

# U.C.L.A. Law Review

## Keeping Speech Cheap: The Progressive Case for a Free Internet

In Response to *Can Speech Be Progressive?* by Louis Michael Seidman

Kathrine Gutierrez

### ABSTRACT

In “Can Free Speech Be Progressive?” Louis Michael Seidman claims that cheap speech, like that found on Twitter, is not really cheap, and is not helpful to progressives—because it relies too heavily on capital. In the era of #metoo and #blacklivesmatter, it seems that Seidman is wrong about cheap speech. Cheap speech exists, and it is associated with a number of progressive successes. Instead of progressive communication being stymied by speech clutter and trolling, volunteer labor effectively facilitates meaningful progressive discussion. Furthermore, cheap speech is notably low-risk for would-be progressive speakers who have reason to fear state violence for speaking. Cheap speech, then, can be a useful tool for progressives, even if, as Seidman also argues, the “modern American free speech right” is not.

### AUTHOR

Kathrine Gutierrez is a law clerk to the Honorable Brendan L. Shannon, United States Bankruptcy Court for the District of Delaware, and would like to thank him for his support and encouragement. The author would also like to thank David Gottlieb, Genevieve Lakier, Jonathan Masur, Eric Posner, and Laura Weinrib.



## TABLE OF CONTENTS

INTRODUCTION.....	74
I. HOW IS CHEAP SPEECH CHEAP?.....	79
II. MARGINALIZED SPEAKERS AND RISK: CHEAP SPEECH IS SAFE AND CHEAP.....	83
III. FAKE NEWS AND SPEECH SILOS: THE RISKS POSED BY EXPENSIVE SPEECH .....	85
IV. THE FUTURE OF CHEAP SPEECH .....	87

## INTRODUCTION

In his essay “Can Free Speech Be Progressive?,” Louis Michael Seidman makes a sweeping argument against the “modern American free speech right”<sup>1</sup>: “the First Amendment cannot be progressive.”<sup>2</sup> Progressivism, per Seidman, “favor[s] an activist government” and seeks to achieve the “public good” by correcting unjust market-based distributions.<sup>3</sup> The opportunity to speak is not egalitarian. Instead, “speech opportunities reflect current property distributions” and the holders of capital have an outsized advantage in the marketplace of ideas.<sup>4</sup> As such, the “unfettered” market, which is the goal of the modern “American free speech tradition and its accompanying ideology,”<sup>5</sup> cannot be progressive. The genius of Seidman’s analysis lies in its simplicity. Romanticize speech all you want, he says, but newspapers are printed using cold, hard, cash—and capitalists have more of it than labor does.<sup>6</sup> Speech is not otherworldly; instead, it is bound by the political here and now, and subject to the normal rules of material power.<sup>7</sup> From this foundation of speech anti-exceptionalism, Seidman goes on to provide a brilliant analysis of the ways in which the “modern American free speech right” preferentially serves capital.<sup>8</sup>

One of Seidman’s major accomplishments, and the subject of this response, is making a powerful case for understanding an unfettered marketplace of ideas as a haven for “the rich and powerful” that serves the needs and interests of capital, to the detriment of progressive goals.<sup>9</sup> Among other sins, the “modern American free speech right” resists any regulation that would temper capital’s advantage.<sup>10</sup> Seidman argues that this resistance to regulation and friendliness to capital is an inherent quality of the right, even as it is idealized by progressives.<sup>11</sup>

---

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

2. *Id.* at 2234.

3. *Id.* at 2220.

4. *Id.* at 2232.

5. *Id.* at 2220.

6. *Id.* at 2233–34.

7. *Id.*

8. *Id.* at 2239–48.

9. *Id.* at 2234.

10. *Id.*

11. *Id.* at 2233–34.

Most progressives would likely agree that the First Amendment can be perverted for cynical pro-capitalist ends, especially post-*Citizens United*.<sup>12</sup> Some of Seidman's cynicism about the "modern American free speech right" treads familiar ground, albeit with a level of nuance and innovation that makes his analysis of the "recent, radical right turn in free speech law" well worth a read.<sup>13</sup> However, Seidman does not stop there. He believes that the problem with the free speech right goes beyond its misapplication or misinterpretation.<sup>14</sup> He thinks that the "modern American free speech right" itself is fatally flawed, even as idealized by progressives; he calls "progressive support for the speech right . . . a kind of 'trickle down' theory of civil liberties. . . . [T]he big victors are the rich and powerful."<sup>15</sup>

For anyone who has been paying attention, Seidman's assertions about wealth's outsized influence on speech have the ring of truth. Well-resourced capitalists are buying up traditional media outlets, gutting newsrooms, and dictating the content of putatively journalistic media. For example, conservative television behemoth Sinclair Media required more than a hundred nominally local television news stations to defend the teargassing of immigrants.<sup>16</sup> A hedge fund known as the "Destroyer of Newspapers,"<sup>17</sup> Alden Global Capital, is famous for purchasing (and gutting) functioning newsrooms. One columnist called it "one of the most ruthless of the corporate strip-miners seemingly intent on destroying local journalism."<sup>18</sup> This is all, of course, in addition to the continued existence of that long-lamented partisan megaphone, Fox News, which is particularly cozy with the

---

12. 558 U.S. 310 (2010); Seidman *supra* note 1, at 2232–33; *See, e.g., Citizens United v. FEC: Corporate Political Speech*, 124 HARV. L. REV. 75, 80 (2010) ("*Citizens United* sparked an immediate firestorm of commentary and debate, with many commentators lamenting the expansive ruling . . .").

