
How Cheap Speech Underserves and Overheats Democracy

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INTRODUCTION

A quarter century ago, Eugene Volokh's article *Cheap Speech and What It Will Do* foretold a new regime of technologically driven "cheap speech" that would fundamentally change how people communicated with one another and navigated the information ecosystem.¹ Professor Volokh's vision was mainly descriptive, and his normative assessment of cheap speech sounded some circumspect notes of warning. Fundamentally, though, he painted an optimistic picture. In particular, he made the important claim that emerging technologies would democratize and diversify our society by giving many more speakers

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¹ See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806-07 (1995).

access to the tools of mass communication and audiences access to many more ideas.²

The Internet and social media have fulfilled Professor Volokh's democratic vision to a significant extent. Most people in the United States now have the capacity to make their ideas broadly available and have immediate access to more knowledge than our parents could have hoped to amass in a lifetime. We can communicate and collaborate with unprecedented ease, and we have many more choices about what information to absorb and evaluate. The U.S. Supreme Court, confronting Internet censorship two years after Professor Volokh's article, joined him in extolling "the vast democratic forums of the Internet."³ The Court has maintained that sunny view, recently describing the rise of online communication as "a revolution of historic proportions."⁴

In important ways, however, cheap speech has failed democracy. This Essay focuses on the less optimistic side of the cheap speech story.

Part I, after acknowledging cheap speech's partial democratic success, discusses two ways in which cheap speech has fallen well short of Professor Volokh's democratic vision.⁵ First, many people still can't enjoy cheap speech's benefits fully or at all. The "digital divide" has narrowed substantially over the past twenty-five years, but too many people continue to languish on its fallow side. The divide generates numerous inequalities. One that has recently gained dire prominence is many families' incapacity to deal with the "new normal" of distance education in the face of the coronavirus pandemic.⁶ Second, while cheap speech has reshaped the problem of underfunded speakers' inequitable access to audiences, that problem stubbornly persists. Even as communications infrastructure has become easily available to most people, access to audiences remains scarce because of finite human attention. Speakers with unearned advantages can outbid other speakers for access to audience attention as surely as they once could outbid other speakers for access to the old media infrastructure.

Part II discusses how cheap speech, to the extent it has succeeded in democratizing communication, creates new hazards for democracy.⁷ One such hazard is the decline of professional journalism. Cheap speech has democratized news production and distribution by giving everyone

² See *id.* at 1833.

³ *Reno v. ACLU*, 521 U.S. 844, 868-69 (1997).

⁴ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017).

⁵ See *infra* Part I.

⁶ See *infra* notes 40-46 and accompanying text.

⁷ See *infra* Part II.

the basic tools for reporting news. That democratization, however, has diminished professional journalists' space for promoting engaged democratic debate. A second hazard involves the vagaries of online communication for members of minority and marginal communities. The era of cheap speech has intensified a long-simmering battle between free speech libertarians and antidiscrimination egalitarians.⁸ By making speech cheaper for everyone, online communication has both fostered extremist attacks on vulnerable groups and increased the advantages of majorities over minorities in conditions of identity-polarized public discourse. Cheap speech thus makes the civil libertarian's tonic of answering destructive arguments with constructive responses even more volatile for vulnerable groups than it was when speech was more expensive.

Part III briefly considers the implications of cheap speech's democratic shortcomings and hazards for First Amendment law.⁹ Professor Volokh posited in 1995 that cheap speech would validate a conventionally libertarian justification for First Amendment rights that crisply distinguishes speech from action; firmly enforces a principle of content neutrality; and, most distinctively, limits First Amendment law to negative protection against government censorship.¹⁰ In my view, both sorts of cheap speech's democratic failings that this Essay explores — the ways in which cheap speech has fallen short of Professor Volokh's democratic vision and the new hazards its partial fulfillment of that vision has caused — undercut the libertarian justification for First Amendment rights.

I. CHEAP SPEECH'S DEMOCRATIC SHORTCOMINGS

Professor Volokh in *Cheap Speech and What It Will Do* argued that online communication would promote democracy and diversity by making tools for publishing and receiving a vast amount and variety of information easily available to a wide range of individuals.¹¹ He discussed the democratic value of cheap speech mainly as a matter of consumers' purchases of entertainment media.¹² That conception of

⁸ See *infra* notes 113–18 and accompanying text.

⁹ See *infra* Part III.

¹⁰ See Volokh, *supra* note 1, at 1843-50.

¹¹ See *id.* at 1807, 1833. Professor Volokh's claim for the democratizing effects of cheap speech appears primarily focused on the United States, and I will mirror that focus here. For my discussion of these issues in a transnational context, see Gregory P. Magarian, *The Internet and Social Media*, in *THE OXFORD HANDBOOK OF FREEDOM OF SPEECH* 350 (Adrienne Stone & Frederick Schauer eds., 2021).

¹² See Volokh, *supra* note 1, at 1808-33.

democratic value emphasizes individual autonomy and self-determination. It fits the ideal of *pluralist democracy*. An alternative (though not necessary contrary) conception of democratic value places greater emphasis on collective political and social structures. That conception, which locates the democratizing value of cheap speech in its advancement of collective self-government and its promotion of full and equal democratic citizenship, defines a familiar antipode to pluralist democracy, *republican democracy*.¹³ I'll use these pluralist and republican models in assessing the democratic consequences of cheap speech.

A. *Cheap Speech's Partial Democratic Success*

Professor Volokh in *Cheap Speech and What It Will Do* centrally predicted that cheap speech would create a communications landscape where “[m]any more speakers will be able to make their speech widely available . . . and listeners will have much more choice than they have now.”¹⁴ He further argued that those developments would advance democracy — pluralist democracy, on my reading. His prediction that cheap speech would increase information’s availability was substantially accurate, and his argument for the pluralist democratic benefits of that development has considerable force.

Cheap speech has dramatically increased the number and variety of speakers in public discourse. “A widely noted and characteristic feature of the digital age,” affirms Jack Balkin, “is the democratization of information production, and therefore the democratization of opportunities to speak and express one’s self.”¹⁵ A Google search on any given topic can return links to independent bloggers and social media posts alongside links to major news organizations. In theory, at least, ordinary individuals and powerful institutional speakers share the same capacity to publish and to participate in public debates. Within a decade of Professor Volokh’s article, more than fifty-three million American adults had used the Internet to create and post content, a number that represented 44% of all Internet users.¹⁶ Those numbers have only grown

¹³ For a thorough contrasting of pluralist and republican democracy in the context of media policy, see C. EDWIN BAKER, *MEDIA, MARKETS, AND DEMOCRACY* 135-43 (2002) [hereinafter *MARKETS*].

¹⁴ Volokh, *supra* note 1, at 1807.

¹⁵ Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 *HARV. L. REV.* 2296, 2304 (2014) [hereinafter *Speech Regulation*].

¹⁶ AMANDA LENHART, JOHN HERRIGAN & DEBORAH FALLOWS, PEW INTERNET & AM. LIFE PROJECT, *CONTENT CREATION ONLINE: 44% OF U.S. INTERNET USERS HAVE CONTRIBUTED THEIR THOUGHTS AND THEIR FILES TO THE ONLINE WORLD 2* (2004),

as networked speech has more fully permeated our society¹⁷ and as social media platforms have given ordinary people new ways to create and share content.¹⁸ In a 2014 Pew Research study, nearly three quarters of U.S. Internet users thought digital technology had improved their ability to share their ideas and creations with others.¹⁹ Online communication lets speakers combine, recontextualize, and comment on information in new ways, making public discourse more interesting as well as more voluminous.²⁰

From the perspective of audiences, the decreased cost of online speech has vastly enhanced the amount and variety of information within easy reach. As Rick Hasen acknowledges, “cheap speech has increased convenience, dramatically lowered the costs of obtaining information, and spurred the creation and consumption of content from radically diverse sources.”²¹ People in the United States place great value on the increased availability of information. The 2014 Pew study found that 87% of U.S. Internet users thought online communication had made them better informed in general, with about three quarters feeling better informed about national and international news in particular.²² More than three quarters of respondents thought the Internet had made average Americans and students better informed. Respondents stated by a ratio of nearly three to one that, rather than feeling overloaded, they felt glad to have so much information.²³ This degree of audience

https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/news/press_releases/society_and_the_internet/pewinternetcontent022904pdf.pdf [https://perma.cc/VQW2-DEM4].

¹⁷ About nine in ten Americans today use the Internet. *Internet/Broadband Fact Sheet*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/> [https://perma.cc/SYM9-E8FX].

¹⁸ See, e.g., *YouTube by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE, <https://www.omnicoreagency.com/youtube-statistics/> (last updated Jan. 6, 2021) [https://perma.cc/GZ68-6349] (reporting that, as of 2019, fifty million users had shared content on YouTube).

¹⁹ See *Americans Feel Better Informed Thanks to the Internet*, PEW RES. CTR. (Dec. 8, 2014), <https://www.pewresearch.org/internet/2014/12/08/americans-feel-better-informed-thanks-to-the-internet/> [https://perma.cc/95JY-XCCR].

²⁰ See generally Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (arguing that digital media requires technological architecture, in addition to legal doctrine, to safeguard free speech values).

²¹ Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 201 (2017).

²² See *Americans Feel Better Informed Thanks to the Internet*, PEW RES. CTR., *supra* note 19.

²³ See *id.*

satisfaction directly reflects new modes of delivering information to consumers that Professor Volokh predicted, including e-books,²⁴ music streaming,²⁵ and video on demand.²⁶

Speakers' enhanced opportunities to publish and audiences' greater ability to receive information promote pluralist democracy, which centrally aspires to broadly dispersed individual autonomy.²⁷ When more speakers enjoy opportunities to participate in public discourse and more information becomes available to audiences, society grows more democratic on pluralist terms. The benefits aren't merely quantitative. By dispersing information sources, cheap speech significantly decentralizes public discourse. Decentralization gives people much greater control over what they say and what they hear than when speech was more expensive. Professor Volokh showed remarkable prescience in predicting these changes and recognizing their democratic significance.

Even so, cheap speech has fallen far short of its full pluralist democratic potential. Important features of online communications technology have deprived many people of cheap speech's benefits and have perpetuated the sorts of disparities in speakers' access to audiences that vexed pre-Internet public discourse.

