

TikTok, Paternalism, and the Federal Police Power

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I. INTRODUCTION

The American people do not trust the federal government.¹ This is not – as a TikTok content creator might phrase it – a hot take.² By itself, it would hardly warrant yet another journal article.³ But what is troubling – if not entirely surprising – is that the feeling is apparently mutual: the federal government does not, in turn, trust its constituents.

To some extent, this, too, is old news. The government has never trusted the general populace to, for instance, access military secrets or possess weapons of mass destruction.⁴ Those are arguably sensible concerns. But with the advent of

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¹ See PEW RESEARCH CENTER, *Public Trust in Government 1958–2023* (Sept. 19, 2023), [\(https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/#:~:text=Public%20trust%20in%20the%20federal,the%20time%E2%80%9D%20\(15%25\)\)](https://www.pewresearch.org/politics/2023/09/19/public-trust-in-government-1958-2023/#:~:text=Public%20trust%20in%20the%20federal,the%20time%E2%80%9D%20(15%25)) (finding that, in 2023, “fewer than two-in-ten Americans say they trust the government in Washington to do what is right ‘just about always’ (1%) or ‘most of the time’ (15%)” [<https://perma.cc/DC3K-6JFH>]).

² See Hot Take, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=hot%20take> [<https://perma.cc/QRB2-ZAGB>] (“an opinion that is likely to cause controversy or is unpopular”).

³ For past discussions, see generally, e.g., Andrew F. Popper, *Discontent and Discord: The Effect of Anti-Government Animus on Compliance with the Norms of Governance*, 101 DENVER L. REV. ONLINE 1 (2023); R. George Wright, *Trust And Distrust Across Constitutional Law*, 36 N.D. J. L. ETHICS & PUB. POL’Y 39 (2022); Robert A. Mikos, *The Populist Safeguards of Federalism*, 8 OHIO ST. L.J. 1669 (2007) (discussing impact of differing levels of trust in state and federal governments).

⁴ See, e.g., Freedom of Information Act, 5 U.S.C. § 552(b)(1)(A) (specifying that FOIA does not apply to “matters that are . . . kept secret in the interest of national defense or

the Digital Age, the dynamic has shifted. Political leaders no longer feel the need merely to protect sensitive information from the public. Rather, a major concern is now the reverse: how to protect the public from sensitive information.

By way of example, consider Division D of the recently enacted 21st Century Peace Through Strength Act.⁵ That section – formally the Protecting Americans from Foreign Adversary Controlled Applications Act, but better known in the media simply as the “TikTok Ban”⁶ – prohibits “an[y] entity” from “distribut[ing], maintain[ing], or updat[ing]” the popular social media application, TikTok, unless ownership of the app is promptly divested to a company based in a non-“adversary” country.⁷

In part, the professed rationale for such a ban is concern over foreign data-mining.⁸ TikTok’s parent company, ByteDance, is based in China, and although company officials have denied direct control by the government, it is undisputed that, under Chinese law, ByteDance may be required to assist with intelligence-gathering.⁹ According to White House National Security Communications Advisor John Kirby, “every American ought to be concerned about . . . what the

foreign policy”); *See also*, *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (holding that the Second Amendment right to bear arms is limited by “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons’” (internal citations omitted)). Or vote directly on issues. *See, e.g.*, THE FEDERALIST NO. 10 at 81–84 (James Madison) (Clinton Rossiter ed., 1961) (discussing the weaknesses of direct democracy).

⁵ H.R. 8038, 118th Cong. (2024). This article was written and accepted for publication following the passage of House Resolution 7521 in the House of Representatives but prior to the introduction of House Resolution 8038. Citations to specific statutory provisions have been updated to reflect this development. However, H.R. 7521 was essentially incorporated wholesale into H.R. 8038 with only minor amendments. *See* CONGRESSIONAL RESEARCH SERVICE, TIKTOK: PROPOSED LEGISLATION AND IMPLICATIONS (Apr. 23, 2024), <https://crsreports.congress.gov/product/pdf/IN/IN12332>. Therefore, citations to prior House Debates have been left unchanged, as they continue to accurately reflect Congressional motives and attitudes. For the same reason, citations to non-Congressional sources, such as journals and interviews, have also been left largely unchanged.

⁶ *See, e.g.*, Aron Solomon, *Everything You Need to Know About the TikTok Ban — and Why It Might Not Even Matter*, THE HILL (Apr. 30, 2024), <https://thehill.com/opinion/technology/4629664tiktok-ban-bytedance-legal-challenge-free-speech-antitrust/> [<https://perma.cc/U84S-8UY7>].

⁷ H.R. 8038, Division D, §§ 2(a)(1); 2(c)(1)(A); 2(g)(6).

⁸ Proponents of the law object to its characterization as a ban. *See* 170 CONG. REC. H1166 (daily ed. Mar. 13, 2024) (statement of Rep. Nancy Pelosi) (“This is not an attempt to ban TikTok. It is an attempt to make TikTok better, tic-tac-toe, a winner.” (punctuation as in original)). However, the law, by its own text, imposes a “prohibition” unless certain requirements are met. H.R. 8038, Division D, §§ 2(a)(1). It is, therefore, a “ban” – albeit a conditional one – under the common definition of that word. *See Ban*, MERRIAM-WEBSTER.COM DICTIONARY (2024), <https://www.merriam-webster.com/dictionary/ban> [<https://perma.cc/8E24-EAXP>] (noun, sense 1: “legal or formal prohibition”). This article therefore employs the term “ban” as shorthand throughout.

⁹ Laura He, *Wait, Is TikTok really Chinese?*, CNN (Mar. 18, 2024, 6:15 AM), <https://www.cnn.com/2024/03/18/tech/tiktok-bytedance-china-ownership-intl-hnk/index.html> [<https://perma.cc/W8YZ-G7CL>].

Chinese Communist Party can do with the information they can glean off of Americans' use of the application."¹⁰

But another major factor behind the ban's passage was the fear of social media as "a propaganda tool" – a way for the nebulous boogeyman of communism "to be able to manipulate a society."¹¹ TikTok, like any other social media platform, is fundamentally a means of communication – of spreading ideas.¹² Proponents of the ban fear the ways in which Americans will react if confronted with some of those ideas.¹³ In other words, they do not trust American citizens to be exposed to the "wrong" information.