13. Seidman, *supra* note 1, at 2232.

14. *Id.* at 2233–34, 2240.

15. *Id.* at 2234.

16. Matt Wilstein, *Sinclair Forces Local TV Stations to Air Segment Defending Tear-Gassing Migrants*, DAILY BEAST (Nov. 27, 2018, 2:04 PM), <https://www.the-dailybeast.com/sinclair-forces-local-tv-stations-to-air-segment-defending-tear-gassing-migrants> [<https://perma.cc/699K-UXCU>].

17. Edmund Lee & Tiffany Hsu, *Hedge Fund Called 'Destroyer of Newspapers' Bids for USA Today Owner Gannett*, N.Y. TIMES: DEALBOOK (Jan. 14, 2009), <https://www.ny-times.com/2019/01/14/business/dealbook/gannett-takeover-offer-mng.html>.

18. Margaret Sullivan, *Is this Strip-Mining or Journalism? 'Sobs, Gasps, Expletives' Over Latest Denver Post Layoffs*, WASH. POST (Mar. 15, 2018), [https://www.washingtonpost.com/lifestyle/style/is-this-strip-mining-or-journalism-sobs-gasps-expletives-over-latest-denver-post-layoffs/2018/03/15/d05abc5a-287e-11e8-874b-d517e912f12-5\\_story.html](https://www.washingtonpost.com/lifestyle/style/is-this-strip-mining-or-journalism-sobs-gasps-expletives-over-latest-denver-post-layoffs/2018/03/15/d05abc5a-287e-11e8-874b-d517e912f12-5_story.html) [<https://perma.cc/J6G3-WYSF>].

current presidential administration.<sup>19</sup> All of these facts are an easy fit with Seidman’s assertion that the marketplace of ideas is just like any other marketplace—capable of being dominated by capital to the detriment of the public good.<sup>20</sup> Or, as A.J. Liebling wrote in 1960, “[f]reedom of the press is guaranteed only to those who own one.”<sup>21</sup>

Speech is not always that expensive, though—not anymore. Eugene Volokh’s 1995 prediction of the rise of “cheap speech” has come true; speech no longer seems expensive or capital-intensive.<sup>22</sup> Instead, with the rise of the internet and technologies like text messaging, speech is everywhere.<sup>23</sup> Seidman admits that speech has become “democratiz[ed],” but denies that cheap speech is beneficial to progressives.<sup>24</sup> This is because, according to Seidman, cheap speech does not work as communication unless it is filtered via capital-intensive “speech management.”<sup>25</sup> That means that cheap speech is either ineffective or too capital-intensive to be meaningfully “cheap.”<sup>26</sup> Either way, Seidman’s position is that cheap speech does not contribute to the progressive project, so he does not really grapple with the implications of truly cheap speech.<sup>27</sup>

Seidman’s dismissal of cheap speech is mistaken. The dominance of traditional, capital-intensive media is lower than it has ever been; cheap speech is ascendant.<sup>28</sup> Happily, the existence of cheap speech is completely

19. Jane Mayer, *The Making of the Fox News White House*, NEW YORKER (Mar. 4, 2019), <https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house> [<https://perma.cc/7GCY-53F6>] (“Nicole Hemmer, an assistant professor of Presidential studies at the University of Virginia’s Miller Center . . . says of Fox, ‘It’s the closest we’ve come to having state TV.’”).

20. See Seidman, *supra* note 1, at 2220.

21. *Id.* at 2232 (quoting A.J. Liebling, *The Wayward Press: Do You Belong in Journalism?*, NEW YORKER, May 14, 1960, at 105, 109.).

22. Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806 (1995) (“[N]ew information technologies . . . will dramatically reduce the costs of distributing speech . . .”).

23. Seidman *supra* note 1, at 2235–36.

24. *Id.* at 2235.

25. *Id.*

26. *Id.* at 2235–36.

27. *Id.*

28. See, e.g., Neeraj Aggarwal et al., *The Digital Revolution is Disrupting the TV Industry*, BOS. CONSULTING GRP. (Mar. 21, 2016), [http://image-src.bcg.com/Images/BCG-The-Digital-Revolution-Is-Disrupting-the-TV-Industry-Mar-2016\\_tcm9-87447.pdf](http://image-src.bcg.com/Images/BCG-The-Digital-Revolution-Is-Disrupting-the-TV-Industry-Mar-2016_tcm9-87447.pdf) [<https://perma.cc/5X2U-R89S>] (“Streaming video completely bypasses the traditional video-aggregation and distribution models . . . . With low costs, and a growing ecosystem of digital aggregators, online and mobile content creators are challenging the long-held belief that producing hit entertainment content must be a very expensive proposition available only to those with deep pockets.”).

compatible with Seidman's analysis. Seidman believes that "because speech opportunities reflect current property distributions, free speech tends to favor" those who hold more capital.<sup>29</sup> A more egalitarian distribution of speech opportunities would lessen the advantage that "current property distributions" give to "the people at the top of the power hierarchy."<sup>30</sup> If cheap speech exists, Seidman's theory implies that it would be relatively friendly to progressive goals and that powerful capitalist interests would seek to limit cheap speech.

Fitting with Seidman's theory, the internet enables cheap speech, and the progressive successes associated with the internet are substantial. Black Lives Matter does not rely on newspapers; it relies on a hashtag.<sup>31</sup> So does #metoo.<sup>32</sup> Progressive political organizing is flourishing. As just one example, the Democratic Socialists of America are experiencing an explosion in the number of dues paying members.<sup>33</sup> This is in line with Seidman's theory—when capital requirements for speech are lower, progressives should be better able to advance their goals.