B. *The Persistent Digital Divide*

Many people in the United States still cannot enjoy the benefits of cheap speech. Professor Volokh's article acknowledged inequalities in access to the means of cheap speech, what we have come to call "the digital divide," although he thought cheap speech would substantially diminish those inequalities.²⁸ The digital divide is really a cascade of divides, starting with some people's lack of basic computer hardware and encompassing further deficits in technology, training, and time.²⁹ The divide has narrowed significantly in the past twenty-five years, but it still limits the democratizing value of cheap speech. In particular, the divide tracks demographic fault lines of race, class, and geography.

²⁴ See Volokh, *supra* note 1, at 1823-26.

²⁵ See *id.* at 1808-14.

²⁶ See *id.* at 1831-33.

²⁷ See BAKER, MARKETS, *supra* note 13, at 135-38 (positing essential elements of pluralist democracy).

²⁸ See Volokh, *supra* note 1, at 1838-41 (suggesting ways in which cheap speech would improve the access of "poor consumers" to various media).

²⁹ See generally KAREN MOSSBERGER, CAROLINE J. TOLBERT & MARY STANSBURY, VIRTUAL INEQUALITY: BEYOND THE DIGITAL DIVIDE (2003).

Today a person's or household's ability to benefit from cheap speech starts with home Internet access. People without home access can utilize cheap speech at libraries, schools, or workplaces, but those venues entail constraints and inconveniences that drive up the cost of speech. In 2000, only 35% of Americans reported accessing the Internet at home.³⁰ By November 2019, home access more than doubled to 73%. Home access, however, still varies substantially based on race, class, and geography. In 2019, only 67% of African-American and Hispanic households reported accessing the Internet at home, compared to 76% of white households. Likewise, only 57% of families with annual incomes under \$25,000 reported home Internet access, compared to 79% of families with annual incomes between \$75,000–99,999. Only 68% of families living in rural communities reported home Internet access, compared to 74% of families in urban areas.

After home Internet access, owning a smartphone provides the most useful vehicle for cheap speech. More people have smartphones than home access, but significant gaps remain. Overall, 81% of adults in 2019 owned smartphones.³¹ Much of the deficit owes to age: 96% of eighteen to twenty-nine-year-olds own smartphones, compared to only 53% of people sixty-five and older. Presumably smartphones will propagate even further as the generations that grew up without them pass on. In addition, smartphone ownership shows only minor racial distinctions — 82% of white adults own smartphones, compared to 80% of African Americans and 79% of Hispanics. On the other hand, smartphone ownership varies greatly based on class, geography, and education. Almost all adults with annual incomes over \$75,000 — 95% — own smartphones, but the number drops to 71% for adults with incomes under \$30,000. Of urban and suburban dwellers 83% own smartphones, but only 71% of rural dwellers do. Of college graduates 91% own smartphones, but only 66% of non-high school graduates do.

³⁰ The statistics in this paragraph come from *Digital Nation Data Explorer: Internet Use at Home, Race or Ethnicity*, NAT'L TELECOMM. & INFO. ADMIN. (June 10, 2020), <https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=homeInternetUser&demo=race&pc=prop&disp=chart> [<https://perma.cc/CT6Y-HPQK>]; *Digital Nation Data Explorer: Internet Use at Home, Family Income*, NAT'L TELECOMM. & INFO. ADMIN. (June 10, 2020), <https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=homeInternetUser&demo=income&pc=prop&disp=chart> [<https://perma.cc/F75F-EKGT>]; *Digital Nation Data Explorer: Internet Use at Home, Population Density*, NAT'L TELECOMM. & INFO. ADMIN. (June 10, 2020), <https://www.ntia.doc.gov/data/digital-nation-data-explorer#sel=homeInternetUser&demo=metro&pc=prop&disp=chart> [<https://perma.cc/PB6T-EN7J>].

³¹ The statistics in this paragraph come from *Mobile Fact Sheet*, PEW RES. CTR. (June 12, 2019), <https://www.pewresearch.org/internet/fact-sheet/mobile/> [<https://perma.cc/TFL8-DEZS>].

Disparities in home Internet access and smartphone ownership matter deeply, from the standpoint of pluralist democracy, because cheap speech has largely become a necessity rather than an option. As the Supreme Court recently emphasized in *Packingham v. North Carolina*,³² “the most important place[] (in a spatial sense) for the exchange of views, today . . . is cyberspace.”³³ That premise led the Court to unanimously restrain states from denying even convicted sex offenders the right to use online communication.³⁴ When 73% or 81% of consumers can access cheap speech infrastructure, providers of goods and services will gravitate to cheap speech infrastructure. That development puts the 27% or 19% of people without access to the infrastructure at a steep disadvantage in connecting with many commercial and government services. As for the racial, class, and other status components of the digital divide, democracy can’t be substantially pluralist if particular segments of the political community can’t fully enjoy democracy’s benefits.

Bare access to the infrastructure of cheap speech may not bring meaningful access to cheap speech’s benefits. Personal banking provides a useful illustration. Brick-and-mortar banking has declined in ways that most directly harm the same people who lack the tools of cheap speech. “Banks no longer serve low-profit customers and communities [W]aves of mergers and consolidations have created banking deserts across the country, where the only ATM in town can charge up to \$7 per transaction”³⁵ The growth of online banking has driven that decline, on the theory that people don’t need brick-and-mortar banks when they can easily bank online. Mobile banking, though, is only useful to the extent one has both Internet access and up-to-date hardware that can handle the newest versions of sites and apps.³⁶ Smartphones provide an imperfect substitute for home Internet access because of frequent updates and smartphone providers’ pay-as-you-go

³² 137 S. Ct. 1730 (2017).

³³ *Id.* at 1735.

³⁴ *See id.* at 1738 (sustaining a First Amendment challenge to a broadly framed ban on convicted sex offenders’ access to the Internet and social media platforms).

³⁵ Mehra Baradaran, *Facebook’s Cryptocurrency Won’t Help the Poor Access Banks. Here’s What Would.*, WASH. POST (Oct. 29, 2019, 3:00 AM PDT), <https://www.washingtonpost.com/outlook/2019/10/29/facebooks-cryptocurrency-wont-help-poor-access-banks-heres-what-would/> [<https://perma.cc/98VS-6GVC>].

³⁶ *See* Jennifer Tescher, *COVID-19 Drives Digital Adoption, But Still Leaves Millions Behind*, FORBES (Apr. 30, 2020, 2:10 PM EDT), <https://www.forbes.com/sites/jenniferteschert/2020/04/30/covid-19-drives-digital-adoption-but-still-leaves-millions-behind/#451ec9d51469> [<https://perma.cc/E8MT-DJB9>].

cost structures, which disadvantage lower-income users.³⁷ Thus, the digital divide renders banking via cheap speech impractical and often flatly inaccessible to poorer, racial minority, and rural communities.

The digital divide similarly limits cheap speech's capacity to democratize government services. Offices at all levels of government have paralleled private businesses in orienting themselves more and more toward the mechanisms of cheap speech.³⁸ Easy Internet access facilitates, and lack of access complicates, everything from participation in elections to awareness of new regulations to attendance at public meetings. Even more than consumer services like banking, government services require degrees of privacy, convenience, and functionality that only home Internet access can ensure. Access to justice provides one important example. In navigating judicial systems, people of color and lower-income people, already disadvantaged within those systems, often must bear the privacy risks and practical limitations of school or library computers.³⁹ While advances in communications technologies could enhance access to justice, the digital divide limits the population those enhancements will help.

Democratic theories, including pluralist democracy, generally extol universal education, because education enables democratic participation and enjoyment of democracy's benefits. Right now the digital divide is ravaging our education system. In spring 2020, the coronavirus pandemic forced schools across the United States to shut down most of their physical operations and quickly move teaching to online platforms. For the same groups who have struggled with the more gradual digital transitions of banks and courts, the sudden lurch

³⁷ See *id.*

³⁸ See BJARNE CORYDON, VIDHYA GANESAN & MARTIN LUNDQVIST, MCKINSEY CTR. FOR GOV'T, *DIGITAL BY DEFAULT: A GUIDE TO TRANSFORMING GOVERNMENT* 3 (2016), <https://www.mckinsey.com/~media/mckinsey/industries/public%20and%20social%20sector/our%20insights/transforming%20government%20through%20digitization/digital-by-default-a-guide-to-transforming-government-final.pdf> [https://perma.cc/VZH9-F3V8] (“[G]overnments have begun borrowing approaches from digital business startups, established companies that are digitizing, and other governments that are farther along in their digital transformations.”); Dan Chenok, *20 Years of Government Going Digital*, FED. COMPUTER WEEK (Oct. 23, 2018), <https://fcw.com/articles/2018/10/23/comment-chenok-gov-going-digital.aspx> [https://perma.cc/KL6Q-ME9S] (“[D]igital transformation has disrupted how government operates — how agencies do work, tackle problems and meet expectations.”).

³⁹ See Mark Lloyd, *The Digital Divide and Equal Access to Justice*, 24 HASTINGS COMM. & ENT L.J. 505, 525 (2002) (discussing limitations of public computers for accessing government services).

to remote education brought widespread chaos and exclusion.⁴⁰ One in five parents worried that their children would “very or somewhat likely” be unable to complete their school work because they lacked home computers and Internet access.⁴¹ This digital “homework gap” was most pronounced in Black, Hispanic, and low-income households.⁴² Within weeks of the shift to online schooling, “education leaders across the country [had already] concluded that millions of children’s learning [would] be severely stunted.”⁴³ In a stark illustration of socio-economic disparity, 41% of lower-income parents reported being “very concerned about their children falling behind in school as a result of . . . disruptions caused by the coronavirus outbreak,” while only 21% of middle-income parents and 17% of upper-income parents felt the same level of concern.⁴⁴ The pandemic education crisis underscores how the digital divide reinforces poor families’ other social disadvantages, including sparse health care, inadequate housing, and general government neglect.⁴⁵ The problem extends to higher education. Many students of color and low-income students are dropping out of college because, among other pandemic-related problems, they lack adequate technology to do their course work.⁴⁶

⁴⁰ See Emily A. Vogels, Andrew Perrin, Lee Rainie & Monica Anderson, *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RES. CTR. (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/> [https://perma.cc/22QL-3XBN].

⁴¹ *Id.*

⁴² See Brooke Auxier & Monica Anderson, *As Schools Close Due to the Coronavirus, Some U.S. Students Face a Digital ‘Homework Gap,’* PEW RES. CTR. (Mar. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/03/16/as-schools-close-due-to-the-coronavirus-some-u-s-students-face-a-digital-homework-gap/> [https://perma.cc/79FU-CXKM].