Laws of this kind, of which the TikTok Ban is only one example, raise myriad constitutional concerns. Perhaps most obviously, the First Amendment quickly comes into play.¹⁴ But other potential challenges include questions of bills of attainder and takings without compensation under the Fifth Amendment.¹⁵ This article, however, does not argue that the ban is

¹⁰Fritz Farrow, *White House Wants TikTok's Parent Company to Divest: 'We Don't Want to See a Ban'*, ABC NEWS (Mar. 17, 2024, 12:25 PM), <https://abcnews.go.com/Politics/white-house-tiktoks-parent-company-divest-ban/story?id=108185890> [<https://perma.cc/TNP4-8K27>].

¹¹Daniel Chaitin, *House Intel Chair Defends TikTok Bill, Warns Of Chinese 'Propaganda Tool'*, DAILY WIRE (Mar. 17, 2024), <https://www.dailywire.com/news/house-intel-chair-defends-tiktok-bill-warns-of-chinese-propaganda-tool> [<https://perma.cc/9EVW-UJ7G>] (quoting House Intelligence Chairman Mike Turner (R-OH)); *see also, e.g.*, David McCabe & Sapna Maheshwari, *What to Know About the TikTok Bill That the House Passed*, N.Y. TIMES (Mar. 13, 2024), <https://www.nytimes.com/2024/03/13/technology/tiktok-ban-law-congress.html> [<https://perma.cc/CMK5-VQV5>] ("Lawmakers including Representative Mike Gallagher, . . . who co-led the bill, and Senator Mark Warner . . . say China could use TikTok . . . to feed its users political propaganda. Christopher A. Wray, director of the Federal Bureau of Investigation, and Avril Haines, director of national intelligence, have flagged the concerns in the last year."); Taylor Lorenz, *The Tiktok Debate Featured Many Disputed Claims. Here Are 7 of Them*, WASH. POST. (Mar. 16, 2024, 10:00 AM) <https://www.washingtonpost.com/technology/2024/03/16/tik-tok-debate-claims/> [<https://perma.cc/XD9Y-NC69>] (listing as a disputed claim: "TikTok's algorithm is controlled by the Chinese Communist Party to push government propaganda to U.S. users.").

¹²*See* Community Guidelines, TIKTOK (Mar. 2023), <https://www.tiktok.com/community-guidelines/en/> [<https://perma.cc/NLJ5-PK43>] (TikTok's "community principles" include "[e]nabl[ing] free expression[.]" "[f]oster[ing] civility[.]" and "[c]hampion[ing] inclusion[.]").

¹³*See, e.g.*, Ari Shapiro, Jordan-Marie Smith, Sarah Handel, *This Senator Tells NPR Why He's Leading a Charge Against TikTok — And What Comes Next*, NPR (Mar. 19, 2024, 4:20 AM), <https://www.npr.org/2024/03/19/1239426001/tiktok-ban-congress-senate-china-senate-mark-warner> [<https://perma.cc/N57L-T95W>] (quoting Senator Mark Warner).

¹⁴*See, e.g.*, Jacob Gershman, *Potential TikTok Ban Tees Up Legal Showdown Over Free Speech*, WALL STREET J. (Mar. 18, 12:10AM), <https://www.wsj.com/us-news/law/tiktok-ban-legal-court-challenges-fdc06180> [<https://perma.cc/DD4R-UGUB>].

¹⁵*See, e.g.*, Joel Thayer, *Is a Ban on TikTok a Bill of Attainder*, FEDSOCIETY BLOG (May 9, 2023), <https://fedsoc.org/commentary/fedsoc-blog/is-a-ban-on-tiktok-a-bill-of-attainder> [<https://perma.cc/64E2-C6BC>]; *See, e.g.*, CONGRESSIONAL RESEARCH SERVICE, LEGAL SIDEBAR 4–5 (Mar. 14, 2024), <https://crsreports.congress.gov/product/pdf/LSB/LSB10942> [<https://perma.cc/4P9J-HZMK>].

unconstitutional on those bases.¹⁶ Instead, this article examines the increasing federal attempts to regulate the media as a manifestation of a more general misguided governmental paternalism. In particular, this article argues that – even if it does so in the exercise of its enumerated powers – when the federal government limits the people’s exposure to potentially untrue information or supposedly harmful ideas, it exercises a general police power that it does not have and runs afoul of basic constitutional principles.

To this end, Part II of this article examines the problem of misinformation and the rise of foreign influence and “fake news” as matters of legal concern. Part III of this article considers the TikTok Ban and laws like it as manifestations of governmental paternalism. It argues that, in the context of the United States federal government, such paternalism is problematic for two reasons: In the abstract, governmental paternalism conflicts with basic principles of representative democracy (IIIA). More concretely, when the federal government enacts laws sweepingly intended to protect Americans from themselves, it reaches beyond its legitimate limits and exercises a general police power that it does not, in fact, have (IIIB). Finally, Part IV briefly concludes this article.

II. THE RISE OF MODERN MISINFORMATION

The spread of dangerous ideas into the United States from abroad is a perennial concern.¹⁷ With the advent of mass media, however, the fear of “foreign influence” has redoubled.¹⁸ Indeed, one source has characterized the related concept of “fake news” as “the central inflammatory charge in media

¹⁶ It self-evidently is. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 754–55 (1990) (Brennan, J., dissenting) (“[I]t is axiomatic that a listener’s reaction to speech is not a content-neutral basis for regulation; *United States v. Eichman*, 496 U.S. 310, 315–318 (1990); *Texas v. Johnson*, 491 U.S. 397, 408–410 (1989). Speech is not subject to regulation ‘simply because it may embarrass others or coerce them into action.’ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988), quoting *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982).” (internal citations cleaned up)); *see also, e.g.*, Artem M. Joukov, *Comrades or Foes: Did the Chinese Break the Law or New Ground for the First Amendment?*, 125 W. VA. L. REV. 123, 160 (2022) (discussing “how the decisions fit into the greater context of First Amendment jurisprudence” and showing “that government regulations of internet communication platforms is almost assuredly unconstitutional”).

¹⁷ *See generally* Joseph Russomanno, *The Right and the Duty: Jefferson, Sedition, and the Birth of the First Amendment’s Central Meaning*, 23 COMM. L. & POL’Y 49 (2017) (explaining the Alien and Sedition Acts of 1798 as an attempt to sequester the United States from French revolutionary ideas which “beg[an] a pattern that the United States would repeat when there was a perception that national security was threatened”).