As Seidman's theory might also predict, capital has not been friendly to cheap speech. Instead, powerful capitalist interests seek the right to exercise control over the content of cheap speech (or to make it more costly). One of the few bipartisan bills passed in the Trump era, SESTA-FOSTA,<sup>34</sup> made it much more costly to maintain online discussion spaces, driving smaller,

---

29. Seidman, *supra* note 1, at 2232.

30. *Id.* at 2232.

31. See MONICA ANDERSON & PAUL HITLIN, PEW RES. CTR., *The Hashtag #BlackLivesMatter Emerges: Social Activism on Twitter*, in SOCIAL MEDIA CONVERSATIONS ABOUT RACE 14, 14 (Aug. 15, 2016) [https://www.pewinternet.org/wp-content/uploads/sites/9/2016/08/PI\\_2016.08.15\\_Race-and-Social-Media\\_FINAL.pdf](https://www.pewinternet.org/wp-content/uploads/sites/9/2016/08/PI_2016.08.15_Race-and-Social-Media_FINAL.pdf) [<https://perma.cc/U6SN-U2AQ>].

32. Dalvin Brown, *19 Million Tweets Later: A Look at #MeToo A Year After the Hashtag Went Viral*, USA TODAY (Oct. 13, 2018, 10:12 PM), <https://www.usatoday.com/story/news/2018/10/13/metoo-impact-hashtag-made-online/1633570002> [<https://perma.cc/H8Z9-KTQG>] ("The hashtag has had an extraordinary impact because it shows the ability of women and survivors of sexual harassment and violence," said Kathy Spillar, executive director of Feminist Majority, a women's advocacy and policy research organization. "It has taken an issue that was whispered about in workplaces and given it a forum. It has made it possible for people to speak out.").

33. Jeff Stein, *9 Questions About the Democratic Socialists of America You Were Too Embarrassed to Ask*, VOX (Aug. 5, 2017, 8:40 AM), <https://www.vox.com/policy-and-politics/2017/8/5/15930786/dsa-socialists-convention-national> [<https://perma.cc/XGH4-GTGN>].

34. See Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND. L. REV. 279, 283 (2018) (describing the passage of FOSTA by "overwhelming margins").

nonprofit publishers to shut their doors.<sup>35</sup> Unsurprisingly, SESTA-FOSTA was supported by 21st Century Fox and Oracle.<sup>36</sup>

The regulatory state is getting in on the action, too. Net neutrality regulations used to require communications infrastructure providers to treat all the content on their networks fairly—but no longer.<sup>37</sup> Soon after Trump took office, the Federal Communications Commission stopped enforcing net neutrality regulations,<sup>38</sup> and then went on to repeal them.<sup>39</sup> The rapid deregulation of cheap speech infrastructure is not limited to the internet. In December, the FCC voted 3–1 to definitively allow wireless carriers much more control over the content of text messaging.<sup>40</sup> The dissenting FCC commissioner stated that “your carrier now has the legal right to block your text messages and censor the very content of your messages.”<sup>41</sup>

Seidman’s dismissal of cheap speech as either nonexistent—or, worse, anti-progressive—does not line up with the facts. Cheap speech is real; it is useful for progressives, and it faces substantial capitalist opposition. That means that the existence of cheap speech is perfectly compatible with Seidman’s theory about the relationship between capital and speech. This essay, then, functions more as a supplement to Seidman’s work than a correction. It extends his arguments to assert that if one considers the evidence, one will necessarily conclude that protecting cheap speech is an important political goal for progressives—although it may be impossible to achieve.

---

35. *Id.* at 289 (describing the expenses imposed by FOSTA on smaller web publishers); See ACLU, *Communications Decency Act Section 230*, <https://www.aclu.org/issues/free-speech/internet-speech/communications-decency-act-section-230> [<https://perma.cc/8V9D-H4EB>] (Asserting that CDA Section 230, which was amended by SESTA-FOSTA, is “the reason why websites can offer platforms for critical and controversial speech without constantly worrying about getting sued.”).

36. Sarah Jeong, *Sex Trafficking Bill is Turning Into a Proxy War Over Google*, VERGE (Sep. 14, 2017, 3:06 PM), <https://www.theverge.com/2017/9/14/16308066/sex-trafficking-bill-sesta-google-cda-230> [<https://perma.cc/X9WH-A9V2>].

37. Daniel A. Schuleman, *The FCC Restoring Internet Freedom Order and Zero Rating or: How We Learned to Stop Worrying and Love the Market*, Spring 2018 U. ILL. J.L. TECH. & POL’Y 149, 151 (2018).

38. *Id.* at 157.

39. Keith Collins, *Net Neutrality Has Officially Been Repealed. Here’s How That Could Affect You*, NY TIMES (Jun. 11, 2018), <https://www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html> [<https://perma.cc/NV47-9T7B>].

40. David Shepardson, *FCC Affirms That Wireless Carriers Can Block Unwanted Text Messages*, REUTERS (Dec. 12, 2018, 10:08 AM), <https://www.reuters.com/article/us-usa-fcc-texts/fcc-affirms-that-wireless-carriers-can-block-unwanted-text-messages-idUSKBN10B2FP> [<https://perma.cc/W6YD-XEXE>].