⁴³ Laura Meckler, Valerie Strauss & Joe Heim, *Millions of Public School Students Will Suffer from School Closures, Education Leaders Have Concluded*, WASH. POST (Apr. 13, 2020, 3:00 AM PDT), https://www.washingtonpost.com/local/education/online-learning-summer-school-coronavirus/2020/04/11/de11c278-7adc-11ea-a130-df573469f094_story.html [https://perma.cc/A3T3-6ZDS].

⁴⁴ See Juliana Menasce Horowitz, *Lower-Income Parents Most Concerned About Their Children Falling Behind Amid COVID-19 School Closures*, PEW RES. CTR. (Apr. 15, 2020), <https://www.pewresearch.org/fact-tank/2020/04/15/lower-income-parents-most-concerned-about-their-children-falling-behind-amid-covid-19-school-closures/> [https://perma.cc/9KFJ-H2ST].

⁴⁵ See Mary Retta, *Online Learning Isn’t Even Remotely Equal*, NATION (July 1, 2020), <https://www.thenation.com/article/society/remote-learning-unequal/> [https://perma.cc/RP7A-3PR9].

⁴⁶ See Heather Long & Danielle Douglas-Gabriel, *The Latest Crisis: Low-Income Students Are Dropping out of College This Fall in Alarming Numbers*, WASH. POST (Sept.

The digital divide continues to constrain millions of people, disproportionately members of disadvantaged communities. At the same time, the infrastructure of cheap speech has spread widely enough to make online communication essential, exacerbating the damage to those left behind. The digital divide defines an important, stubborn limit on cheap speech's benefits for pluralist democracy.

C. *The Mutation of Access Disparities*

What pitfalls lie beyond the digital divide? If our society can put the instruments of cheap speech in everyone's hands, will we achieve a truly democratic communications regime? Egalitarian critics of First Amendment law in the pre-Internet era looked beyond the mere capacity to speak. They identified the high cost of reaching a mass audience as a serious free speech problem, and they called for adjustments to First Amendment doctrine that would let more speakers benefit from mass media infrastructure.⁴⁷ Jerome Barron made the strongest form of this argument, advocating a qualified First Amendment right of access to mass media.⁴⁸

The Supreme Court in the late 1960s recognized a right of expressive access to private real property generally open to the public.⁴⁹ In the media realm, however, the Court never went as far as Professor Barron urged. Instead, the Court at most rejected First Amendment challenges to certain legislatively and administratively drawn access rights. Most notably, in *Red Lion Broadcasting Company v. FCC*,⁵⁰ the Court upheld the part of the federal broadcast fairness doctrine that required broadcasters to give equal time to opposing viewpoints on issues of public concern. Although the Court in *Red Lion* found no affirmative

16, 2020, 8:24 AM PDT), <https://www.washingtonpost.com/business/2020/09/16/college-enrollment-down/> [https://perma.cc/X365-FHJ8].

⁴⁷ See generally OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996); OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

⁴⁸ See generally JEROME A. BARRON, *FREEDOM OF THE PRESS FOR WHOM? THE RIGHT OF ACCESS TO MASS MEDIA* (1973); Jerome A. Barron, *Access to the Press — A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967) (arguing that media companies should have the affirmative duty of promoting access to outside viewpoints); Jerome A. Barron, *An Emerging First Amendment Right of Access to the Media?*, 37 GEO. WASH. L. REV. 487 (1968) (discussing the importance of a right of access to media).

⁴⁹ See *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 319-20 (1968) (finding a First Amendment right of access to a privately owned shopping center), *abrogated by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

⁵⁰ *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 370 (1969).

First Amendment right of access, it ascribed free speech value to the fairness doctrine.⁵¹

Red Lion posited a distinctive technological barrier that broadcasting posed for public access: scarcity of infrastructure. The broadcast spectrum only accommodates so many frequencies. That scarcity justified government regulation of broadcasting, starting with licensure of broadcasters and including the fairness doctrine.⁵² As communications technologies evolved, new media increasingly seemed to transcend the scarcity rationale and with it the *Red Lion* doctrine.⁵³ In *Turner Broadcasting System, Inc. v. FCC*,⁵⁴ the Court ostensibly refused to extend *Red Lion* to cable television because cable infrastructure is more plentiful than broadcast frequencies.⁵⁵ However, the *Turner* Court rejected a First Amendment challenge to a federal content mandate for cable systems on the ground that cable technology gave operators “bottleneck, or gatekeeper, control” over audiences’ access to programming.⁵⁶ That reasoning effectively adapted the *Red Lion* scarcity rationale to cable.

The Internet might appear to obviate the scarcity problem, and thus the deeper problem of mass media access, once and for all. Certainly the Internet eliminates the specific technological limitation of broadcast spectrum scarcity. The Internet might even appear to solve the bottleneck-gatekeeper problem of *Turner*. The Internet, unlike cable, is disaggregated, a many-to-many rather than one-to-many system of communication. With no central physical infrastructure for anyone to administer, the Internet creates the tantalizing possibility of

⁵¹ See *id.* at 390 (emphasizing “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences”). The Court subsequently refused to extend the *Red Lion* holding to a state’s mandate of access to newspapers. See *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974). The Court further refused to find an affirmative First Amendment right for speakers to be able to pay market rates for access to broadcast media. See *CBS, Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 123 (1973). In contrast, the Justices upheld a legislatively created right to pay for access. See *CBS, Inc. v. FCC*, 453 U.S. 367 (1981). The Court similarly deferred to legislative access mandates for real property. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76-77 (1980) (upholding a state constitutional amendment that protected free speech in private shopping centers).

⁵² See *Red Lion Broad. Co.*, 395 U.S. at 387-89.

⁵³ See generally Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245 (2003) (critiquing constitutional arguments for extending the *Red Lion* doctrine).

⁵⁴ 512 U.S. 622, 639 (1994).

⁵⁵ See *id.* at 637-40.

⁵⁶ *Id.* at 656.

communication without control.⁵⁷ The lived experience of online communication has realized this possibility to some extent. No online authority or institution exercises the power that broadcast and cable licensees inherently possessed to prevent other speakers from communicating with mass audiences. As a result, a larger number and broader variety of speakers can and do reach mass audiences than in the pre-Internet era.

Resource scarcity, however, tends to recur across communications technologies. Having conquered the particular access problems confronted by *Red Lion* and *Turner*, the Internet presents those problems' evolutionary descendant. The scarce resource of the Internet Age is audience attention.⁵⁸ The Internet has multiplied the amount and variety of information that people can reach, but no one can grasp more than a tiny fraction of that bounty. Of course audience attention is a different sort of resource than the broadcast spectrum or control of cable systems. In theory, attention is freely available to be earned and given. Professor Volokh imagined a version of cheap speech in which speakers and audiences could and would find one another without notable interference. He envisioned a disaggregated system in which robust competition among content providers and an enhanced role for professional critics would satisfy consumer preferences and prevent information overload.⁵⁹

In practice, though, attention shakes out much like earlier eras' scarce communication resources. The Internet has perpetuated access disparities from its inception,⁶⁰ and those disparities persist today. Attention, like the broadcast spectrum and control of cable systems, has become commodified. Professor Volokh's important prediction that cheap speech would make communication intermediaries less powerful, or at least more competitive, has proved mistaken.⁶¹ In fact, intermediaries have grown more powerful and less competitive. A new class of infrastructural speech intermediaries — most prominently

⁵⁷ See Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 DAEDALUS J. AM. ACAD. ARTS & SCI. 18, 19 (2016) (describing features of the early Internet that promoted decentralization of control over online communications).

⁵⁸ See generally Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389 (2004); Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547 (2018).

⁵⁹ See Volokh, *supra* note 1, at 1815-18 (discussing music); *id.* at 1829-31 (discussing print media).

⁶⁰ See Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373, 1384-88 (2007) (discussing reasons for access disparities in the Internet's early years).

⁶¹ See Volokh, *supra* note 1, at 1807, 1834-38.

Internet service providers (“ISPs”), search engines, and social media platforms — has grown increasingly entrenched.⁶² Those intermediaries dominate today’s information landscape. They epitomize the prevailing ethos in First Amendment law that I have called “managed speech,” through which courts empower or permit powerful government and private institutions to set the terms of our public discourse.⁶³

The commodification of attention follows directly from a communications regime built to flood the world with information. Online audiences don’t simply form autonomous preferences and then proactively find the best content to satisfy those preferences. Rather, in a process familiar from the pre-Internet age, intermediaries and large-scale content providers buy and develop the best methods for capturing audiences’ attention and shaping their preferences. In the cheap speech version of that process, online intermediaries use sophisticated, efficient algorithms to monetize audience attention, selling off advertising views and users’ personal information.⁶⁴ Yes, the cheap speech era has generated rags-to-riches anecdotes of clever YouTube entrepreneurs and charismatic Twitter influencers.⁶⁵ Even so, money can buy or beat cleverness and charisma. Effective mass communication entails not just the ability to publish but also the opportunity to reach a large audience. That sort of opportunity remains expensive in the Internet Age. Moreover, like the digital divide, disadvantages in access to audiences continue to track long-standing disparities between historically privileged and disadvantaged identity groups.⁶⁶

Prescribing a workable plan for broadening access to online audiences lies far beyond the scope of this Essay. Net Neutrality defines the floor

⁶² I discuss online speech intermediaries more extensively in Gregory P. Magarian, *Forward into the Past: Speech Intermediaries in the Television and Internet Ages*, 71 OKLA. L. REV. 237 (2018) [hereinafter *Forward into the Past*].

⁶³ See generally GREGORY P. MAGARIAN, *MANAGED SPEECH: THE ROBERTS COURT’S FIRST AMENDMENT* (2017).

⁶⁴ See generally TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* (2016).

⁶⁵ See *What Is an Influencer? The Fundamentals of Social Fame*, MEDIUM (June 28, 2019), <https://medium.com/socialbook/what-is-an-influencer-the-fundamentals-of-social-fame-7daf520f0c1d> [<https://perma.cc/W5A3-V7SU>] (describing the rise of social influencing as a feature of online marketing).

