I'M STILL DANCING: THE CONTINUED EFFICACY OF FIRST AMENDMENT PRECEDENT AND VALUES FOR NEW-SCHOOL REGULATION

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This symposium provides an occasion to reflect on the meaning of two foundational First Amendment decisions: *New York Times Co. v. Sullivan*[1] — "an occasion for dancing in the streets"[2] — which imposed limits on public officials' recovery for defamation,[3] and *New York Times Co. v. United States*,[4] which reaffirmed the central First Amendment principle against prior restraints.[5] Professor Jack Balkin characterizes these decisions as responses to "old-school speech regulation . . . [in which] the state had used penalties and injunctions directed at speakers and publishers in order to control and discipline their speech."[6] But, Balkin observes, changes in the infrastructure and technology of free expression and in the regulation of speech have significantly weakened the impact of these decisions.[7] He claims that "new-school" speech regulation — government exercise of informal control over and co-optation of privately-owned digital infrastructure providers — is not meaningfully subject to these precedents: "[T]he impact of these two decisions has been weakened by significant changes in the practices and technologies of free expression . . . ."[8] Balkin expresses particular concern about the inefficacy of the prior restraint doctrine in circumstances of collateral censorship, in which the government encourages private intermediaries like ISPs to censor the speech of others.[9] Such instances of collateral censorship, he worries, will effect an end run around the traditional procedural safeguards imposed on prior restraints.[10] Balkin also expresses concern about the

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[1] 376 U.S. 254 (1964).

[2] Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221 n.125 (quoting Alexander Meiklejohn) (quotation marks omitted).

[3] *Sullivan*, 376 U.S. at 283.

[4] 403 U.S 713 (1971) (per curiam).

[5] *Id.* at 714.

[6] Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2298 (2014).

[7] *Id.* at 2342.

[8] *Id.* at 2296.

[9] *See id.* at 2298, 2308–11.

[10] *See id.* at 2318.

government's co-optation of private infrastructure providers, through which the government informally pressures these entities to restrict users' privacy and freedom of expression.[11]

In this Response, I contend first that the prior restraint doctrine reinforced by the Court in *New York Times Co. v. United States* is still effective in holding in check new-school regulation — at least outside the national security context — as evidenced by cases such as *Center for Democracy and Technology v. Pappert*.[12] Second, I argue, Balkin's concerns about government co-optation of private infrastructure providers should be partially allayed by steps these providers have taken to expose efforts by the government to co-opt them and to commit themselves to upholding First Amendment principles and to transparency and visibility in responding to government requests to censor content or reveal user information.

Balkin writes that, in new-school regulation, governments seek to implement collateral censorship, in which they censor speech not by their own hands but by incentivizing private intermediaries like ISPs, which the government may threaten with criminal sanctions for noncompliance.[13] In such cases, ISPs have the incentive to overblock users' speech and may not be held accountable for overblocking because they are not state actors.[14] But in the case of *Pappert*, which involved precisely this sort of new-school regulation and collateral censorship, the state's indirect efforts to censor were held subject to — and deficient under — the prior restraint doctrine.[15] This case involved a Pennsylvania law requiring ISPs to block or take down content on or accessible through their servers, upon receipt of an ex parte judicial order, upon submission by the attorney general that there was probable cause that the specified content contained child pornography, or upon receipt of an informal notice from the attorney general that the specified content contained child pornography.[16] If the ISP failed to quickly take down such content, it would be held criminally liable.[17]

Despite the informal nature of the requests, and despite the fact that private entities were charged with taking down the content, the court found that the law embodied an unconstitutional prior restraint, in part because the law failed to provide the requisite procedural pro-

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[11] *See id.* at 2298–99.

[12] 337 F. Supp. 2d 606 (2004).

[13] *See* Balkin, *supra* note 6, at 2298.

[14] *Id.* at 2309.

[15] *Pappert*, 337 F. Supp. 2d at 611, 656–58.

[16] *Id.* at 619, 622–24; *see also* PA. CONS. STAT. ANN. § 7626 (West 2003), *invalidated by Pappert*, 337 F. Supp. 2d 606.

[17] *Pappert*, 337 F. Supp. 2d at 619 (noting that violators faced fines up to $30,000 and a prison term of up to seven years).

tections.[18] The law was held to be deficient because a judge was only required to make a finding of probable cause that the content contained child pornography, ex parte, with no requirement that content provider receive notice or have the opportunity to be heard by the court.[19] Notwithstanding the fact that the law allowed for informal notices requesting voluntary compliance, the court held that this scheme was still subject to constitutional scrutiny.[20] Similar to the informal requests found unconstitutional in *Bantam Books v. Sullivan*,[21] the informal notices in *Pappert* were held subject to — and deficient under — the prior restraint doctrine.[22] *Pappert* and cases like it[23] thus suggest that the prior restraint doctrine is still effective in holding in check the government's power to restrict speech in the context of new-school regulation[24] — at least in contexts other than national security.