41. *Id.*

## I. HOW IS CHEAP SPEECH CHEAP?

Seidman's counterintuitive argument is that that cheap speech will be dominated by the interests of capital because it is *too* cheap—there is too much of it.<sup>42</sup> He claims that cheap speech, to be effective, needs to be “managed” by capital-intensive means.<sup>43</sup> To Seidman, speech management is so capital-intensive for speakers that cheap speech is actually less progressive than traditional speech.<sup>44</sup> Furthermore, managed speech, rather than exposing audiences to progressive ideas, instead risks sequestering listeners in “speech silo[s]” where they may be shielded from progressive ideas and where “listener autonomy makes real conversation impossible.”<sup>45</sup>

Speech management is not necessarily all that capital-intensive, though, even in traditional publishing. Many publications, such as law reviews, are edited by volunteer or low-cost labor.<sup>46</sup> But without capital, it is hard to amplify speech—or, at least, it was before the internet. Printing newspapers costs money.<sup>47</sup> Owning a television station is expensive, far beyond the means of capital-poor individuals, however dedicated. While coordinated projects like phone banking and canvassing can spread messages to large numbers of people, for the most part, capital has a huge advantage when it comes to mass communication. This advantage is even more pronounced when communication channels are limited by technological constraints, as with television and radio.<sup>48</sup>

One of Seidman's concerns about cheap speech is that “aggregation and amplification—speech management—still require capital.”<sup>49</sup> That is true in some sense, but effective speech management can be accomplished with volunteer labor and minimal capital. In other words, there are some costs of communication for which labor can reasonably substitute for capital, as with

---

42. Seidman, *supra* note 1, at 2235.

43. *Id.*

44. *Id.*

45. *Id.* at 2235–36.

46. See *Law Review*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, [https://en.wikipedia.org/wiki/Law\\_review](https://en.wikipedia.org/wiki/Law_review) [<https://perma.cc/R5C2-9GYH>] (“In the US, law reviews are normally published by an organization of students at a law school or through a bar association.”).

47. Nicholas Carlson, *Printing the NYT Costs Twice as Much as Sending Every Subscriber a Free Kindle*, BUS. INSIDER (Jan. 30, 2009, 8:35 AM) <https://www.businessinsider.com/2009/1/printing-the-nyt-costs-twice-as-much-as-sending-every-subscriber-a-free-kindle> [<https://perma.cc/S8ZH-FUD4>].

48. See, e.g., Radio Spectrum Allocation, FEDERAL COMM. COMM'N, <https://www.fcc.gov/engineering-technology/policy-and-rules-division/general/radio-spectrum-allocation> [<https://perma.cc/UR8E-BHHV>] (describing the assignment of limited radio spectrum).

49. Seidman, *supra* note 1, at 2235.

speech management, and some where capital easily dominates labor. The physical means of speech amplification and mass communication are easily dominated by capital, but curatorial and editorial work, like “speech management,” can be accomplished by labor.

That means that nonphysical means of mass communication even the playing field for labor substantially. This, of course, is only true when regulation prevents capitalists from dominating the means of affordable speech amplification. With equal access to cheap amplification, though, one can engage in mass communication without using much capital.

Before 2017, regulation helped keep speech cheap. The FCC required communications infrastructure owners to provide equal access to all users.<sup>50</sup> Congress also proactively provided a sort of liability safe harbor for online publishers, which kept the liability costs of publishing or “hosting” online speech low.<sup>51</sup> Together, those regulatory efforts kept the digital means of speech amplification affordable. Because cheap speech is enabled by regulation, it is not an exception to the general rule—which, Seidman tells us, is that regulation is required to rein in capital.<sup>52</sup> With adequate regulation, cheap speech, and progressive communication, thrives.

A few examples will make it easier to understand how labor can enable successful progressive communication, even in the face of “the proliferation and splintering of speech opportunities,” which lead to what Seidman calls “the modern free speech problem . . . speech clutter, trolling, and speech siloing.”<sup>53</sup> First, there are a number of progressive communities online which facilitate communication and organization. Many of these are subreddits, distinct spaces for communication which are easy to create using Reddit, a (mostly) content-neutral platform with a distinctly libertarian ethos.<sup>54</sup> A

---

50. See *U.S. Telecom. Ass’n v. Fed. Comm’n Comm’n*, 825 F.3d 674, 740 (D.C. Cir. 2016) (“The [net neutrality] rules generally bar broadband providers from denying or downgrading end-user access to content and from favoring certain content by speeding access to it. In effect, they require broadband providers to offer a standardized service that transmits data on a nondiscriminatory basis.”).

51. Goldman, *supra* note 34, at 279 (“Section 230 enables [services that publish third party content] to start, grow, and thrive without crippling legal exposure or expensive editorial staffs.”).

52. Seidman, *supra* note 1, at 2240.

53. *Id.* at 2235.

54. See Kashmir Hill, *Reddit Co-Founder Alexis Ohanian’s Rosy Outlook On The Future of Politics*, FORBES (Feb. 2, 2012, 11:33 AM), <https://www.forbes.com/sites/kashmir-hill/2012/02/02/reddit-co-founder-alexis-ohanians-rosy-outlook-on-the-future-of-politics/#73247e745550> [<https://perma.cc/8WGB-FZGG>] (Reddit’s cofounder said that “[m]aybe libertarians especially like Reddit because it is a perfect marketplace of content . . . [e]very Redditor is created equal . . .”).

number of subreddits are highly political and capital-hostile. For example, the *r/socialism* subreddit boasts 199,000 “Comrades” (members).<sup>55</sup> The *r/chapotrathouse* subreddit, which formed to discuss ideas of the “dirtbag left,” including anti-capitalism, has 126,000 members.<sup>56</sup>