⁶⁶ See, e.g., Clark Merrefield, *Race and the Newsroom: 7 Studies to Know*, JOURNALIST’S RESOURCE (July 20, 2020), <https://journalistsresource.org/studies/society/news-media/newsroom-diversity-7-studies/> [<https://perma.cc/35DT-GRU8>] (summarizing recent studies on the underrepresentation of women and people of color in the U.S. news media).

for such a project.⁶⁷ Other measures, likely focused on further decentralization and mitigation of online intermediaries' power, would have to address the myriad access barriers before and beyond ISPs' discrimination in delivering content.⁶⁸ Recent antitrust actions filed by the federal and multiple state governments against Facebook and Google may help the cause.⁶⁹ My point here is mainly descriptive. If pluralist democracy requires that many and varied speakers enjoy not just the bare capacity to publish but also meaningful opportunities to access large audiences, then cheap speech underserves pluralist democracy.

II. CHEAP SPEECH'S DEMOCRATIC HAZARDS

A familiar antipode to pluralist democracy is republican democracy. A republican conception of democracy requires robust opportunities for people to interact communally and through institutions of collective self-government. In contrast to the pluralist emphasis on individual autonomy, republican democracy emphasizes full and equal membership in the political community.⁷⁰ Robert McChesney evokes a republican democratic vision of mass communication when he argues that "to be a force for raising the tide of democracy," the Internet "must help arrest the forces that promote inequality, monopoly, hypercommercialism, corruption, depoliticization, and stagnation."⁷¹

⁶⁷ See generally DAWN C. NUNZIATO, *VIRTUAL FREEDOM: NET NEUTRALITY AND FREE SPEECH IN THE INTERNET AGE* (2009); Moran Yemini, *Mandated Network Neutrality and the First Amendment: Lessons from Turner and a New Approach*, 13 VA. J.L. & TECH. 1 (2008).

⁶⁸ See, e.g., Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1117-18 (2007) (recommending legal constraints on search engines' power to interfere with Internet speakers' and audiences' posited right to unimpeded communication).

⁶⁹ See Cecilia Kang & Mike Isaac, *U.S. and States Say Facebook Illegally Crushed Competition*, N.Y. TIMES (Dec. 9, 2020), <https://www.nytimes.com/2020/12/09/technology/facebook-antitrust-monopoly.html> [<https://perma.cc/DB84-BFKE>]; David McCabe & Daisuke Wakabayashi, *10 States Accuse Google of Abusing Monopoly in Online Ads*, N.Y. TIMES (Dec. 16, 2020), <https://www.nytimes.com/2020/12/16/technology/google-monopoly-antitrust.html> [<https://perma.cc/9Q2R-UKGJ>].

⁷⁰ See BAKER, *MARKETS*, *supra* note 13, at 138-43 (positing essential elements of republican democracy).

⁷¹ ROBERT W. MCCHESENEY, *DIGITAL DISCONNECT: HOW CAPITALISM IS TURNING THE INTERNET AGAINST DEMOCRACY* 62 (2013).

Pluralist and republican democracy in practice can fit together as complementary aspects of a fulsome democratic society.⁷² Even so, the two models sometimes conflict. Cheap speech has created serious problems for republican democracy. My goal here is not to catalog every social and political harm of cheap speech.⁷³ Rather, I mean to highlight ways in which cheap speech's degree of pluralist democratic success, its empowerment of more speakers to make more information available to mass audiences,⁷⁴ overheats democracy by creating republican democratic hazards.

A. *The Decline of Professional Journalism*

Much political and legal theory treats professional journalism as a pillar of democracy, "one of the very agencies the Framers of our Constitution thoughtfully and deliberately selected to improve our society and keep it free."⁷⁵ Professor Volokh in 1995 predicted a communications landscape in which established news outlets would largely survive, but with important changes in distribution strategies and business models.⁷⁶ That prediction has proved broadly accurate. Most of the leading legacy media brands from 1995 — CNN, *The New York Times*, etc. — survive today both in their "old media" formats and

⁷² See, e.g., BAKER, MARKETS, *supra* note 13, at 143-53 (synthesizing aspects of pluralist and republican democratic models into a holistic vision of "complex democracy").

⁷³ One democratically important consequence of cheap speech that this Essay leaves aside is governments' and private actors' enhanced capacity to perform surveillance and gather private personal information. See, e.g., Carol Cadwalladr & Emma Graham-Harrison, *Revealed: 50 Million Facebook Profiles Harvested for Cambridge Analytica in Major Data Breach*, GUARDIAN (Mar. 17, 2018, 6:03 PM EDT), <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election> [<https://perma.cc/3GRF-F2E5>]; Glenn Greenwald & Ewan MacAskill, *NSA Prism Program Taps in to User Data of Apple, Google and Others*, GUARDIAN (June 7, 2013, 3:23 PM EDT), <https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data> [<https://perma.cc/5YAN-6TB6>].

⁷⁴ See *supra* Part I.A.

⁷⁵ *Mills v. Alabama*, 384 U.S. 214, 219 (1966). Professor Volokh has notably dissented from this view as a historical matter. See Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 462-63 (2012) (arguing that the First Amendment's "freedom of the press" refers to a means of communication, not to news media). *But see* Sonja R. West, *The "Press," Then and Now*, 77 OHIO ST. L.J. 49 (2016) (contending that the Press Clause mandates distinctive First Amendment protection for news media).

⁷⁶ See Volokh, *supra* note 1, at 1828-29 (discussing tailored publications and electronic distribution); *id.* at 1841-43 (discussing shifts in advertising methods and strategies).

online. Even so, the professional news media has declined markedly in the age of cheap speech.⁷⁷ Republican democracy requires consistent sources of broadly reliable information about matters of public concern. The same attributes that help cheap speech to promote pluralist democracy have accelerated the decline in professional journalism that degrades republican democracy.

In the media landscape of the late 20th century, the Television Age, technological limits largely constrained the forms and modes of information exchange. However, the institutional news media functioned as speech intermediaries that exercised substantial control over content.⁷⁸ In deciding what news to convey and how to present it, these media gatekeepers had to balance the demands of the public, advertisers, and (mainly as to broadcasting) government regulators. The journalistic profession developed strong norms of ethical behavior, professionalism, and objectivity to maintain credibility with those disparate interest groups.⁷⁹ The need to satisfy diverse, broadly grounded constituencies while also upholding professional standards encouraged the news media to report information in ways that would sustain societal equilibrium.⁸⁰

Intermediaries in the Internet Age influence public discourse in a converse manner from the Television Age. The major intermediaries of cheap speech — ISPs, search engines, and social media platforms — generally don't dictate the content of expression. However, these new intermediaries have substantially shifted the forms and modes of information exchange.⁸¹ Intermediaries' decreased control of news reporting's content has positive value for democracy, especially on a pluralist conception. Ordinary people can use the tools of cheap speech to observe, record, and report important events, resulting in more

⁷⁷ See generally Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 *LOY. L. REV.* 499 (2018).

⁷⁸ See Magarian, *Forward into the Past*, *supra* note 62, at 239-50 (discussing the functions of Television Age speech intermediaries).

⁷⁹ See Blake D. Morant, *Democracy, Choice, and the Importance of Voice in Contemporary Media*, 53 *DEPAUL L. REV.* 943, 951 n.23 (2004) (compiling journalistic codes of ethics).

⁸⁰ See Erin C. Carroll, *Promoting Journalism as Method*, 12 *DREXEL L. REV.* 691, 698 (2020) (discussing the importance of the institutional press in the 20th century for establishing broadly accepted boundaries of public debate).

⁸¹ See Magarian, *Forward into the Past*, *supra* note 62, at 250-60 (discussing the functions of Internet Age speech intermediaries).

sources' delivering more varied information to the public.⁸² Citizen journalism has, to take one crucial example, strongly influenced the national debate over police violence against people of color. The mass uprising sparked in 2020 by Minneapolis police officers' murder of George Floyd only happened because a witness to the crime made a video recording that went viral on social media.⁸³ None of that could have happened in the Television Age. But even as cheap speech enhances some democratically beneficial aspects of news production and distribution, it diminishes others.

In particular, the cheapening of speech has battered the professional news outlets that systematically gather and disseminate news in order to inform the public and facilitate republican democracy.⁸⁴ Professor Volokh's prediction that "publications will be easier to start and easier to keep profitable"⁸⁵ has proved overly optimistic. Concentration of media ownership, already a problem in the Television Age,⁸⁶ has accelerated in the cheap speech era. By 2016 just five companies controlled almost 40% of the nation's full-power local television stations.⁸⁷ Consolidation has nationalized and homogenized local stations' news reporting.⁸⁸ Meanwhile, the medium that has most persistently promoted professional journalism, the daily newspaper, keeps fading away. Combined print and digital newspaper circulation fell almost 10% between 2017 and 2018, plummeting to its lowest recorded level.⁸⁹ Between 2008 and 2018 newspapers lost 62% of their

⁸² See, e.g., Justin F. Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016) (discussing the importance of digital video recording as a means of reporting news and advancing democracy).

⁸³ See Lauren Aratani, *George Floyd Killing: What Sparked the Protests – and What Has Been the Response?*, GUARDIAN (May 29, 2020, 1:57 EDT), <https://www.theguardian.com/us-news/2020/may/29/george-floyd-killing-protests-police-brutality> [<https://perma.cc/5JYW-29ZD>].

⁸⁴ See Carroll, *supra* note 80, at 711-14 (discussing characteristic values and practices of professional journalism).

⁸⁵ Volokh, *supra* note 1, at 1826.

⁸⁶ See generally BEN H. BAGDIKIAN, *THE NEW MEDIA MONOPOLY* (2004); C. EDWIN BAKER, *MEDIA CONCENTRATION AND DEMOCRACY: WHY OWNERSHIP MATTERS* (2006).

⁸⁷ See Katerina Eva Matsa, *Buying Spree Brings More Local TV Stations to Fewer Big Companies*, PEW RES. CTR. (May 11, 2017), <https://www.pewresearch.org/fact-tank/2017/05/11/buying-sprees-brings-more-local-tv-stations-to-fewer-big-companies/> [<https://perma.cc/Y4AC-5G6R>].

⁸⁸ See Gregory J. Martin & Joshua McCrain, *Local News and National Politics*, 113 AM. POL. SCI. REV. 372, 382 (2019).