¹⁸ *See, e.g., Combating Foreign Influence, FBI*, <https://www.fbi.gov/investigate/counterintelligence/foreign-influence> (last visited Mar. 18, 2024) (“Foreign influence operations . . . are not a new problem. But the interconnectedness of the modern world, combined with the anonymity of the Internet, have changed the nature of the threat . . .”).

discourse in the United States since the 2016 presidential contest.”¹⁹ This is perhaps unsurprising given the overwhelming evidence that Russian entities directly interfered in the 2016 presidential election, notably by “carr[ying] out a social[-]media campaign that favored presidential candidate Donald J. Trump and disparaged presidential candidate Hillary Clinton.”²⁰

Nor was the 2016 election an isolated incident. For instance, foreign operatives made similar efforts to spread propaganda in advance of the 2022 midterm elections,²¹ and there is evidence that Russian intelligence agencies used social media to disseminate false information regarding the COVID-19 pandemic and vaccines.²² Likewise, as the 2024 presidential election approaches, Chinese profiles have already begun social-media campaigns aimed at widening existing American political divides.²³ Thus, while the spread of foreign, “anti-American” propaganda has always been a concern, there is now a general consensus that the advent of mass media has fundamentally changed the game.²⁴

Moreover, these rekindled fears of foreign influence are not limited to large-scale issues like elections or vaccine campaigns. Concern continues to grow that foreign countries are working to shape individual Americans into pawns, dupes, or even weapons. The Brookings Institute reports that Russia, China, Iran, and Turkey, among other states, have been “engaged in social cyberwarfare” since at least 2014, with the goal of installing “useful idiots” among the American

¹⁹ Lili Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 232, 233 (2017).

²⁰ ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1 (2019), <https://www.justice.gov/archives/sco/file/1373816/dl> [<https://perma.cc/R7HZ-VGUS>].

²¹ See, e.g., Sean Lyngaas, *Russia and China Are Promoting US Voting Misinformation Ahead of Midterms, FBI Warns*, CNN (Oct. 3, 2022, 4:06 PM), <https://www.cnn.com/2022/10/03/politics/2022-election-security-fbi/index.html> [<https://perma.cc/DD3K-FY5B>].

²² See, e.g., Michael R. Gordon & Dustin Volz, *Russian Disinformation Campaign Aims to Undermine Confidence in Pfizer, Other Covid-19 Vaccines, U.S. Officials Say*, WALL STREET JOURNAL (Mar. 7, 2021, 10:00 AM), <https://www.wsj.com/articles/russian-disinformation-campaign-aims-to-undermine-confidence-in-pfizer-other-covid-19-vaccines-u-s-officials-say-11615129200> [<https://perma.cc/VXR5-TH3H>].

²³ See, e.g., Shannon Bond, *2024 Elections are Ripe Targets for Foes of Democracy*, NPR (Dec. 29, 2023, 5:26 AM), <https://www.npr.org/2023/12/29/1220087754/2024-elections-targets-foes-democracy-disinformation> [<https://perma.cc/V55H-6YVJ>].

²⁴ See, e.g., Samantha Bradshaw, Centre for International Governance, *Influence Operations and Disinformation on Social Media*, Report: MODERN CONFLICT & ARTIFICIAL INTELLIGENCE 42 (2020), <https://www.jstor.org/stable/pdf/resrep27510.9.pdf> [<https://perma.cc/LV9L-VBTG0>]. (“Today, unlike in the past, when disinformation campaigns were slow, expensive and data-poor, social media provides a plethora of actors with a quick, cheap[,] and data-rich medium to use to inject disinformation into civic conversations.”).

populace.²⁵ Foreign-based radicalization campaigns of this kind have been identified or alleged not just on TikTok,²⁶ but also on Facebook, Reddit, and YouTube, among other platforms.²⁷ And the effects have already been felt – for instance, in 2016, the same year that Oxford Dictionaries selected “post-truth” as the Word of the Year,²⁸ James Comey, Director of the FBI, announced that Pulse-nightclub shooter Omar Mateen had been radicalized online by “foreign terrorist organizations”.²⁹

Federal responses to these concerns have taken multiple forms. In 2019, President Donald Trump declared a state of emergency on the ground that “foreign adversaries are increasingly creating and exploiting vulnerabilities in information and communications . . . in order to commit malicious cyber-enabled actions.”³⁰ The following year, he would rely on that declaration to target TikTok specifically, issuing an executive order “Addressing the Threat Posed by TikTok.”³¹ That order, which would have required that TikTok be divested to an approved American company or be banned within the United States,³² was blocked by the District of D.C. and later repealed by President Joe

²⁵ DANA BETH WEINBERG & JESSICA DAWSON, BROOKINGS INSTITUTE, FROM ANTI-VAXXER MOMS TO MILITIA MEN: INFLUENCE OPERATIONS, NARRATIVE WEAPONIZATION, AND THE FRACTURING OF AMERICAN IDENTITY 3 (2021), https://www.brookings.edu/wp-content/uploads/2021/10/FP_20211108_influencer_operations_dawson_weinberg_v2.pdf [https://perma.cc/89J9-WRCT].

²⁶ See, e.g., Drew Harwell, *TikTok Was Slammed for Its Pro-Palestinian Hashtags. But It's Not Alone*, THE WASH. POST (Nov. 13, 2023, 10:05 AM), <https://www.washingtonpost.com/technology/2023/11/13/tiktok-facebook-instagram-gaza-hashtags/> [https://perma.cc/XF2D-XCPM] (quoting various federal government officials alleging that TikTok is “brainwashing our youth against the country and our allies”).

²⁷ See, e.g., Melissa Alonso, *Judge Rules YouTube, Facebook and Reddit Must Face Lawsuits Claiming They Helped Radicalize a Mass Shooter*, CNN (Mar. 19, 2024), <https://www.cnn.com/2024/03/19/tech/buffalo-mass-shooting-lawsuit-social-media/index.html> [https://perma.cc/2X2X-P6VA]; Simon Shuster & Billy Perrigo, *Like, Share, Recruit: How a White-Supremacist Militia Uses Facebook to Radicalize and Train New Members*, TIME (Jan. 7, 2021, 6:20 PM), <https://time.com/5926750/azov-far-right-movement-facebook/> [https://perma.cc/AE5K-C8J9].

