brandenburg* opinion does not use clear and present danger language, the Holmes-Brandeis pre-*Dennis* formulation of clear and present danger, one that emphasizes immediacy and specific intent, is its core.²⁰⁵ Though *Brandenburg* itself did not answer the question of how to assess imminence and likelihood of the harm, later incitement cases have all required express advocacy of immediate violation of the law and a high likelihood of such action, employing the Court's *Brandenburg* incitement test to consistently invalidate convictions for mere advocacy.²⁰⁶

²⁰³ See STONE, *supra* note 147, at 409. Instead of clear and present danger, the Court was back to the bad tendency approach. See Redish, *supra* note 201, at 1173 n.71 (“*Dennis* ‘is simply the remote bad tendency test dressed up in modern style.’” (quoting M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 65 (1966))).

²⁰⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that “constitutional guarantees . . . do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); see, e.g., See STONE, *supra* note 147, at 522 (noting that *Brandenburg* “finally and unambiguously embraced the Holmes-Brandeis version of clear and present danger”).

²⁰⁵ See David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 32, 57 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) (noting that “the Court’s emphasis on imminence and on a high probability of harm” flows directly from Holmes-Brandeis clear and present danger approach).

²⁰⁶ See, e.g., *NAACP v. Claiborne Hardware Co.*, 459 U.S. 886, 902 (1982) (overturning civil judgment against the NAACP for boycott of white-owned businesses based in part on the statement: “If we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”); *Watts v. United States*, 394 U.S. 705, 706 (1969) (reversing conviction of man who publicly said “if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.”); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (per curiam) (reversing conviction for shouting “[w]e’ll take the fucking street later” at an antiwar demonstration); see also Dow & Shieldes, *supra* note 169, at 1233–34 (noting use of *Brandenburg* test to invalidate convictions for advocacy of violence).

CONCLUSION

This article highlights that most of the high-visibility congressional and executive branch concern shown in the area of terror-related speech on social media has been and remains largely directed at constitutionally protected speech. The targeted radicalization, recruitment and propaganda-type speech can undoubtedly, and tragically, help inspire a few of the over three billion individuals on social media to join terrorist groups and/or commit acts of violence. While Congress and the executive branch emphasize this very slight chance of harm that could result from such speech, they fail to equally emphasize that the large majority of it remains outside their constitutional purview to regulate, yet they try to do so regardless—successfully. This article demonstrates that much of the terror content speech restrictions currently employed by the leading social media platforms have resulted from congressional pressure to enact such restrictions—restrictions that Congress itself could not enact due to the protections the First Amendment lends to much of this speech.

This is problematic because congressional leaders have failed to engage with the reasons why the Constitution prohibits them from regulating such speech: because the slight and remote potential that such offensive and vile speech will cause harm is far outweighed by its potential political value. Also, the Constitution prohibits regulation of such admittedly repulsive speech because speech with such slight causal connection to violence or other illegality is prone to censorship because of its disliked ideas or disliked speakers, instead of because of any strong connection to eventual violence or other illegality. These realities are conveniently ignored today by both government officials and private actors involved in policing social media speech in their efforts to appear effective against terrorism. Instead of trying to censor pre-incitement speech, they should be focusing on the root causes behind the formation and continued existence of such extremist groups and their violent crimes.

Seemingly defending social media speech that glorifies violence, terrorist acts, and/or that glorifies extremist groups that cater in misogyny, racial or ethnic animus plus violent means to achieve nefarious ends, is not a comfortable nor popular position for this author to take. This article does not defend such speech *qua* speech; it instead critiques the blanket suppression of incredibly broad speech categories by social media platforms, at the direct behest of Congress (with executive branch help). Blanket suppression of types of social media

speech that are either not intended to cause imminent illegality, nor are reasonably likely to cause imminent violence or law-breaking and fall into no other category of unprotected speech, risks stifling speech with political value that is necessary for a participatory democracy. Such restrictions also risk serving as conduits for large, democratically unaccountable entities to decide what type of speech the rest of us can hear. This despite the Supreme Court's jurisprudence calling for greater speech—even offensive, vile, and potentially harmful speech—not less, if our democratic experiment is to thrive.