⁸⁹ *Newspapers Fact Sheet*, PEW RES. CTR. (July 9, 2019), <https://www.journalism.org/fact-sheet/newspapers/> [<https://perma.cc/6KHZ-QWS3>]. Pew notes that measuring

advertising revenue.⁹⁰ Most troubling from the standpoint of republican democracy, that same decade wiped out nearly half of newsroom reporting and editorial jobs.⁹¹ More people now get news from social media platforms than from newspapers.⁹² Cheap speech, notwithstanding the democratic benefits of decentralization, exacerbates the collective action problem that has long challenged the news media: Individuals don't want to pay for professional journalism that benefits the whole political community.⁹³

One consequence of our fractured media landscape is the increasing inability of people and groups with different worldviews and values to agree about factual premises of political debates.⁹⁴ Television Age intermediaries tended to promote shared understandings. Now, in contrast, "[t]here is no Walter Cronkite for all Americans to trust anymore."⁹⁵ Professor Volokh foresaw cheap speech's erosion of shared understandings,⁹⁶ but his enthusiasm for consumer autonomy⁹⁷ may have caused him to underestimate the potential consequences. Certainly pluralist democracy benefits from individuals' and factions' greater capacities to make their views known to through cheap speech,

digital circulation presents challenges that may make the overall picture slightly rosier than those numbers suggest. *See id.*

⁹⁰ Elizabeth Grieco, *Fast Facts About the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy*, PEW RES. CTR. (Feb. 14, 2020), <https://www.pewresearch.org/fact-tank/2020/02/14/fast-facts-about-the-newspaper-industrys-financial-struggles/> [<https://perma.cc/8E83-DD44>].

⁹¹ *See id.*

⁹² Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RES. CTR. (Dec. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/> [<https://perma.cc/SY7H-HZ6K>]. Social media has also become the most important portal to newspapers' and other news sources' content. *See* Alexis C. Madrigal, *What Facebook Did to American Democracy*, ATLANTIC (Oct. 12, 2017), <https://www.theatlantic.com/technology/archive/2017/10/what-facebook-did/542502/> [<https://perma.cc/QU7C-9VXV>].

⁹³ *See* BAKER, MARKETS, *supra* note 13, at 41-43 (discussing externalities in markets for media goods).

⁹⁴ *See* Hasen, *supra* note 21, at 214-15 (discussing social media's tendency to polarize political discussion to an extent that harms democracy); John Keegan, *Blue Feed, Red Feed*, WALL ST. J. (May 18, 2016, 8:00 AM ET), <https://graphics.wsj.com/blue-feed-red-feed/> [<https://perma.cc/4WP9-JWKT>] (showing differences in liberal and conservative Facebook feeds).

⁹⁵ Hasen, *supra* note 21, at 204.

⁹⁶ *See* Volokh, *supra* note 1, at 1834-36, 1835 n.92 (discussing the possibility that cheap speech might fray social cohesion and encourage closed-mindedness).

⁹⁷ *See id.* at 1828 ("What people want are newspapers and magazines with stories about the things that interest *them* (just as they want radio with the songs they like)."). This formulation also ignores media's important role in shaping people's interests and preferences. *See supra* note 64 and accompanying text.

and republican democracy benefits from broader, more contentious political discussion. On the other hand, cheap speech impedes republican democracy by encouraging people to sort themselves into self-affirming “filter bubbles.”⁹⁸ Starkly divergent factual understandings severely complicate republican democracy’s ideal of collective self-government, as the 2016 and 2020 U.S. national elections garishly illustrate.⁹⁹ Relatedly, and again contrary to Professor Volokh’s sanguine take,¹⁰⁰ cheap speech’s devolution of professional journalistic standards has increased the volume of false and misleading information that reaches the public.¹⁰¹

The decline of professional journalism doesn’t only damage republican democracy by eroding social and political consensus. It also stifles social and political dynamism. The republican democratic ideal of collective self-government depends on energetic processes, not harmonious outcomes. News media in the Television Age arguably pushed our society toward an artificial, preemptive degree of consensus by foregrounding only a narrow range of viewpoints.¹⁰² Did all Americans — Black and white, poor and rich, young and old — really trust Walter Cronkite? During the Television Age, the hard left and hard right rarely clashed in prominent public forums because they were rarely heard. Under cheap speech, in contrast, the hard left and hard right often fail to clash because they’re rarely heard in the same forum by the same audience.¹⁰³ For strongly progressive or conservative policy

⁹⁸ See CASS R. SUNSTEIN, *REPUBLIC.COM 2.0*, at 1-18 (2007) (expressing concern about potential societal consequences of “the Daily Me”). See generally ELI PARISER, *THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK* (2011).

⁹⁹ See Ann Gerhart, *Election Results Under Attack: Here Are the Facts*, WASH. POST, <https://www.washingtonpost.com/elections/interactive/2020/election-integrity/> (last updated Jan. 14, 2021, 11:13 AM) [<https://perma.cc/7PEW-N5Y4>] (delineating and debunking numerous false attacks on the 2020 election results by Donald Trump and his supporters); Madrigal, *supra* note 92 (discussing how Facebook’s preference-based news feed distorted and enabled manipulation of public political debate during the 2016 election).

¹⁰⁰ See Volokh, *supra* note 1, at 1837-38 (downplaying cheap speech’s implications for the accuracy of media publications).

¹⁰¹ See Carroll, *supra* note 80, at 699-701 (discussing online platforms’ hospitality to disinformation); Hasen, *supra* note 21, at 204-09 (positing that the decline of professional media has enabled increases in fake news, disinformation, and propaganda).

¹⁰² See Magarian, *Forward into the Past*, *supra* note 62, at 239-43 (contending that Television Age speech intermediaries substantially homogenized public discourse).

¹⁰³ See Ricardo Gandour, *Study: Decline of Traditional Media Feeds Polarization*, COLUM. JOURNALISM REV. (Sept. 19, 2016), https://www.cjr.org/analysis/media_polarization_journalism.php [<https://perma.cc/5SU9-JFYS>].

proposals to prevail, those proposals must gain the upper hand in public political debates and then work their way through the necessary institutional structures. That can't happen if people and institutions have crammed themselves into opposite, ideologically comfortable corners of public discourse. News reporting in the age of cheap speech too often avoids the essential democratic work of building a field on which political opponents can compete, win, and lose.

The most lamented journalistic casualties of the cheap speech era are local news¹⁰⁴ and investigative reporting.¹⁰⁵ Both of those aspects of professional journalism promote dynamism more than they promote consensus. Local news outlets can encourage an ethos of localism, refracting information in ways that validate geographically disparate audiences' particular experiences. The accelerated gutting of local news operations over the past quarter century has diminished communities' capacities to sustain distinctive points of view grounded in local concerns.¹⁰⁶ Investigative journalism promotes dynamism in a different way. The point of investigative reporting is to dig beneath comfortable, settled understandings of the world and to expose hidden truths that destabilize what audiences thought they knew. Investigative journalism requires time and creativity, and it inspires journalistic competition. Local news and investigative journalism embody nuanced discourses between audiences and news media, unpredictable interplays that can help challenge established concentrations of political and economic power.

¹⁰⁴ See, e.g., Margaret Sullivan, *The Death Knell for Local Newspapers? It's Perilously Close.*, WASH. POST (Nov. 22, 2019), https://www.washingtonpost.com/lifestyle/style/the-death-knell-for-local-newspapers-its-perilously-close/2019/11/21/e82bafbc-ff12-11e9-9518-1e76abc088b6_story.html [<https://perma.cc/RSB8-V9S9>] (reporting that more than 2000 local newspapers in the U.S. had shut down in the past fifteen years); see also Martin & McCrain, *supra* note 88, at 372 (examining news media's diminished attention to local concerns due to nationalization of media ownership).

¹⁰⁵ The state of investigative journalism in the age of cheap speech presents complications. On one hand, investigative journalism is expensive and particularly vulnerable to collective action problems. See BAKER, *MARKETS*, *supra* note 13, at 49-50. On the other hand, endangered media outlets such as daily newspapers may promote their investigative reporting as a distinguishing virtue in a fraught marketplace, at least until budget cuts make that strategy unsustainable. See generally ANDREA CARSON, *INVESTIGATIVE JOURNALISM, DEMOCRACY AND THE DIGITAL AGE* (2020); BETH KNOBEL, *THE WATCHDOG STILL BARKS: HOW ACCOUNTABILITY REPORTING EVOLVED FOR THE DIGITAL AGE* (2018).

¹⁰⁶ See generally PEN AM., *LOSING THE NEWS: THE DECIMATION OF LOCAL JOURNALISM AND THE SEARCH FOR SOLUTIONS* (2019), <https://pen.org/wp-content/uploads/2019/12/Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf> [<https://perma.cc/3W57-62HJ>] (extensively documenting how the decline of local journalism has harmed local communities).

Beyond directly crowding out conventional news media, cheap speech also undermines professional journalism in a more ambient way. The age of cheap speech has seen the U.S. public's trust in the mass media continue a long-term decline.¹⁰⁷ More than half of us now doubt that journalists act in the public's best interest.¹⁰⁸ In part that loss of trust likely reflects a healthy demystification that has attended Television Age intermediaries' fall from dominance. Even so, the legacy news media haven't gotten demonstrably worse at their job (aside from their constricted budgets), and it's hard to argue that new media do much of that job demonstrably better. Getting something cheaply, or free of charge, can make the thing appear less worthy. When the local network TV affiliate no longer has distinctive access to the channels of mass communication; when the morning paper is no longer something many or most people read; when those outlets instead have to fight for clicks with hundreds of upstart competitors, and none of it comes at any apparent price — in those conditions, building respect and trust gets a lot harder. The news audience may slip more easily into Oscar Wilde's definition of a cynic: one "who knows the price of everything, and the value of nothing."¹⁰⁹

The decline of professional journalism corresponds with a decline in judicial attention to press freedom. The Supreme Court under Chief Justice John Roberts has not decided a single case under the First Amendment's Press Clause. The Court has long resisted giving the press First Amendment protections distinct from those for ordinary speakers¹¹⁰ and has more recently suggested that the First Amendment

¹⁰⁷ See, e.g., Megan Brenan, *Americans' Trust in Mass Media Edges Down to 41%*, GALLUP (Sept. 26, 2019), <https://news.gallup.com/poll/267047/americans-trust-mass-media-edges-down.aspx> [<https://perma.cc/A42V-ME2B>]. Gallup's polling shows a decrease of public trust in mass media from a starting point of 68% when polling began in 1972 to around 55% as the Internet grew during the late 1990s to an election-driven all-time low of 32% in 2016, with a rebound to the 41% figure in 2019. See *id.*

¹⁰⁸ See JEFFREY GOTTFRIED, MASON WALKER & AMY MITCHELL, PEW RESEARCH CTR., *AMERICANS' VIEWS OF THE NEWS MEDIA DURING THE COVID-19 OUTBREAK* (2020), <https://www.journalism.org/2020/05/08/americans-views-of-the-news-media-during-the-covid-19-outbreak/> [<https://perma.cc/XPJ2-MUMX>] (reporting that 52% of Americans have no or little confidence that journalists serve the public interest).