²⁸ Word of the Year 2016, OXFORD UNIVERSITY PRESS (2016), <https://global.oup.com/academic/content/word-of-the-year/?cc=us&lang=en> [https://perma.cc/NR8L-3J7B] (“relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief”).

²⁹ Ed Pilkington & Dan Roberts, *FBI and Obama Confirm Omar Mateen Was Radicalized on the Internet*, THE GUARDIAN (June 14, 2016, 2:06 AM), <https://www.theguardian.com/us-news/2016/jun/13/pulse-nightclub-attack-shooter-radicalized-internet-orlando> [https://perma.cc/HV8N-UN7N].

³⁰ Exec. Order No. 13873, 84 Fed. Reg. 22,689 (May 17, 2019).

³¹ Exec. Order No. 13942, 85 Fed. Reg. 48,637 (Aug. 6, 2020).

³² See Joukov, *supra*, note 16, at 160.

Biden.³³ But efforts to regulate social media did not end with the Trump administration.

Since taking office, President Biden, too, has issued orders which, while ostensibly affirming American support for “open, global, interoperable, reliable, and secure flows of data across borders,”³⁴ continue to target the “use in the United States of certain connected software applications . . . subject to the jurisdiction or direction of[] a foreign adversary, . . . includ[ing] the People’s Republic of China.”³⁵ Furthermore, in a case currently pending before the Supreme Court,³⁶ the attorneys general of Missouri and Louisiana, along with several private parties, have alleged that “at least since the 2020 presidential transition[,] a group of federal officials has been in regular contact with nearly every major American social-media company about the spread of ‘misinformation’ on their platforms.”³⁷ The Western District of Louisiana,³⁸ subsequently affirmed by the Fifth Circuit,³⁹ found that those allegations had merit and enjoined the Biden administration from continuing what they characterized as “a ‘coordinated campaign’ . . . to suppress the expression of disfavored views on important public issues.”⁴⁰

Most recently, Congress has also taken up the fight. On March 5, 2024, Representative Mike Gallagher introduced House Resolution 7521, the Protecting Americans from Foreign Adversary Controlled Applications Act,⁴¹ which, in a rare display of overwhelming bipartisanship, quickly passed the House by a margin of 352 to sixty-five.⁴² And while that Act floundered in the Senate,⁴³ it was soon resurrected as a rider to House Resolution 8038, the 21st

³³ *TikTok Inc. v. Trump*, 490 F. Supp. 3d 73 (D.D.C. 2020); Exec. Order No. 14034, 86 Fed. Reg. 31,423 (June 9, 2021).

³⁴ Exec. Order No. 14117, 89 Fed. Reg. 15780 (Feb. 28, 2024).

³⁵ Exec. Order No. 14034, 86 Fed. Reg. 31,423 (June 9, 2021).

³⁶ *Murthy v. Missouri*, No. 23-30445 (application for stay filed Sept. 14, 2023, construed as petition for certiorari and granted, 92 U.S.L.W. 3087 (U.S. Oct. 20, 2023) (No. 23-00411)).

³⁷ *Missouri v. Biden*, 83 F.4th 350, 359 (5th Cir. 2023).

³⁸ See *Missouri v. Biden*, 3:22-cv-01213, 2022 U.S. Dist. LEXIS 131135 (W.D. La. July 12, 2022).

³⁹ See *Biden*, 83 F.4th 350.

⁴⁰ *Murthy*, 92 U.S.L.W. at 7 (Alito, J., dissenting from grant of application for stay) (quoting *Biden*, 83 F.4th at 392).

⁴¹ H.R. 7521, 118th Cong. (2024).

⁴² 170 CONG. REC. H1170–71 (daily ed. Mar. 13, 2024).

⁴³ Mary Clare Jalonick, *TikTok Bill Faces Uncertain Fate in the Senate as Legislation to Regulate Tech Industry Has Stalled*, AP NEWS (Mar. 25, 2024, 12:29 AM), <https://apnews.com/article/senate-tiktok-ban-lobbying-congress-china-a340cf30b05343816380793af1c5d186> [https://perma.cc/J5GN-5P9X]; Sahil Kapur, Frank Thorp V, Kate Santaliz, *TikTok Ban’s Fate Is Uncertain in the Senate, Where There Is Less Urgency to Act*, NBC NEWS (Mar. 13, 2024, 10:40 AM), <https://www.nbcnews.com/politics/congress/tiktok-bans-fate-uncertain-senate-less-urgency-act-rcna143162> [https://perma.cc/WR9A-CD2K].

Century Peace Through Strength Act.⁴⁴ That Act, a mostly unrelated bill forming part of a larger foreign-aid package, passed the House on April 20 and the Senate on April 23 and was signed into law by President Biden on April 24.⁴⁵

The relevant portion of the newly enacted law not only explicitly targets TikTok,⁴⁶ but it also applies to other “foreign[-]adversary[-]controlled applications” to be identified in the future by the President.⁴⁷ It provides that any app so identified must, within one year,⁴⁸ be divested so that, in the judgment of the President, it is “no longer being controlled by a foreign adversary.”⁴⁹ Failing such divestment, it is unlawful for any entity in the United States to “distribute, maintain, or update” such an app, or to “[p]rovide internet hosting services” that would facilitate distribution, maintenance, or updates.⁵⁰ Any entity in violation is subject to civil penalties of up to \$5,000 for every American user of a prohibited app.⁵¹

On the House floor, the 21st Century Peace Through Strength Act was debated for only thirty minutes, during which the TikTok Ban was, compared to the bill’s more prominent foreign-aid and sanction provisions, largely an afterthought.⁵² And in its original incarnation as House Resolution 7521, the ban was subject to only slightly longer debate.⁵³ Unsurprisingly, that discussion

⁴⁴ H.R. 8038, 118th Cong. (2024).