Balkin is also concerned with government co-optation of private free speech infrastructure providers and about informal, nontransparent government regulation of these entities.[25] Yet there is substantial evidence that these entities are resisting government co-optation and acting to increase visibility and transparency in the context of new-school regulation. Several leading Internet infrastructure providers — including Google, Microsoft, Yahoo!, and Facebook — have also publicly committed themselves to respecting First Amendment values, as I discuss below.

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[18] *Id.* at 611, 656–58.

[19] *Id.* at 656–58.

[20] *Id.* at 660.

[21] 372 U.S. 58 (1963).

[22] *Pappert*, 337 F. Supp. 2d at 660.

[23] *See, e.g.*, Mainstream Loudoun v. Bd. of Trs. of Loudoun Cnty. Library, 24 F. Supp. 2d 552, 568–70 (E.D. Va. 1998) (finding an unconstitutional prior restraint where a public library implemented filtering software to block patrons' access to child pornography, obscenity, and content deemed "harmful to juveniles," where such filtering scheme lacked the requisite procedural safeguards); *see also, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (law conditioning federal subsidies for public libraries on their implementation of filters to block harmful content did not impose unconstitutional prior restraint or unconstitutional condition on spending, in part because the libraries were required to remove such filters upon request from adult patrons).

[24] Moreover, the prior restraint doctrine has become an influential force within other countries as well, many of which had not formerly adopted a version of this doctrine. The European Court of Human Rights is actively borrowing from this and other First Amendment doctrines. In the case of *Yildirim v. Turkey*, for example, which involved collateral censorship, the court found a violation of European Convention of Human Rights Article 10 when Turkey blocked all of Google Sites in order to block one anti-Turkish Google Sites website. Yildirim v. Turkey, App. No. 3111-10 at 20 (Eur. Ct. H.R. Dec. 18, 2012), *available at* http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-115705. Judge Paulo Pinto de Albuquerque expressly referred to prior restraint jurisprudence, explaining: "To borrow the words of *Bantam Books*, *Inc.*, any prior restraint on expression on the Internet comes to me with a heavy presumption against its Convention validity." *Id.* at 31 (Pinto de Albuquerque, J., concurring).

[25] *See* Balkin, *supra* note 6, at 2323–29.

First, the leading Internet infrastructure providers have fought to resist government efforts to render them complicit in the surveillance of Internet users. In 2013, Google, Microsoft, Facebook, and Yahoo! filed suit in the Foreign Intelligence Surveillance Court (FISC) arguing that, under the prior restraint doctrine, government efforts to prohibit them from disclosing their policies regarding NSA requests for and FISC-ordered disclosures of user information were unconstitutional.[26] They argued that, based on the First Amendment's presumption against prior restraints, they should not be prohibited from releasing information regarding their responses to NSA requests. In addition, they argued that making such information available was necessary for them to respond to allegations that they were complicit in the government surveillance.[27] In January, the providers reached a settlement with the Justice Department, permitting disclosure of some of the information at issue.[28] These challenges brought by many (though not all) of the major infrastructure providers to increase the transparency and visibility of government regulation and resist co-optation give us reason to be optimistic about the continued efficacy of the prior re-

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[26] Larry Seltzer, *Microsoft, Google, Facebook and Yahoo! File Motions in FISA Court*, ZDNET (Sept. 9, 2013, 3:17 PM), http://www.zdnet.com/microsoft-google-facebook-and-yahoo-file-motions-in-fisa-court-7000020439/, *archived at* http://perma.cc/7E3J-FPWV; Brad Smith, *Responding to Government Legal Demands for Consumer Data*, MICROSOFT ON THE ISSUES (July 16, 2013, 1:08 PM), http://blogs.technet.com/b/microsoft_on_the_issues/archive/2013/07/16/responding-to-government-legal-demands-for-customer-data.aspx, *archived at* http://perma.cc/L5PF-X9TE.

[27] Ewen MacAskill, *Yahoo Files Lawsuit Against NSA Over User Data Requests*, GUARDIAN (Sept. 9, 2013, 4:09 PM), http://www.theguardian.com/world/2013/sep/09/yahoo-lawsuit-nsa-surveillance-requests, *archived at* http://perma.cc/R5G-LJKE; *see also* Amended Motion for Declaratory Judgment, In re Amended Motion for Declaratory Judgment of Google Inc.'s First Amendment Right to Publish Information About FISA Orders, No. Misc. 13-03 (FISA Ct. Sept. 9, 2013), *available at* http://services.google.com/fh/files/blogs/google_fisc_motion_sep9_2013.pdf; Microsoft Corporation's Motion for Declaratory Judgment or Other Appropriate Relief Authorizing Disclosure of Aggregate Data Regarding Any FISA Orders It Has Received, In re Motion to Disclose Aggregate Data Regarding FISA Orders, No. Misc. 13-04 (FISA Ct. June 19, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-04-motion.pdf; Yahoo!'s Motion for Declaratory Judgement [sic] to Disclose Aggregate Data Regarding FISA Orders and Directives, In re Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives, No. 13-05 (FISA Ct. Sept. 9, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-05-motion-130909.pdf; In re Motion for Declaratory Judgment to Disclose Aggregate Data Regarding FISA Orders and Directives, No. 13-06 (FISA Ct. Sept. 9, 2013), *available at* http://www.uscourts.gov/uscourts/courts/fisc/misc-13-06-motion-130909.pdf (Facebook's motion).