¹⁰⁹ OSCAR WILDE, *LADY WINDERMERE'S FAN*, act 3 (1893). A skeptic of the legacy media might fairly respond with Wilde's parallel definition of a sentimentalist: one "who sees an absurd value in everything and doesn't know the market price of any single thing." *Id.*

¹¹⁰ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 692 (1972) (rejecting reporters' claims of a First Amendment right not to disclose confidential sources' identities).

even bars legislatures from granting the press special prerogatives.¹¹¹ Cheap speech, in promoting pluralist democracy, feeds this rejection of press exceptionalism. The broader dispersion of opportunities and capacities to perform at least some functions of the news media makes “the press” harder for courts to identify and distinguish.¹¹² Erosion of constitutional protection for the news media further diminishes professional journalism’s contributions to republican democracy.

B. *Extremism and Identity-Polarized Public Discourse*

We live in an age of increasing cultural and political tension over the very idea of free speech. In mid-2020 a group of public intellectuals published an open letter in *Harper’s* that warned darkly of rising intolerance, especially on the political left, and reiterated familiar libertarian themes about the value of unconstrained debate.¹¹³ That letter and the view it expresses have met with strong opposition from members of minority and politically marginal communities, including people of color,¹¹⁴ women,¹¹⁵ and other left-wing advocates of social and political equality.¹¹⁶ Within three days of the *Harper’s* letter, a different group of public intellectuals, largely coming from minority and socially marginal communities, published their own open letter that criticized the *Harper’s* letter as, among other things, out of touch with lived experiences and insufficiently concerned with problems of systemic

¹¹¹ See Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 96-100 (2018) (discussing the Court’s suggestion in *Citizens United v. FEC*, 558 U.S. 310 (2010), that the First Amendment bars governments from treating the institutional press more favorably than ordinary speakers).

¹¹² See *id.* at 128-31 (linking the Court’s move away from press exceptionalism to the problem of identifying the press).

¹¹³ See *A Letter on Justice and Open Debate*, HARPER’S (July 7, 2020), <https://harpers.org/a-letter-on-justice-and-open-debate/> [<https://perma.cc/4SXX-K76G>].

¹¹⁴ See, e.g., Richard Delgado & Jean Stefancic, *Southern Dreams and a New Theory of First Amendment Legal Realism*, 65 EMORY L.J. 303 (2015). While critiques of free speech grounded in critical race theory have gained cultural traction in the age of cheap speech, they’re hardly new. See, e.g., Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

¹¹⁵ See, e.g., Mary Anne Franks, *Fearless Speech*, 17 FIRST AMEND. L. REV. 294 (2018). The same caveat about traction and novelty that applies to critical race critiques of free speech applies to feminist critiques. See, e.g., CATHERINE A. MACKINNON, *ONLY WORDS* (1993).

¹¹⁶ See, e.g., Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219 (2018).

inequality and exclusion.¹¹⁷ Such pushback bewilders many conventional civil libertarians.¹¹⁸ Why, these First Amendment boosters implore, can't critics see the benefits of free speech for oppressed people and groups? Why can't they understand how the same political values that enable hateful and marginalizing speech provide the vehicle for its repudiation?

Professor Volokh's cheap speech frame, deployed with problems of identity and power in mind, can go far toward explaining the rising discomfort of minority and marginal groups with free speech verities. Cheap speech certainly provides some support for civil libertarian homilies about the positive value of unconstrained discourse. By giving more speakers the means to publish their views, cheap speech has increased opportunities to talk up all varieties of social and political change. Cheap speech brings some particular benefits for identity minorities and political dissidents.¹¹⁹ In the old communications landscape of expensive speech, smaller or more idiosyncratic speakers or groups often could not access mass media platforms at all. They lacked the identity to create majoritarian demand for their points of view, the money to buy air time or column inches, and the influence to build and leverage connections with powerful media actors. Cheap speech, at a minimum, gives smaller and more idiosyncratic groups and speakers real opportunities to make their viewpoints available to mass audiences.

However, cheap speech's stimulation of dynamism in public discourse brings the bitter with the sweet. Black people, women, and Trans people now can more effectively broadcast their political views. So can white supremacists, misogynists, and anti-trans bigots. So too can more ostensibly respectable opponents of disadvantaged groups' social and political aspirations. Cheap speech is cheap for everyone. All social and political ideas — humanist and dehumanizing, radical and reactionary, inclusive and subordinating — pay the same low price for exposure to mass audiences. This flat pricing of speech ends up

¹¹⁷ *A More Specific Letter on Justice and Open Debate*, OBJECTIVE (July 10, 2020), <https://theobjective.substack.com/p/a-more-specific-letter-on-justice> [<https://perma.cc/T4SE-V2PQ>].

¹¹⁸ See generally FLOYD ABRAMS, *THE SOUL OF THE FIRST AMENDMENT* (2017); NADINE STROSSEN, *HATE: WHY WE SHOULD RESIST IT WITH FREE SPEECH, NOT CENSORSHIP* (2018).

¹¹⁹ See Kathrine Gutierrez, *Keeping Speech Cheap: The Progressive Case for a Free Internet*, 67 UCLA L. REV. DISCOURSE 72, 76-78 (2019). See generally Seth F. Kreimer, *Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet*, 150 U. PA. L. REV. 119 (2001).

disproportionately burdening minority and marginal communities in at least two ways.

First, and more obviously, cheap speech facilitates extremist attacks on those communities. Hate speech and identity-based harassment have exploded on the Internet and social media.¹²⁰ Television Age speech intermediaries, even as they limited democratic dynamism, acted as stabilizing forces. They largely insulated the mass public from radical, disturbing, destabilizing ideas.¹²¹ The big three broadcast networks and metropolitan daily newspapers, as a group, were hardly paragons of progressive or inclusive values. Their conception of societal consensus tended to flatten differences and to exclude fresh or marginal points of view.¹²² However, they relied on mass audiences and advertising revenues, giving them strong incentives to keep discourse civil. They impeded radical change, but they also discouraged reactionary backlash.

The new speech intermediaries — ISPs, search engines, social media platforms — operate on a very different business model than broadcast networks and metropolitan newspapers. Where the old intermediaries created speech that embodied societal consensus, the new intermediaries channel speech that reflects societal fragmentation. Where the old intermediaries actively edited the information they delivered, the new intermediaries largely function as conduits.¹²³ Conduits gain nothing from sanding the rough edges off public discourse. They thrive by facilitating speech as indiscriminately as possible — by juicing the purest pluralist democratic potential of cheap speech.¹²⁴ The hesitation of online intermediaries to police the socially destructive speech they carry to mass audiences¹²⁵ reflects their

¹²⁰ See Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 62 (2009); Sheera Frenkel, Mike Isaac & Kate Conger, *On Instagram, 11,696 Examples of How Hate Thrives on Social Media*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/2018/10/29/technology/hate-on-social-media.html> [<https://perma.cc/5N2W-XMAN>].

¹²¹ See Magarian, *Forward into the Past*, *supra* note 62, at 243-50 (discussing Television Age intermediaries' role in structuring society).

¹²² One vivid example of this flattening emerges from *The Kansas City Star's* recent apology and accounting for decades of marginalizing African Americans' perspectives and achievements. See Mike Fannin, *The Truth in Black and White: An Apology from The Kansas City Star*, KAN. CITY STAR (Dec. 20, 2020, 5:00 AM), <https://www.kansascity.com/news/local/article247928045.html> [<https://perma.cc/2M2S-UTJU>].

¹²³ See, e.g., Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986 (2008).

¹²⁴ See Magarian, *Forward into the Past*, *supra* note 62, at 257-60 (discussing Internet Age intermediaries' role in structuring society).

¹²⁵ See Carroll, *supra* note 80, at 699-700 (discussing online intermediaries' limited incentives to restrict disinformation); Hasen, *supra* note 21, at 227-28 (expressing

incentive to enable whatever expression their many and varied users want to publish, including extremist attacks. I don't mean to blame cheap speech and its intermediaries entirely for the explosion of online extremism. Certainly the ascendancy of a virulently racist U.S. president¹²⁶ has played a crucial role in normalizing hate speech and attacks on vulnerable groups.¹²⁷ Then again, the Internet was instrumental in bringing Trump to power¹²⁸ and in propagating his hateful views and rhetoric.¹²⁹

Two features of cheap speech exacerbate its propensity for extremism. The first is a "squeaky wheel" tendency. We might expect a reactionary viewpoint like white supremacism to have trouble influencing public debate even under conditions of cheap speech. Some new media intermediaries might mirror old intermediaries in seeking to muzzle the viewpoint; the limits of its appeal might make it difficult to spread to receptive audiences; some majority allies might join minority group

skepticism about online intermediaries' will and capacity to curb damaging online speech). Online intermediaries' relationships with regulators and the public are constantly evolving, and intermediaries have recently voiced some greater willingness to restrict destructive speech. See, e.g., Salvador Rodriguez, *Zuckerberg: Facebook Will Prohibit Hate Speech in Its Ads*, CNBC (June 26, 2020, 2:32 PM EDT), <https://www.cnbc.com/2020/06/26/zuckerberg-facebook-will-prohibit-hate-speech-in-its-ads.html> [<https://perma.cc/95T2-DHV7>].

¹²⁶ See German Lopez, *Donald Trump's Long History of Racism, From the 1970s to 2020*, Vox, <https://www.vox.com/2016/7/25/12270880/donald-trump-racist-racism-history> (last updated Aug. 13, 2020, 7:00 PM EDT) [<https://perma.cc/9APC-4SRH>] (providing a timeline of Trump's racist statements throughout his years in the public eye).

¹²⁷ See Fabiola Cineas, *Donald Trump Is the Accelerant*, Vox, <https://www.vox.com/21506029/trump-violence-tweets-racist-hate-speech> (last updated Jan. 9, 2021, 11:04 AM EST) [<https://perma.cc/CA7R-P4FQ>] (providing a chronology of linkages between Trump's statements and hate crimes).