⁴⁵ See, e.g., Kati Perry, Hannah Dormido, Dylan Moriarty, Kevin Uhrmacher, Adrian Blanco, *How Every House Member Voted on Aid to Ukraine, Israel, and More*, WASH. POST (Apr. 20, 2024, 3:34 PM), <https://www.washingtonpost.com/politics/interactive/2024/04/20/ukraine-israel-border-funding-house-vote/> [<https://perma.cc/GP5F-JNN3>] (describing H.R. 8038 as containing “various sanctions” as part of “a \$95 billion foreign aid package”); Morgan Rimmer & Ted Barrett, *Senate Passes \$95 Billion Package Sending Aid to Ukraine, Israel and Taiwan After Months of Delay*, CNN (Apr. 30, 2024, 1:16 PM), <https://www.cnn.com/2024/04/23/politics/senate-vote-foreign-aid/index.html> [<https://perma.cc/N2QB-3F95>]; Aamer Madhani & Seung Min Kim, *Biden Says the US is Rushing Weaponry to Ukraine as He Signs a \$95 Billion War Aid Measure Into Law*, AP NEWS (Apr. 24, 2024, 4:28 PM), <https://apnews.com/article/joe-biden-mike-johnson-ukraine-israel-b72aed9b195818735d24363f2bc34ea4> [<https://perma.cc/7KNJ-HZKE>].

⁴⁶ H.R. 8038, Division D, § 2(g)(3)(A)(ii).

⁴⁷ *Id.* at §2(g)(3)(B).

⁴⁸ The law provides for an initial period of 270 days. *Id.* at § 2(a)(2). However, the President may, under certain circumstances, grant a single extension of ninety days. *Id.* at § 2(a)(3). For apps expressly identified in the law itself (i.e., TikTok) the period began to run on the date of the law’s enactment. *Id.* at § 2(a)(2)(A). For apps subsequently identified by the President, the period begins to run on the date that the President makes “the relevant determination”. *Id.* at § 2(a)(2)(b).

⁴⁹ *Id.* at §§ 2(c)(1)(A); 2(g)(6)(A).

⁵⁰ *Id.* at § 2(a)(1).

⁵¹ *Id.* at § 2(d)(1)(A).

⁵² 170 CONG. REC. H2562 (daily ed. Apr. 20, 2024). TikTok was mentioned only eight times, one of which concerned the ubiquity of footage of the Israel-Palestine conflict on social media rather than the proposed Ban. *Id.* at H2564 (statement of Rep. Joaquin Castro).

⁵³ 170 CONG. REC. H1164 (daily ed. Mar. 13, 2024).

centered not on TikTok's data-collecting capabilities, but rather on its potential use as "a valuable propaganda tool for the [Chinese Communist Party] to exploit."⁵⁴ Representative Cathy McMorris Rodgers, for instance, who first rose in support of the bill, argued that the ban was necessary to frustrate CCP attempts to "weaponize[] applications it controls to manipulate tens of millions of people to further its agenda,"⁵⁵ while Representative Thomas Massie countered that "Americans have the right to view information," and "don't need to be protected by the government from information."⁵⁶ Other opponents challenged the bill as an expansion of the "surveillance state" that would presage mandatory "engage[ment] with America's three-letter agencies in content moderation"⁵⁷ and explicitly defended "a First Amendment right of access to foreign propaganda."⁵⁸ By contrast, supporters argued that the bill was narrowly tailored to target "conduct, not content" as part of the United States' ongoing "cold war with China"⁵⁹ and that forced divestiture of TikTok represented "a stand against the Chinese Communist Party and [its] efforts to turn content creators in America into foot soldiers for the CCP."⁶⁰

In the end, of course, proponents of the ban – or, perhaps, proponents of imposing sanctions on Russia and Palestine – carried the day.⁶¹ The 21st Century Peace Through Strength Act, and with it the TikTok Ban, passed Congress and was signed into law on April 24, presenting TikTok parent company ByteDance with an ultimatum: divest or be banned. But, as the remainder of this article will establish, the imposition of such an ultimatum – like other attempts to sequester the American people from dangerous ideas – is a troubling overreach beyond what the federal government should be empowered to do.

III. THE DUAL PROBLEMS OF PATERNALISM

Speaking in opposition to House Resolution 7521, Representative Thomas Massie opened his remarks by recognizing the good intentions of the ban's supporters and acknowledging that "the sponsors of this bill are sincere in their

⁵⁴ *Id.* at H1164 (statement of Rep. Cathy McMorris Rodgers).

⁵⁵ *Id.* Notably, and apparently in earnest, she expressed concern that "[c]ompanies controlled by a foreign adversary, like the CCP, will never embrace American values like the freedom of speech . . . and a free press." *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at H1166 (statement of Rep. Warren Davidson).

⁵⁸ *Id.* at H1167 (statement of Rep. Dan Bishop) (arguing that "the proper relationship between government and citizen in the United States is that the citizen decides what to be exposed to and what ideologies to embrace and consider and is always free to engage in expression including across international boundaries").

⁵⁹ 170 CONG. REC. H1168 (daily ed. Mar. 13, 2024) (statement of Rep. Chip Roy).

⁶⁰ *Id.* (statement of Rep. Kat Cammack).

⁶¹ See H.R. 8038, Division B (Rebuilding Economic Prosperity and Opportunity for Ukrainians Act); Division I (Hamas and Other Palestinian Terrorist Groups International Financing Prevention Act) (118th Cong. 2024).

concerns and in their effort to protect Americans.”⁶² This article in no way contests that point. To the contrary, there is every reason to believe that the Senators and Representatives who voted in favor of banning TikTok did so out of an earnest concern for the safety of the United States and its citizens. The points with which this article takes issue, however, are why Americans need protection, from what, and by whom.

The language used by the ban’s proponents is telling. The report by the House Committee on Energy and Commerce on House Resolution 7521 noted that “[c]ommunications applications that are owned and operated by companies controlled by foreign adversary countries . . . can be used by those countries to collect vast amounts of data on Americans, conduct espionage campaigns, *and push misinformation, disinformation, and propaganda on the American public.*”⁶³ Highlighting this point, the report quoted FBI Director Christopher Wray’s warning that TikTok is “in the hands of a government that doesn’t share our values and that has a mission that’s very much at odds with what’s in the best interests of the United States.”⁶⁴ It further noted the potential use of the app “to help manipulate social discourse and amplify false information to tens of millions of Americans”⁶⁵ and – apparently unironically – echoed State-Department fears that “TikTok creates opportunities for PRC global censorship.”⁶⁶ On these and other grounds, the Committee concluded that passage of the bill was necessary to “protect Americans” from “[f]oreign adversaries” who “push disinformation and propaganda campaigns in an attempt to undermine our democracy and gain worldwide influence and control.”⁶⁷

Likewise, in debate on the House floor, Representatives flagged fears of “manipulation”⁶⁸ and “propaganda.”⁶⁹ In an article comparing TikTok to “digital fentanyl,” Representative Mike Gallagher wrote that TikTok is “brainwashing our youth against the country and our allies.”⁷⁰ Presidential hopeful Nikki Haley claimed that exposure to TikTok makes individuals

⁶² 170 CONG. REC. H1164 (daily ed. Mar. 13, 2024).