While these communities provide spaces for mass communication which might not be possible elsewhere, they are by no means completely “free” in the sense of being unmanaged. Instead, their content is tightly controlled—but by volunteer labor, not by capital. This allows for communication without the disruption caused by what Tim Wu calls “flooding” tactics.<sup>57</sup> For example, *r/latestagecapitalism* is a heavily moderated community which describes itself as “A One-Stop-Shop for Evidence of our Social, Moral and Ideological Rot.”<sup>58</sup> It has 413,000 members and a strict ban on “capitalist apologia,” which helps it avoid “speech clutter” and “trolling,” and keeps the discussion focused on the downsides of capitalism.<sup>59</sup> Although *r/latestagecapitalism* may be a “speech silo,” which Seidman considers part of the “modern free speech problem,” it is not a capitalist speech silo.<sup>60</sup> It is an effective progressive communication space.<sup>61</sup>

Second, labor can also effectuate successful communication by playing a role that is highly analogous to the role played by traditional editors and publishers (and self-publishers). From the infancy of the internet, bloggers and networks of bloggers, like the Volokh Conspiracy, have reached wide audiences using a publishing method reminiscent of a regular newsletter.<sup>62</sup> More recently, Twitter has facilitated individual content creation and curation on a massive scale.<sup>63</sup> Twitter users are able to publish their own

---

55. *r/socialism*, REDDIT, <https://www.reddit.com/r/socialism> [<https://perma.cc/R23C-N6P6>].

56. Jia Tolentino, *What Will Become of the Dirtbag Left?*, NEW YORKER (Nov. 18, 2016), <https://www.newyorker.com/culture/persons-of-interest/what-will-become-of-the-dirtbag-left> [<https://perma.cc/TG2A-SJYG>] (describing the podcast “Chapo Trap House” and the “dirtbag left”).

57. Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 548 (2018).

58. *r/LateStageCapitalism*, REDDIT, <https://www.reddit.com/r/LateStageCapitalism> [<https://perma.cc/9WP3-GQ24>].

59. *Id.*

60. Seidman, *supra* note 1, at 2235.

61. *Id.*

62. ABA JOURNAL: THE VOLOKH CONSPIRACY, [http://www.abajournal.com/blawg/the\\_volokh\\_conspiracy](http://www.abajournal.com/blawg/the_volokh_conspiracy) [<https://perma.cc/9B9Y-RK5P>] (last visited May 23, 2019).

63. Hamza Shaban, Twitter Reveals its Daily Active User Numbers for the First Time, WASH. POST (Feb. 7, 2019), [https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/?utm\\_term=.e0eae22139c1](https://www.washingtonpost.com/technology/2019/02/07/twitter-reveals-its-daily-active-user-numbers-first-time/?utm_term=.e0eae22139c1) [<https://perma.cc/JU58-GPWP>] (“Twitter said that it has 126 million daily active users”).

content as well as republishing (retweeting) content that fits their preferences.<sup>64</sup> By selecting which Twitter users to follow (and who or what topics to block or mute), Twitter users can easily filter the content they see.<sup>65</sup> Twitter users can also use hashtags (like #blacklivesmatter or #metoo) to see everything relating to a given topic.<sup>66</sup>

It is far from true, then, that “Twitter produces an undifferentiated and useless swamp of information and opinion.”<sup>67</sup> Instead, Twitter allows its users to generate a personalized feed of news, commentary, images, and information from trusted (or, at least, interesting) sources.<sup>68</sup> Popular Twitter users can reach thousands or even millions of people without ever having the support of a traditional, capital-intensive publisher.<sup>69</sup> (For example, @dril, who has not had any celebrity outside of his internet fame, has approximately 1.34 million followers.)<sup>70</sup>

The people who use Twitter (and hashtags like #blacklivesmatter) clearly do not consider Twitter useless—nor does Donald Trump.<sup>71</sup> Progressive political figures can reach massive audiences on Twitter. Alexandria Ocasio-Cortez, whose Twitter following was around one million on the day she won a Democratic congressional primary, allegedly tweets “more than Trump,”<sup>72</sup>

---

64. *How to Use Twitter: Critical Tips for New Users*, WIRED, (Aug. 29, 2018, 5:25 PM), <https://www.wired.com/story/how-to-setup-twitter-search-hashtag-and-login-help> [<https://perma.cc/KP6A-NSAM>].

65. *Id.*

66. *Id.*

67. Seidman, *supra* note 1, at 2235; Seidman is not alone in criticizing Twitter, which Eric Posner called a “planetary-scale hate machine” in 2018. See Eric Posner, *The Worthy Tweet*, MISC. (Mar. 3, 2018), <http://ericposner.com/the-worthy-tweet> [<https://perma.cc/HL3J-D6GM>].

68. *But see* Eric Posner, *Twenty Theses About Twitter*, MISC. (July 3, 2017), <http://ericposner.com/twenty-theses-about-twitter> [<https://perma.cc/24YR-JCLC>] (arguing that Twitter does not allow successful filtering and calling Twitter “a black hole of value-destroying technology for all concerned.”).

69. See Jake Swearingen, *It is With a Heavy Heart That Twitter is Finding Out Who @Dril is*, N.Y. MAG.: INTELLIGENCER (Nov. 17, 2017), <http://nymag.com/selectall/2017/11/it-is-with-a-heavy-heart-that-twitter-found-out-who-dril-is.html> [<https://perma.cc/879A-6449>] (describing @dril’s Twitter-only, pseudonymous rise to fame).