¹²⁸ See Kara Alaimo, *Where Donald Trump Got His Real Power*, CNN, <https://www.cnn.com/2016/11/15/opinions/social-media-facebook-twitter-trump-alaimo/index.html> (last updated Nov. 15, 2016, 8:40 PM EST) [<https://perma.cc/3MP5-WFA8>] (discussing the importance of Trump's social media presence for his 2016 presidential victory); Madrigal, *supra* note 92 (discussing various ways in which Facebook promoted Trump and aided his electoral success).

¹²⁹ See Mike McIntire, Karen Yourish & Larry Buchanan, *In Trump's Twitter Feed: Conspiracy-Mongers, Racists and Spies*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-disinformation.html> [<https://perma.cc/4VM9-25GF>] (stating that "[b]y retweeting suspect accounts, seemingly without regard for their identity or motives, [Trump] has lent credibility to white nationalists, anti-Muslim bigots and obscure QAnon adherents"); Ayesha Rascoe, *Twitter Analysis Shows How Trump Tweets Differently About Nonwhite Lawmakers*, NPR (Oct. 10, 2019, 5:00 AM ET), <https://www.npr.org/2019/10/10/768646968/as-summer-heated-up-trumps-tweets-about-non-white-democrats-intensified> [<https://perma.cc/KEN9-C5C8>] (discussing Trump's own racist tweets).

members in pushing back against extremist attacks. Extremists, however, relish opportunities to promote their views. They're dogged patrons of cheap speech.¹³⁰ Extremists use cheap speech to reach both potential sympathizers and mainstream audiences who may find extreme messages lurid, fascinating, or repellent.¹³¹ The squeaky wheel problem helps to explain conflicts that arise when mainstream media report on extremists whose targets then criticize the media for normalizing the extreme viewpoint.¹³² Cheap speech enables and often encourages amplification of socially destructive viewpoints.

The other feature of cheap speech that exacerbates its value for extremists is the ubiquity in many (though not all) online settings of anonymous expression. First Amendment law has long recognized the importance of anonymity for speakers with unpopular ideas, especially political dissidents. The Supreme Court has protected speakers' rights to share their ideas anonymously¹³³ and to conceal membership in¹³⁴

¹³⁰ An infamous exemplar of online hate speech's fervor has been the Gamergate campaign against diversity and inclusion in the video game industry. See Caitlin Dewey, *The Only Guide to Gamergate You Will Ever Need to Read*, WASH. POST (Oct. 14, 2014, 2:23 PM PDT), <https://www.washingtonpost.com/news/the-intersect/wp/2014/10/14/the-only-guide-to-gamergate-you-will-ever-need-to-read/> [<https://perma.cc/S96B-K5AH>].

¹³¹ See Joan Donovan, *How Hate Groups' Secret Sound System Works*, ATLANTIC (Mar. 17, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/extremists-understand-what-tech-platforms-have-built/585136/> [<https://perma.cc/B45J-E2L4>] (describing hate groups' manipulation of online platforms to spread their messages). For one example of this phenomenon, see Genevieve Koski, *How 2 Racist Trolls Got a Ridiculous Star Wars Boycott Trending on Twitter*, VOX (Oct. 19, 2015, 5:50 PM EDT), <https://www.vox.com/2015/10/19/9571309/star-wars-boycott> [<https://perma.cc/V5T5-DCH6>] (describing the viral spread of a fringe hate campaign).

¹³² See Whitney Phillips, *The Oxygen of Amplification*, DATA & SOC'Y (May 22, 2018), <https://datasociety.net/library/oxygen-of-amplification/> [<https://perma.cc/UTM4-VVSC>] (reporting and analyzing instances between 2016 and 2018 in which mainstream news outlets amplified right-wing hate messages). One widely visible debate over media reporting on extremism arose in late 2017 from a human interest-flavored *New York Times* profile of a suburban neo-Nazi. See Richard Fausset, *A Voice of Hate in America's Heartland*, N.Y. TIMES (Nov. 25, 2017), <https://www.nytimes.com/2017/11/25/us/ohio-hovater-white-nationalist.html> [<https://perma.cc/C56D-ACJP>]; see also Marc Lacey, *Readers Accuse Us of Normalizing a Nazi Sympathizer; We Respond*, N.Y. TIMES (Nov. 26, 2017), <https://www.nytimes.com/2017/11/26/reader-center/readers-accuse-us-of-normalizing-a-nazi-sympathizer-we-respond.html> [<https://perma.cc/YKV8-QAPY>] (describing and attempting to answer criticisms of the profile).

¹³³ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (striking down a state ban on distribution of anonymous political handbills).

¹³⁴ *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960) (establishing an individual's First Amendment right not to disclose membership in a political organization).

and support of¹³⁵ controversial political groups. The fact that anyone may speak at great length online without having to reveal their identities brings benefits for both pluralist and republican democracy. The Internet's vast scope, however, changes the stakes of anonymity. The ease with which numerous people can join forces distinguishes unaccountable, often massive aggregations of anonymous online speakers from an individual anonymous leafletter or a physical group whose members know and may check one another. Online mobs have wreaked tremendous havoc, frequently targeting women and people of color for harassment, threats, and invasions of privacy, sometimes driving their victims off social media or offline entirely.¹³⁶ Although cheap speech can aid minority communities in uncovering and defusing extremist attacks,¹³⁷ anonymity helps to ensure that cheap speech will enable extremists more than it deters them.

Beyond promoting extremism, cheap speech disadvantages minority and marginal communities in a second way: by amplifying majorities' numerical and political primacy where a minority or marginal group faces consistent majoritarian antipathy or opposition in public discourse. An analogy from voting rights law illuminates the problem. Our law in the 1970s came to recognize that freedom from racial discrimination in voting required more than just the individual's right to cast a ballot. Communities of political interest needed meaningful opportunities to band together and elect representatives of their choice: the right of aggregation. For most such communities — Catholics, union members, educated professionals, and so forth — opportunities for aggregation emerge organically in electoral processes. But some groups, most commonly African Americans, face sustained barriers to their aggregation, usually in the form of electoral districts gerrymandered to limit the group's collective power. That problem led Congress to amend the Voting Rights Act, adding restrictions on racial gerrymandering.¹³⁸ The Supreme Court identified as a precondition for those restrictions the presence of *racially polarized voting*: the tendency

¹³⁵ *Brown v. Socialist Workers '74 Campaign Comm.* (Ohio), 459 U.S. 87, 101-02 (1982) (establishing a First Amendment right not to disclose campaign contributions to a broadly unpopular minor political party or candidate).

¹³⁶ See, e.g., Citron, *supra* note 120, at 69-81 (describing various online mob attacks).

¹³⁷ See, e.g., Caitlin O'Kane & Olivia Wilson, "A Long Time Coming": *Black Students Turn to Social Media to Expose Racism at Private Schools*, CBS NEWS (Sept. 14, 2020, 8:33 AM), <https://www.cbsnews.com/news/black-at-instagram-students-private-school-racism-social-media/> [<https://perma.cc/5JZ3-34K6>].

¹³⁸ See Voting Rights Act of 1965, Pub. L. No. 97-205, § 2, 96 Stat. 134 (1982).

of the white majority to systematically oppose candidates preferred by the Black minority.¹³⁹

Just as socially and politically salient identity differences give rise to polarized voting, they also give rise to polarized public discourse. The same cultural fissures that cause white electoral majorities to routinely oppose Black minorities' preferred political candidates often lead the white majority, as a whole, to oppose or resist the Black minority's viewpoints, interests, and ideas. Filter bubbles dramatically exacerbate this problem online. Of course the analogy of public discourse to voting is imperfect. Voting is largely binary, whereas public discourse is complex and nuanced. Even though a relatively moderate white voter and a hardcore racist might both indulge in racially polarized voting, they might strongly disagree about various racially charged subjects in public debate. Still, in public discourse as in voting, majorities have power to dominate minorities, cheap speech enhances that power, and identity polarization spurs majorities to use it. Critical race and feminist scholars frequently lament that our society's supposedly strong free speech regime shrugs off the silencing in public discourse of minority and marginal voices.¹⁴⁰ The phenomenon of identity-polarized discourse helps to untangle that contradiction.

The problem of identity-polarized public discourse afflicts not only African Americans but also other racial minority groups, other politically salient numerical minority groups like LGBTQ+ people, and the still-politically underpowered numerical majority of women. Polarized discourse helps to explain why voices from those communities have challenged canonical free speech premises with accelerating urgency in the cheap speech era. When everyone can buy openings to audiences for the same low price, the majority gets more of those openings, enhancing its ability to dominate the minority. The classic liberal remedy of counter-speech holds little promise for beleaguered minorities. Yes, racial minorities and women often answer racist and misogynist messages with antiracist and feminist messages. However, unless they possess abnormal powers of persuasion, polarization and raw numbers will systematically cause their counter-speech to fail.

Pointing to minority groups, particularly African Americans, as cheap speech losers might seem odd at this moment, which has enhanced

¹³⁹ See *Thornburg v. Gingles*, 478 U.S. 30, 44-45 (1986).

¹⁴⁰ See, e.g., Alice Marwick, *A New Study Suggests Online Harassment Is Pressuring Women and Minorities to Self-Censor*, QUARTZ (Nov. 24, 2016), <https://qz.com/844319/a-new-study-suggests-online-harassment-is-persuading-women-and-minorities-to-self-censor/> [https://perma.cc/258M-99UM].

hopes for white Americans' progress toward human decency. White Americans seem more sharply attuned to African Americans' grievances in the wake of police officers' murders of George Floyd in Minneapolis and Breonna Taylor in Louisville. Cheap speech, most obviously in the form of social media, spread the horrifying images of Floyd's murder, aided African Americans' political mobilization, and helped to propagate white people's declarations of solidarity and atonement.¹⁴¹ But how instrumental has online speech really been in this moment? The essential instrument of racial progress in 2020 has been a much older form of cheap speech: mass street protest.¹⁴² Taking to the streets costs more than posting online, but the costs — in coordination, labor, and risk of retaliation — seem to be ones that proponents of positive social change are more willing to pay than racist trolls or apologists for the status quo. In this age of technologically enhanced cheap speech, African Americans have made political gains largely through the technologically simplest form of public expression.