⁶³ H.R. REP. NO. 118–417, at 2 (2024) (emphasis added).

⁶⁴ *Id.* at 8 (citing Anisha Kohli, *Why the FBI Is Concerned About TikTok*, TIME MAG. (Dec. 3, 2022, 3:42 PM), <https://time.com/6238540/tiktok-fbi-security-concerns/> [<https://perma.cc/388K-J5YC>]).

⁶⁵ *Id.* at 9.

⁶⁶ *Id.* at 11 (cleaned up; no citation provided in original).

⁶⁷ *Id.* at 2.

⁶⁸ 170 CONG. REC. H1164 (daily ed. Mar. 13, 2024) (statement of Rep. Cathy McMorris Rodgers); *id.* at H1167 (statement of Rep. Anna Eshoo); *id.* at H1168 (statement of Rep. Larry Bucshon).

⁶⁹ *Id.* at H1164 (statement of Rep. Cathy McMorris Rodgers); *id.* at 1165 (statement of Rep. Frank Pallone); *id.* at 1169 (statement of Rep. Christopher Smith).

⁷⁰ Mike Gallagher, *Why Do Young Americans Support Hamas? Look at TikTok*, THE FREE PRESS (Nov. 1, 2023), <https://www.thefp.com/p/tik-tok-young-americans-hamas-mike-gallag> [<https://perma.cc/9BK4-63CV>].

quantifiably “more antisemitic.”⁷¹ And Senator Mark Warner has speculated that “particularly in an election year like this,” the Chinese Communist Party might manipulate TikTok’s algorithm to convince users that “Taiwan is really part of China.”⁷²

But the passage of a federal law to address these concerns presupposes that the American people cannot handle them on their own. It assumes that citizens cannot identify or resist “misinformation” or “propaganda” – whatever those buzzwords may mean – without the help of the government. In other words, banning TikTok for fear of the information it spreads suggests – and indeed, is only necessary if – the federal government cannot trust its constituents to reach the “right” conclusions when confronted with such information.

This is what is meant by governmental “paternalism”: the restriction of freedoms – in this case, freedom of communication – justified by the government’s belief that citizens cannot be trusted to use those freedoms in their own best interests.⁷³ As an abstract concept, there is nothing inherently wrong with paternalism. A parent, for instance, acts paternalistically when they forbid a child to run with scissors.⁷⁴ But, in the context of American lawmaking, paternalism presents two problems. As a matter of political theory, it is simply inconsistent with a system of representative democracy. And as a matter of constitutional law, it should not be permitted to justify action by the federal government.

A. *Paternalism and Government by the People*

To begin with, democratic systems in general typically view governmental paternalism as suspect at best,⁷⁵ because it allows “the state [to] treat adults like children, substituting its judgment of their best interests for their own.”⁷⁶ As an

⁷¹ Em Steck, *Fact Check: Nikki Haley Makes a Misleading Claim About Tiktok Leading to Antisemitism*, CNN (Dec. 8, 2023, 4:15 PM), <https://www.cnn.com/2023/12/08/politics/fact-check-nikki-haley-misleading-claim-tiktok-antisemitism/index.html> [<https://perma.cc/L9RK-R4D6>].

⁷² Shapiro et al., *supra* note **Error! Bookmark not defined.**

⁷³ This definition is adapted from two definitions employed by Professor Dale Carpenter in his article, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 579, 582–83 (2004) (“regulation . . . based on the fear that people will not be able to use their freedom properly”; and “a restriction on otherwise protected speech justified by the government’s belief that speaking or receiving the information in the speech is not in citizens’ own best interests”).

⁷⁴ Literally. See *Paternal*, ONLINE ETYMOLOGY DICTIONARY (Mar. 26, 2024), <https://www.etymonline.com/word/paternal> [<https://perma.cc/5F8X-YCT2>] (deriving ultimately from Latin *pater*, “father”).

⁷⁵ See, e.g., Carpenter, *supra* note 73 at 579 (citing David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 519 (1988) (“Ever since John Stuart Mill’s assault in his renowned essay, *On Liberty*, paternalism has not been held in high regard by democratic theorists and practitioners.”)).

⁷⁶ Carpenter, *supra*, note 73, at 579.

illustration, suppose that Senator Warner’s prediction comes to pass: at the direction of the CCP, ByteDance uses TikTok to spread viral videos asserting that “Taiwan is really part of China.”⁷⁷ If we assume that the general American populace is composed of reasonably rational, intelligent people, then the logical response is “so what?” In those circumstances, competent adults could presumably be trusted to choose whether or not to continue using the app.⁷⁸ Having continued to use the app, they could presumably be trusted to determine whether any given video was a credible source of information about the legitimacy of the Taiwanese government. And having determined that a video was a credible source, they could presumably be trusted to decide whether the information they had learned was sufficient to change their position on Taiwanese sovereignty.

Put simply, even assuming its proponents’ worst-case scenarios, a ban on TikTok is necessary only if we accept the patronizing premise that, without the federal government’s help, the American people *cannot* be trusted to do any of these things. Moreover, such a ban presupposes that support for an independent Taiwan – or any other “orthodox” political stance – is an objectively “correct” belief that the federal government must foster in its constituents.

But these premises are untenable. There is a conceptual absurdity in supposing that the general populace cannot be trusted to make the right decisions *except* when deciding who to elect to the highest offices in the land. As Professor George Nation has observed when describing what he terms “the paternalism hazard” of representative democracy,⁷⁹ the entire constitutional system of the United States begins and ends – quite literally – with “the People.”⁸⁰ Such a system is incompatible with the conception of elected representatives as a kind of superior being better equipped than their electors to know what information those electors can handle.

Of course, the intelligence and rationality of the general populace should not be overstated. Assuming that there is such a thing as objective truth,⁸¹ not every American citizen is going to arrive at it every time. Certainly, the American people have a long way to go when it comes to evaluating the

⁷⁷ See Shapiro et al., *supra* note **Error! Bookmark not defined.**

⁷⁸ Or, of course, to allow their children to continue to do so. See, e.g., Gallagher, *supra* note 70 (discussing TikTok’s influence on minors).