70. Wint (@dril), TWITTER (last visited May 23, 2019) <https://twitter.com/dril> [<https://perma.cc/ET5Y-CA69>].

71. Donie O’Sullivan, *Twitter Co-Founder Calls President Trump ‘Master of the Platform*, CNN BUS. (May 22, 2019, 4:22 PM), <https://www.cnn.com/2019/05/22/tech/president-trump-twitter-ev-williams/index.html> [<https://perma.cc/6QVS-6N7D>].

72. Kathryn Krawczyk, Alexandria Ocasio-Cortez Tweets More than Trump, WEEK (May 3, 2019), <https://theweek.com/speedreads/839263/alexandria-ocasiocortez-tweets-more-than-trump> [<https://perma.cc/XS2X-ZD6F>].

and her Tweets get attention.<sup>73</sup> While an elected representative might be able to get the word out without using Twitter, the same is not true of niche thinkers and activists who find a home on Twitter. For example, Black Socialists of America, “a 501(c)(4) organization of anticapitalist Black Americans who believe in the core principles of Socialism as defined by Karl Marx,”<sup>74</sup> is a verified account with more than 57,000 followers.<sup>75</sup>

The point here is not that cheap speech is completely independent of capital. Nothing is. Instead, the purpose of this essay is to show that, with the help of regulation, labor is able to successfully *substitute* for capital in ways that allow for the existence of truly cheap—and truly anti-capitalist—speech. The existence of meaningful communication and discussion on the internet—facilitated by volunteer labor—shows that speech can be cheap when the means of speech amplification are not under the unfettered control of capitalists. This is why free speech advocates like the American Civil Liberties Union have put substantial effort into maintaining content-neutral internet infrastructure<sup>76</sup>—or, to put it another way, into preventing capitalists from gaining complete control over the means of (cheap) speech production.

## II. MARGINALIZED SPEAKERS AND RISK: CHEAP SPEECH IS SAFE AND CHEAP

Cheap speech skeptics often point to the role that cheap speech plays in facilitating harassment and threats.<sup>77</sup> For example, in his essay “Is the First Amendment Obsolete?” Wu warns of “vicious, swarm-like attacks” aimed at disfavored speakers.<sup>78</sup> While Wu’s analysis of government-funded harassment phenomenon is detailed and substantial,<sup>79</sup> coordinated online

---

73. Alexandria Ocasio-Cortez Decries ‘Myth’ of Low-Paying Jobs in Emotional Tweet, N.Y. POST (May 11, 2019, 4:02 PM), <https://nypost.com/2019/05/11/aoc-decries-myth-of-low-paying-jobs-in-emotional-tweet> [<https://perma.cc/38S7-N4VA>].

74. Black Socialists of America (@BlackSocialists), TWITTER, <https://twitter.com/blacksocialists> [<https://perma.cc/UJ2K-878W>].

75. *Id.*

76. *Net Neutrality*, ACLU, <https://www.aclu.org/issues/free-speech/internet-speech/net-neutrality> [<https://perma.cc/D6HY-MJG4>] (last visited July 24, 2019).

77. Wu, *supra* note 57, at 548 (“[T]he emergent techniques of speech control depend on new punishments, like the unleashing of ‘troll armies’ to abuse critics, the fabrication of news, and ‘flooding’ tactics that distort or drown out other speech . . .”).

78. *Id.* at 562.

79. *Id.* at 560–65.

harassment is, as he notes, not new.<sup>80</sup> Women and people of color are familiar with the fact that speaking publicly on the internet risks threats of violence and harassment—which are systematically ignored by law enforcement.<sup>81</sup>

Speaking in public in general carries a risk of harassment, even for those working in traditional media, and often leads to in-person harassment or threats.<sup>82</sup> Regardless, it seems likely that cheap speech, in particular, facilitates coordinated harassment efforts.<sup>83</sup> So why #metoo and #blacklivesmatter? The cheapness of speech likely contributes; power and wealth go hand-in-hand and both are often denied to marginalized speakers. There is another answer, though, which Seidman and other writers on this topic miss: cheap speech is safe.

Notably, especially in light of Seidman’s claim that “the modern free speech problem is not government suppression,”<sup>84</sup> physical protest in the United States carries with it a real risk of serious harm at the hands of the state.<sup>85</sup> In addition to direct physical harm, like being teargassed or pepper sprayed,<sup>86</sup> protesters risk being arrested<sup>87</sup> or sued.<sup>88</sup> The collateral

---

80. See generally Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009) (describing coordinated online harassment efforts).

81. *Id.* at 402–04.

82. MICHELLE FERRIER, *ATTACKS AND HARASSMENT: THE IMPACT ON FEMALE JOURNALISTS AND THEIR REPORTING*, 23 (Elisa Lees Munoz ed. 2018) <https://www.iwmf.org/wp-content/uploads/2018/09/Attacks-and-Harassment.pdf> [<https://perma.cc/6ZRS-AP6J>] (finding that, of surveyed female journalists working in the United States, 52 percent had been threatened or harassed in person and 18 percent had been physically attacked).

83. Wu, *supra* note 57, at 548.

84. Seidman, *supra* note 1, at 2235.

85. Tim Elfrink, *Sacramento Police Arrest Reporter, 84 Protesters at March Against Stephon Clark Shooting*, WASH. POST (Mar. 5, 2019), <https://www.washingtonpost.com/nation/2019/03/05/sacramento-police-arrest-reporter-protesters-march-against-stephon-clark-shooting> [<https://perma.cc/S694-9EWE>].