III. CHEAP SPEECH'S IMPLICATIONS FOR FIRST AMENDMENT LAW

Professor Volokh closed *Cheap Speech and What It Will Do* with a brief, intriguing argument about cheap speech's implications for First Amendment doctrine. The doctrine, he suggested, has traditionally rested on "some rather idealized premises" — that good ideas prevail over bad ones, that counter-speech can effectively remedy harmful or dangerous speech, that people can avert their eyes from speech they don't want to hear.¹⁴³ However well or badly these premises fit the world of expensive speech, Professor Volokh argued, they would likely fit the world of cheap speech better. Cheap speech's democratic benefits — its

¹⁴¹ See Kim Parker, Juliana Menasce Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RES. CTR. (June 12, 2020), <https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/> [https://perma.cc/Z26V-7598]. The durability of white Americans' conscientious shift remains uncertain. See Deja Thomas & Juliana Menasce Horowitz, *Support for Black Lives Matter Has Decreased Since June But Remains Strong Among Black Americans*, PEW RES. CTR. (Sept. 16, 2020), <https://www.pewresearch.org/fact-tank/2020/09/16/support-for-black-lives-matter-has-decreased-since-june-but-remains-strong-among-black-americans/> [https://perma.cc/48XR-46R5].

¹⁴² See Lara Putnam, Erica Chenoweth & Jeremy Pressman, *The Floyd Protests Are the Broadest in U.S. History — and Are Spreading to White, Small-Town America*, WASH. POST (June 6, 2020, 11:10 PM PDT), <https://www.washingtonpost.com/politics/2020/06/06/floyd-protests-are-broadest-us-history-are-spreading-white-small-town-america/> [https://perma.cc/Z56Q-V3CR].

¹⁴³ Volokh, *supra* note 1, at 1846.

opening of public discourse to more speakers and ideas and its heightening of individuals' control over their information environments — would move the reality of mass communication closer to First Amendment law's idealized vision.¹⁴⁴ He presciently acknowledged that cheap speech might also increase the prevalence of hate speech, dis- and misinformation, and ideological siloing. Even so, he maintained, changing First Amendment law to allow more content regulation would be a cure worse than any conceivable disease.¹⁴⁵

In my view, the present reality of cheap speech cuts in the opposite direction from Professor Volokh's First Amendment analysis. Cheap speech's pluralist democratic shortcomings, discussed in Part I, belie his optimism that new media would better align the reality of communication with idealized First Amendment premises.¹⁴⁶ The digital divide and the commodification of audience attention impede the development of a robust, inclusive "marketplace of ideas." Resources and social power still confer enormous advantages on privileged speakers who may not offer the most appealing, let alone the most constructive, ideas or information. Cheap speech's republican democratic hazards, discussed in Part II, belie Professor Volokh's sanguine account of cheap speech's dangers.¹⁴⁷ The decline of professional journalism has cleared the way for rampant disinformation and hidebound ideological self-sorting. Hate speech, riding the current of identity-polarized discourse, has become a national plague, with white supremacists and violent misogynists oozing out of online forums and onto the streets. The communications landscape of 2020, viewed through a prism of civil libertarian idealism, looks much more like a dystopia than a paradise. For better or worse, cheap speech provides distinctive reasons to question prevalent First Amendment doctrine's three most important premises.

First, cheap speech complicates the speech-action distinction that creates the foundation for First Amendment law. Justice Louis Brandeis, splitting the First Amendment atom, explained that suppression of speech is only justified when "the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion,"¹⁴⁸ when speech effectively collapses into action. The Court eventually embedded Justice Brandeis's admonition into its incitement doctrine, holding that only "imminent lawless action" would prevent

¹⁴⁴ See *id.* at 1847.

¹⁴⁵ See *id.* at 1848-50.

¹⁴⁶ See *supra* Part I.

¹⁴⁷ See *supra* Part II.

¹⁴⁸ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

the First Amendment from protecting lawless advocacy.¹⁴⁹ For decades afterward, courts could safely assume that nothing short of an immediate exhortation to an angry mob would activate the incitement doctrine. Arguments that words can directly cause injury¹⁵⁰ garnered scant judicial support. Online, however, words undeniably can cause injury. Anonymous speakers can band together to hound and harass members of minority and marginal communities into fear and silence. Terrorists and criminals can deploy keystrokes instead of weapons to disrupt online systems and activities. Hate groups can use electronic communication to spur acolytes to violence without having to confront anything like “full discussion.”¹⁵¹ The weaponization online of hateful, deceptive, and incendiary speech puts enormous pressure on the comfortable truism that people can most effectively pursue autonomy, learning, and collective self-government when a normatively charged category of human activity called “speech” enjoys a singular immunity from the political majority’s power to regulate in the public interest. The easy path from cheap speech to injury may force some difficult choices between expressive freedom and other cherished social values — not least a robust, inclusive vision of public discourse itself.

Second, cheap speech destabilizes the content neutrality principle that forms the framework of First Amendment law. The Supreme Court in recent years has doubled down on content neutrality.¹⁵² The judicial commitment to content neutrality, however, developed in comfortable social conditions that cheap speech has degraded. Courts in the pre-Internet age didn’t worry about the quality or integrity of public discourse. Only speech that met conventional societal standards of relevance, sensibility, and quality passed dominant intermediaries’ filters to reach a mass audience. Accordingly, courts in First

¹⁴⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

¹⁵⁰ An emblematic compilation of such arguments is MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD DELGADO & KIMBERLÈ WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

¹⁵¹ See, e.g., *Planned Parenthood v. Am. Coal. of Life Activists*, 290 F.3d 1058 (9th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 2637 (2003) (denying First Amendment protection to a website that published photos and personal information about abortion providers and then emphasized the name of any provider murdered or wounded by anti-abortion terrorists).

¹⁵² See *Barr v. Am. Ass’n of Political Consultants*, 140 S. Ct. 2335, 2335 (2020) (plurality opinion) (striking down as impermissible content discrimination an exception to a federal ban on robocalls to cell phones); *Reed v. Town of Gilbert*, 576 U.S. 155, 155 (2015) (striking down a municipal sign regulation and characterizing the content neutrality principle as categorical). Despite this judicial trend, the content neutrality principle continues to draw formidable academic criticism. See, e.g., Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427 (2017).

Amendment cases could largely forswear judgments about the value of speech while still credibly urging public faith in the continuing quality of public discourse.¹⁵³ As I've explained, though, the new intermediaries empowered by cheap speech don't worry about editing for quality.¹⁵⁴ They simply transmit whatever their users publish, free of value judgments. As a result, hate speech has grown more corrosive, misinformation and disinformation take hold more quickly and firmly than ever, and noise often drowns out substantive debate. Maybe the rise of cheap speech will lead us not to care whether speech that commands public attention has value, integrity, or relevance; but that would carry us, and the Court, far from any conventional understanding of public discourse. The Internet has largely sublimated the area of First Amendment law that most plainly embodies value judgments about speech — the obscenity doctrine.¹⁵⁵ It will be ironic if the political economy of cheap speech eventually prods the Court to repurpose that doctrine's value-laden methodology for other areas of First Amendment controversy.

Finally, cheap speech undermines the public-private distinction that defines the boundaries of First Amendment law. The unprecedented wealth and power in the Internet Age of private speech intermediaries — ISPs, search engines, and especially social media platforms — subverts the foundational First Amendment ideas that government presents a unique threat to speech and that merely protecting private activity from government regulation ensures meaningful expressive freedom. If effective repression of ideas ever categorically required the government's monopoly on the use of force,¹⁵⁶ it doesn't now. Repression merely requires the power to drown out other speakers, to

¹⁵³ See, e.g., *Renton v. Playtime Theaters*, 475 U.S. 41, 47-50 (1986) (upholding as a content-neutral regulation a zoning restriction on businesses that sold sexually explicit material). The Court's approach tacitly rejected Justice Stevens's earlier call for categorically assigning lesser First Amendment protection to sexually explicit speech based on that speech's putative lower value. See *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 65-71 (1976) (plurality opinion).

¹⁵⁴ See *supra* notes 123-25 and accompanying text.

¹⁵⁵ See *Miller v. California*, 413 U.S. 15, 24 (1973) (granting states presumptive authority to ban sexually explicit materials that "appeal to the prurient interest in sex [and] portray sexual conduct in a patently offensive way").

¹⁵⁶ I have strong doubts. See Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 127-50 (2004) (critiquing and reconceptualizing the public-private distinction in First Amendment law).

divert attention from their speech, or to harass them into silence.¹⁵⁷ Many and varied private actors can use those techniques of repression, which operate through speech itself. In circumstances where private activity can function as the enemy of free speech, not always its friend, we need to take seriously the possibility that government regulation can function as the friend of free speech, not always its enemy. The scrambled public-private distinction informs, for example, current debates about regulating social media platforms to prevent disinformation, protect privacy, and discourage violent extremism. We may well reject some or all proposed regulations as unwise, unworkable, or even censorious. We shouldn't reject them, however, based on a reflex to protect speech-promoting private activity from speech-repressing government. The categories aren't that simple.

The dizzying changes wrought by evolving communications technologies demand that we reassess received free speech assumptions with fresh eyes. If, as free speech principle holds, our best path forward lies through active engagement with important ideas,¹⁵⁸ then we should feel enthusiastic and confident about rethinking First Amendment law to meet the challenges of cheap speech. Just as cheap speech requires us as human beings to step up our critical engagement with the ocean of available information, it should inspire us as democratic citizens to think critically and cogently about which normative values we want First Amendment doctrine to serve and how best to advance them.

CONCLUSION

We don't live in a paradise of disaggregated communication where the dispersed capacity to publish maximizes people's autonomy and diminishes the power of concentrated wealth and power. The communications technology of cheap speech makes that rosy scenario theoretically possible, but realities of social power and rampant inequality foreclose it. We live, instead, in a contingent world where most people have the technical capacity to reach mass audiences and to access a broad range of information but where few people can actually do those things. The digital divide and the commodification of audience attention limit our capacity to realize cheap speech's democratic potential on its own terms. The decline of professional journalism and the metastasis of extremism and identity polarized discourse reflect

¹⁵⁷ For discussions of changes in governments' methodologies for suppressing speech, see Balkin, *Speech Regulation*, *supra* note 15, at 2306-29; Wu, *supra* note 58, at 558-68.

¹⁵⁸ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

steep costs that enhanced individual autonomy imposes on collective self-government. New speech intermediaries, more formidable than those that preceded them, have accrued unprecedented degrees of power to control the processes of public discourse. The technological infrastructure of cheap speech won't effectively promote democracy until we use our democratic energy to harness that infrastructure for democratic goals and ideals.