⁷⁹ George A. Nation III, *We the People: The Consent of the Governed in the Twenty-First Century: The People’s Unalienable Right to Make Law*, 4 DREXEL L. REV. 319, 336 (2012).

⁸⁰ *Id.* at 324 n. 27 (noting that “the People” is both the first phrase of the Constitution and the last line of the Bill of Rights).

⁸¹ *But see generally, e.g.,* Tristram Hunt, *Whose Truth? Objective Truth and a Challenge for History*, TRUTH COMMISSIONS AND COURTS 193–98 (William Schabas & Shane Darcy eds. 2004) (cautioning against the dangers of attempting to reach “the official truth of a country”).

trustworthiness of news sources.⁸² But we are getting better at it.⁸³ And there is absolutely no evidence whatsoever to suggest that our elected officials do any better.⁸⁴

B. A Police Power by Any Other Name

In addition to being abstractly objectionable as a matter of republican principles, paternalism poses legal difficulties when embraced by the American federal government. To this point, although it has rarely explicitly condemned federal “paternalism” as such, the Supreme Court has repeatedly and emphatically held that “[t]he Constitution . . . withhold[s] from Congress a plenary police power.”⁸⁵ In other words, while “[t]he States have broad authority to enact legislation for the public good . . . , [t]he Federal Government, by contrast, has no such authority.”⁸⁶ Thus, while a general desire to safeguard

⁸² See, e.g., Ryan Prior, *Most Americans Think They Can Spot Fake News. They Can't*, *Study Finds*, CNN (May 31, 2021, 8:03 P.M.), <https://www.cnn.com/2021/05/31/health/fake-news-study/index.html> [<https://perma.cc/GD9C-N8TV>]; see also, e.g., the truly insane texts that my mother sends me (on file with the author).

⁸³ See Ryan C. Moore *et al.*, *Exposure to Untrustworthy Websites in the 2020 U.S. Election*, 7 NATURE HUMAN BEHAVIOR 1096–1105 (2023) (finding that approximately 20% fewer adult Americans accessed untrustworthy websites in 2020 election than in 2016 election).

⁸⁴ See, e.g., Marjorie Taylor Greene (@RepMTG), X (formerly TWITTER) (Sept. 18, 2023, 8:19 AM), <https://x.com/RepMTG/status/170374543834655755?s=20> [<https://perma.cc/5YWM-TAL6>] (sharing staged video as real); Sen. Ted Cruz (@tedcruz), X (formerly TWITTER) (Aug. 28, 2023, 5:37 PM), <https://x.com/tedcruz/status/1696275828869353581?s=20> [<https://perma.cc/REA2-29V5>] (sharing video purporting to show that “[t]he Biden administration welded open the Trump border wall”, which in fact shows established practice of opening floodgates during monsoon season); Former President Donald J. Trump (@realDonaldTrump), X (formerly TWITTER) (Oct. 16, 2020, 6:07 AM), <https://x.com/realDonaldTrump/status/1317044556328730625?s=20> [<https://perma.cc/LYZ2-WH3Q>] (sharing satirical news article apparently in earnest); Sen. Mike Lee (@BasedMikeLee), X (formerly TWITTER) (Aug. 19, 2023, 1:42 AM), <https://x.com/BasedMikeLee/status/1692773970691473463?s=20> [<https://perma.cc/E2LR-EFCU>] (sharing, apparently in earnest, unsourced screenshot of headline from well-known false news website InfoWars).

⁸⁵ *United States v. Lopez*, 514 U.S. 549, 566 (1995).

⁸⁶ *Bond v. United States*, 572 U.S. 844, 854 (2014).

citizens' ideological welfare *might* be sufficient to support legislative action by a State,⁸⁷ Congress “can exercise only the powers granted to it.”⁸⁸

Of the powers at Congress' disposal, the most obvious candidate to justify the TikTok Ban is the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁸⁹ Since at least the New Deal, the courts have interpreted this power expansively,⁹⁰ holding that it allows Congress to reach matters as seemingly distant from the everyday meaning of “interstate” or “foreign commerce” as personal consumption of home-grown marijuana and attempted robbery of a local drug dealer.⁹¹ Certainly, it extends far enough to authorize general regulation of the internet and the means of accessing it.⁹²

But, however expansively interpreted, the Commerce Clause has its limits.⁹³ In recent years, the Supreme Court has, for example, stricken down as exceeding federal power under the Commerce Clause laws which criminalized the possession of firearms in school zones and created a civil cause of action for gender-motivated violence.⁹⁴ Of course, laws like the TikTok Ban are not precisely the same as these examples. Unlike the Gun-Free School Zones Act⁹⁵ or the Violence Against Women Act,⁹⁶ laws that explicitly target activity by

⁸⁷ Compare *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 790 (1988) (“The State's remaining justification – the paternalistic premise that charities' speech must be regulated for their own benefit – is equally unsound.”) with *id.* at 808, n. 1 (Rehnquist, J., dissenting) (“All economic regulation of this sort is ‘paternalistic’ in the sense that it prevents parties who wish to contract with one another from entering into a contract on precisely the terms that they would choose. But ever since *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) . . . ‘paternalism’ has been a perfectly acceptable motive for legislative regulation of this sort . . .”).

⁸⁸ *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819).

⁸⁹ U.S. CONST. art I, § 8, cl. 3. The text of the bill itself does not explicitly identify which of those powers supports its enactment. See H.R. 7521, 118th Cong. (2024). However, that omission is far from fatal. It is well-established that “the constitutionality of [an] action taken by Congress does not depend on recitals of the power which it undertakes to exercise.” *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); see also *EEOC v. Wyoming*, 460 U.S. 226, 243 n. 18 (1983).

⁹⁰ See *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring) (surveying development of Commerce Clause case law since the framing).

⁹¹ See *Gonzales v. Raich*, 545 U.S. 1 (2005); See *Taylor v. United States*, 579 U.S. 301 (2016).

⁹² See, e.g., *Van Buren v. United States*, 141 S. Ct. 1648, 1652 (2021) (noting that because it applies to any computer “used in or affecting interstate or foreign commerce or communication”, the Computer Fraud and Abuse Act of 1986, 18 U.S.C. § 1030, “now applies—at a minimum—to all information from all computers that connect to the Internet”).

⁹³ See *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968) (“[T]he power to regulate commerce, though broad indeed, has limits.”).