86. See, e.g., Martin Kaste, *Police Face Backlash Over Crowd Control Measures After Several Political Protests*, NPR (Aug. 25, 2017, 4:33 PM), <https://www.npr.org/2017/08-25/546186268/police-face-backlash-over-crowd-control-measures-after-several-political-protest> [<https://perma.cc/P972-PJHD>]; Kianna Gardner & Maddy Ryan, *Phoenix Officials Promise ‘Thorough’ Review of Police Response After Trump Rally*, ARIZ. DAILY SUN (Aug. 24, 2017), [https://azdailysun.com/news/local/phoenix-officials-promise-thorough-review-of-police-response-after-trump/article\\_62cc4287-ed5a-5a6a-9b4c-97700770ba4e.html](https://azdailysun.com/news/local/phoenix-officials-promise-thorough-review-of-police-response-after-trump/article_62cc4287-ed5a-5a6a-9b4c-97700770ba4e.html) [<https://perma.cc/32YA-DS33>], (“We have received many complaints that people, including children and people with mobility and respiratory issues, were taken by surprise when the police bombarded them with chemical irritants, with no warning’ . . . ‘Tear gas and pepper spray can have devastating health effects.’”).

consequences of any arrest can be serious.<sup>89</sup> Legal mechanisms for redress of harms caused by the police are severely limited and may come too late to be meaningful.<sup>90</sup>

Cheap speech, then, is cheap for two reasons: it does not require the use of capital-intensive means of speech amplification *or* place the speaker in close proximity to the police. So, while cheap speech may facilitate harassment or threats, it seems unlikely that it is, overall, more costly for progressive speakers than other options. After all, as Geoffrey Stone has noted, harassment of disfavored speakers is nothing new.<sup>91</sup> What is new, however, is the ability for those at particular risk of harassment and violence to easily reach a likeminded audience without leaving the relative safety of their homes.

### III. FAKE NEWS AND SPEECH SILOS: THE RISKS POSED BY EXPENSIVE SPEECH

Having shown that cheap speech truly can be cheap and that it demonstrably is cheap, the baseline assumption must be that cheap speech is good for progressives. After all, the alternative is the capital-dominated speech marketplace which Seidman himself decries. Nevertheless, Seidman believes that cheap speech is an overall negative for progressive causes, echoing concerns raised by other scholars<sup>92</sup> about the role cheap speech plays

---

87. Yamiche Alcindor, *DeRay Mckesson, Arrested While Protesting in Baton Rouge, Is Released*, N.Y. TIMES (Jul. 10, 2016), <https://www.nytimes.com/2016/07/11/us/deray-mckesson-arrested-in-baton-rouge-protest.html> [<https://perma.cc/8JLL-46HU>].

88. Joe Gyan Jr., *Injured BRPD Officer Can Sue Black Lives Matter Activist DeRay Mckesson, Court Says*, ADVOCATE (Apr. 24, 2019, 8:31 PM), [https://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_071ec624-66ee-11e9-98a0-73787f4c25ab.html](https://www.theadvocate.com/baton_rouge/news/crime_police/article_071ec624-66ee-11e9-98a0-73787f4c25ab.html) [<https://perma.cc/T9GN-XQ93>].

89. Eisha Jain, *Proportionality and Other Misdemeanor Myths*, 98 B.U. L. REV. 953, 958 (2018) (“The consequences of a mere arrest—much less a misdemeanor conviction—can be severe and last long after any criminal penalty is complete.”).

90. Leah Litman, *Remedial Convergence and Collapse*, 106 CAL. L. REV. 1477, 1528 (2018) (describing “the status quo” in “public law cases related to policing” as “largely a system of no remedies for constitutional rights”).

91. Geoffrey R. Stone, *Reflections on Whether the First Amendment Is Obsolete*, KNIGHT FIRST AMENDMENT INST. COLUM. UNIV., <https://knightcolumbia.org/content/reflections-whether-first-amendment-obsolete> [<https://perma.cc/FL6A-W6UP>] (“Individuals who take positions that offend others in their community have always been vulnerable to condemnation by others . . . [a]nd, yet, we lived with it.”).

92. Seidman, *supra* note 1, at 2235–36; *see also* Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 201 (2017) (“In place of media scarcity, we now have a media fire hose which has diluted trusted sources of information and led to the rise of ‘fake news’ . . . .); Wu, *supra* note 57, at 549 (“ . . . its cheapness makes it easier to weaponize as a tool of speech control.”).

in spreading misinformation (often termed “fake news”)<sup>93</sup> and preventing “conversation.”<sup>94</sup>

Those who would criticize cheap speech on these grounds must consider the alternative. If one takes seriously Seidman’s assertions about the relationship between speech and capital, it is by no means a given that expensive speech will be honest or facilitate genuine “conversation.”<sup>95</sup> Tech-savvy Russian misinformation campaigns may be new (and genuinely interesting), but one cannot ignore the outsized role of boring, expensive, and effective Fox News.<sup>96</sup> Recent efforts to consolidate ownership of traditional media outlets make the risks posed by capitalist-dominated media crystal clear.<sup>97</sup> It is hard to imagine how one could see hundreds of local news stations being directed to air segments justifying the tear gassing of immigrants and decide that the real problem is Twitter.

One might argue that journalistic standards play an important role in keeping traditional media honest. Even assuming that is true, and that it is an inherent feature of traditional media, capital-intensive media cannot (and does not) publish everything.<sup>98</sup> The range of information shared by capital-intensive publishers is necessarily limited by the interests of capitalist owners. Some progressive speech, especially progressive speech which is particularly unfriendly to capital, will be left on the cutting room floor.<sup>99</sup> That limits the usefulness of traditional media for progressives.