[28] Press Release, Dep't of Justice, Joint Statement by Attorney General Eric Holder and Director of National Intelligence James Clapper on New Reporting Methods for National Security Orders (Jan. 27, 2014), *archived at* http://perma.cc/9YBU-5Y2G (describing settlement in which infrastructure providers were permitted to release "the number of national security orders and requests issued to communications providers, and the number of customer accounts targeted under those orders and requests including the underlying legal authorities").

straint and other First Amendment doctrines in the era of new-school regulation.[29]

Second, the leading infrastructure providers — including Google, Microsoft, Yahoo!, and Facebook — have publicly committed themselves to upholding First Amendment values. These entities have joined the Global Network Initiative (GNI), a multi-stakeholder organization whose members formally commit themselves to "respect and protect the freedom of expression rights of their users when confronted with government demands, laws and regulations to suppress freedom of expression, remove content or otherwise limit access to information and ideas."[30] Further, they have agreed to be independently assessed regarding their compliance with these commitments.[31] This independent assessment process focuses on national security related surveillance requests, government requests for user information, blocking and filtering requirements, and takedown requests received by these entities, to determine whether they have complied with the free speech and privacy principles to which they have publicly committed.[32] The results of the first independent assessments of GNI founding members Google, Microsoft, and Yahoo! were released in January.[33]

These free speech infrastructure providers have further committed to transparency and visibility regarding government censorship and surveillance requests by releasing transparency reports. Google, Microsoft, Yahoo!, and Facebook, as well as Twitter, publicly release detailed transparency reports setting forth the government requests they have received and how they respond to such requests.[34]

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[29] Although the challenges brought by Google, Microsoft, Facebook, and Yahoo! are encouraging from a First Amendment perspective, it bears noting that none of the telephony providers implicated in the NSA mass surveillance program haves challenged NSA requests. *See, e.g.*, Brian Fung, *U.S. Phone Companies Never Once Challenged NSA Data Requests*, WASH. POST (Sept. 18, 2013, 9:15 AM), http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/18/u-s-phone-companies-never-once-challenged-nsa-data-requests/, *archived at* http://perma.cc/9HGH-8EAT.

[30] GLOBAL NETWORK INITIATIVE, PRINCIPLES ON FREEDOM OF EXPRESSION AND PRIVACY 2 (footnote omitted), *available at* http://globalnetworkinitiative.org/sites/default/files/GNI_-_Principles_1_.pdf.

[31] GLOBAL NETWORK INITIATIVE, PUBLIC REPORT ON THE INDEPENDENT ASSESSMENT PROCESS FOR GOOGLE, MICROSOFT, AND YAHOO 3 (Jan. 2014), *available at* http://globalnetworkinitiative.org/sites/default/files/GNI%20Assessments%20Public%20Report.pdf (describing independent assessment process by KPMG, PwC, and Foley Hoag).

[32] *See id.*

[33] *See id.* at 3–4 (executive summary).

[34] *See Transparency Report*, GOOGLE, https://www.google.com/transparencyreport/ (last visited June 9, 2014), *archived at* http://perma.cc/7WXM-YXKW; *Law Enforcement Requests Report*, MICROSOFT, http://www.microsoft.com/about/corporatecitizenship/en-us/reporting/transparency/ (last visited June 9, 2014), *archived at* http://perma.cc/LBZ5-L7Y4 ; *Transparency Report Overview*, YAHOO!, https://transparency.yahoo.com/ (last visited June 9, 2014), *archived at* http://perma.cc/7W6K-FUCA; *Global Government Requests Report*, FACEBOOK,

In summary, the prior restraint doctrine — at least outside of the national security context — is still effective in holding in check government efforts to restrict speech. And recent actions by the entities responsible for the Internet's free speech infrastructure have trended toward transparency and against co-optation by the government. These developments give us reason to be optimistic about the continued relevance of First Amendment precedent and values in the era of new-school regulation. So I'm still dancing.

https://www.facebook.com/about/government_requests (last visited June 9, 2014), *archived at* http://perma.cc/TT8C-TVT2; *Transparency Report*, TWITTER, https://transparency.twitter.com/ (last visited June 9, 2014), *archived at* http://perma.cc/77AP-NXPJ.