⁹⁴ *Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000).

⁹⁵ 18 U.S.C. § 922(q)(1)(1A); see *Lopez*, 514 U.S. 549.

⁹⁶ 42 U.S.C. § 13981; see *Morrison*, 529 U.S. 598.

foreign entities clearly do not attempt to regulate purely intrastate conduct.⁹⁷ Nor do such laws, unlike those examples, apply only to patently non-commercial activities.⁹⁸ Even setting aside users' ability to directly monetize content,⁹⁹ it would be largely uncontroversial to recognize that the distribution of an app through digital "stores" falls within the meaning of "commerce."¹⁰⁰ Thus, laws like the TikTok Ban do seem to fall, at least facially, within the broad definition of "regulat[ing] Commerce with foreign Nations."¹⁰¹

Nevertheless, the same concerns that have counseled the Supreme Court to "read [the Commerce Clause] carefully"¹⁰² in recent cases render social media laws like the TikTok Ban equally suspect. Recognizing that "the enumeration of [federal] powers . . . presupposes something not enumerated,"¹⁰³ the Supreme Court has refused "to convert congressional authority under the Commerce Clause [in]to a general police power of the sort retained by the States."¹⁰⁴ But this is precisely the kind of paternalistic power that Congress exercises by passing laws like the TikTok Ban.

Of course, the Supreme Court has, on the one hand, held that "[t]he motive and purpose of a regulation [under the Commerce Clause] are matters for the legislative judgment upon the exercise of which the Constitution places no restriction."¹⁰⁵ In other words, Congress either has the power to ban foreign-controlled social media or it does not – it does not have to account for its reasons for doing so. But, on the other hand, the Court has, from its very earliest decisions, recognized that, "should Congress, under the *pretext* of executing its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become [the Court's] painful duty . . . to say that such an act was not the law of the land."¹⁰⁶ That is, while Congress may use "all means which are appropriate . . . [and] which are not prohibited" to reach its ends, the ends themselves should also "be legitimate."¹⁰⁷

⁹⁷ Compare, H.R. 7521, 118th Cong. (2024) (applying only to "foreign adversary controlled" applications) with, e.g., *Morrison*, 529 U.S. at 613 ("Congress elected to cast [VAWA's] remedy over a . . . purely intrastate[] body of crime.").

⁹⁸ See *infra* notes 109–10 and accompanying text.

⁹⁹ See, e.g., 170 CONG. REC. H1168 (daily ed. Mar. 13, 2024) (statement of Rep. Robert Garcia) ("[M]illions of entrepreneurs and small[-]business owners use [TikTok] to support their famil[ies].").

¹⁰⁰ See, e.g., *Baston v. United States*, 580 U.S. 1182, 1184–85 (2017) (Thomas, J., dissenting from denial of certiorari) (recognizing that the Supreme Court "has never thoroughly explored the scope of the Foreign Commerce Clause" (internal citation omitted) but surveying lower-court case law recognizing a broad scope).

¹⁰¹ U.S. CONST. art I, § 8, cl. 3.

¹⁰² *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

¹⁰³ *Id.* at 534 (quoting *Gibbons v. Ogden*, 22 U.S. 1 (1824) (internal quotations omitted)).

¹⁰⁴ *Lopez*, 514 U.S. at 567.

¹⁰⁵ *United States v. Darby*, 312 U.S. 100, 115 (1941).

¹⁰⁶ *McCulloch v. Maryland*, 17 U.S. 316, 423 (1819) (emphasis added).

¹⁰⁷ *Id.* at 421.

But the ends of laws like the TikTok Ban are not legitimate. By policing what Americans believe and how they reach those beliefs, those laws intrude upon areas not entrusted by our Constitution to the federal government. If Congress can legislate such personal and subjective choices for the American citizenry under the guise of regulating commerce, then it effectively wields the general “authority to provide for the public health, safety, and morals.”¹⁰⁸ In other words, if it grants the power to regulate what citizens see, hear, and believe, then, in effect, the Commerce Clause affords exactly the police power that has always been denied to the federal government.

IV. CONCLUSION

The Supreme Court has made clear that Congress’ power under the Commerce Clause “is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.”¹⁰⁹ Thus, aside from a brief, anomalistic blip in the late twentieth century,¹¹⁰ the courts have so far declined to invalidate a federal law solely because, in validly regulating commerce, Congress has trodden on forbidden ground. This article does not attempt to rewrite or ignore precedent by suggesting that, under current law, the courts will – or even necessarily *should* – strike down the TikTok Ban. What courts will or ought to do are complex questions requiring considerations beyond the purely legal.¹¹¹

What this article has instead attempted to demonstrate is that, independent of any final judicial determination regarding strict constitutionality, laws like the TikTok Ban are normatively unacceptable under the American system of government. If Congress can, under the guise of its enumerated powers, pick and choose the information with which citizens can be trusted, then federal authority has no effective limits, and general governmental paternalism is rendered legitimate as both a means and an end. But, as the Missouri Supreme Court phrased it more than a hundred years ago, such “[p]aternalism . . . is pernicious in its tendencies. In a word[,] it minimizes the citizen and maximizes the government. Our Federal and State governments are founded upon a principle wholly antagonistic to such a doctrine.”¹¹²

¹⁰⁸ *Barnes v. Glen Theatre*, 501 U.S. 560, 569 (1991) (defining “the traditional police power of the States”).

¹⁰⁹ *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (citing *Gibbons v. Ogden*, 9 Wheat. 1, 196 (1824)); *see also, e.g.*, *Lottery Case*, 188 U.S. 321, 353 (1903).

¹¹⁰ *See Nat’l League of Cities v. Usery*, 422 U.S. 833 (1976) (holding that principles of federalism prevented federal regulation under the Commerce Clause of the States themselves “in areas of traditional governmental functions”), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

¹¹¹ *See generally, e.g.*, Gillian E. Metzger, *Considering Legitimacy*, 8 GEO. J.L. & PUB. POL’Y 353 (2020) (considering the extent to which the Supreme Court can validly consider its own legitimacy in reaching its rulings).

¹¹² *Missouri ex rel. Garth v. Switzler*, 143 Mo. 287, 322–23 (Mo. 1898).

In sum, the TikTok Ban and laws like it, which allow federal officials to substitute their judgment for the judgments of their electors, go too far. Such laws should be rejected.