As shown above, it is possible to effectively manage speech on the internet, and anti-progressive “speech silo[s]” full of cheap speech certainly exist. But so do progressive speech silos, and many progressive ideas are very

---

93. Seidman, *supra* note 1, at 2235.

94. *Id.* at 2236. Wu, *supra* note 57, at 554–56.

95. Seidman, *supra* note 1, at 2236.

96. Gregory J. Martin & Ali Yurukoglu, *Bias in Cable News: Persuasion and Polarization*, 107(9) AM. ECON. REV. 2565, 2597 (“Our estimates imply increasing effects of [Fox News] on the Republican vote share in presidential elections over time, from 0.46 points in 2000 to 6.34 points in 2008. . . . we find that an influence-maximizing owner of the cable news channels could have large effects on vote shares . . .”).

97. Cecilia Kang, *F.C.C. Opens Door to More Consolidation in TV Business*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/business/media/fcc-local-tv.html>.

98. U.S. Telecomm. Ass’n v. Fed. Commc’ns Comm’n, 825 F.3d 674, 742 (D.C. Cir. 2016), quoting *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 257 (1974) (“In selecting which speech to transmit, newspapers and cable companies engage in editorial discretion. Newspapers have a finite amount of space on their pages and cannot “proceed to infinite expansion of ... column space”).

99. *Miami Herald Pub. Co.*, 418 U.S. at 257.

popular.<sup>100</sup> The “listener autonomy” that Seidman decries works in favor of progressive ideas when listeners can opt into receiving progressive information.<sup>101</sup> But even that fact is somewhat beside the point, though—what about capitalist speech silos? As Seidman points out, “[f]reedom of the press is guaranteed only to those who own one.”<sup>102</sup> Why should a newspaper owned by multimillionaire publishers and partially supported by advertising dollars escape the charge that it “makes real conversation impossible”?<sup>103</sup> Especially when, without cheap speech, a single newspaper might be one of only a handful of news sources available?

#### IV. THE FUTURE OF CHEAP SPEECH

The real progressive problem with cheap speech is not that it does not exist, or that it prevents the spread of progressive ideas, or that it limits conversation. The real problem with cheap speech is that a government dominated by the interests of capital will not act to protect or enable it. Cheap speech, having shown its value to progressive causes, is almost certainly on its way out.<sup>104</sup>

What can be done? Cheap speech was facilitated by government regulation, like the safe harbor (formerly) provided by section 230 of the Communications Decency Act (CDA 230) and the regulations (formerly) protecting net neutrality. However, it is hard to see how protection of the infrastructure that makes cheap speech possible is a workable political project. After all, the passage of FOSTA, the bill which limited CDA 230 and drove a number of smaller websites out of business by raising their costs, was a *bipartisan* legislative success.<sup>105</sup> The executive branch may (or may not)

---

100. For example, polls have found that around 70 percent of Americans support Medicare for all. See Megan Keller, *Seventy Percent of Americans Support ‘Medicare for All’ in New Poll*, HILL (Aug. 23, 2018, 11:16 AM) <https://thehill.com/policy/healthcare/403248-poll-seventy-percent-of-americans-support-medicare-for-all> [<https://perma.cc/J4ZN-HE5U>].

101. Seidman, *supra* note 1, at 2236.

102. *Id.* at 2232.

103. Seidman, *supra* note 1, at 2236.

104. Seidman notes, and the author agrees, that this level of cynicism about government may be incompatible with a belief in the efficacy of progressivism: “if we take seriously the argument that the political branches are likely to be controlled by the enemies of progressives, we risk impeaching the progressive position more generally.” Seidman, *supra* note 1, at 2242.

105. Goldman, *supra* note 34, at 288–89 (“Because FOSTA imposes criminal liability based on what online services ‘know’ about third party content, FOSTA effectively resurrects a dilemma that Section 230 had been designed to eliminate: Should Internet services try to

prove to be more friendly to progressive goals after the coming presidential election. The good news for cheap speech is that Senators Elizabeth Warren and Bernie Sanders both signed a letter decrying the FCC ruling that allowed content discrimination in text messaging;<sup>106</sup> and the bad news is that all of the Democratic presidential candidates who could vote for FOSTA did.<sup>107</sup>

There is another option, of course: litigation. The judiciary can, per Seidman, play a role in shielding progressive interests from the political branches.<sup>108</sup> Communications infrastructure providers are plausibly state actors who might be held to standards of content neutrality.<sup>109</sup> While it would not solve all of the political problems faced by cheap speech, free speech litigation might at least be able to limit blatantly content-discriminatory policies. One example of such content-discrimination would be when Verizon tried to prevent NARAL from using its services in 2007, based on an assertion that it has the “right to block ‘controversial or unsavory’ text messages.”<sup>110</sup>

However, even the most clear-cut precedents are subject to “doctrinal manipulation,” and arguments have been made that the First Amendment requires the state to allow telecommunications providers to discriminate based on content.<sup>111</sup> Existing precedent on this issue may, at first, inspire optimism. After all, the U.S. Court of Appeals for the D.C. Circuit has found that net neutrality regulations did not violate the First Amendment,<sup>112</sup> writing that “[c]ommon carriers have long been subject to nondiscrimination

---

moderate third party, even if these moderation efforts are imperfect, or should they simply do the minimum possible moderation? . . . [S]everal smaller services have already chosen . . . to shut down.”)

106. Letter from Senators Edward J. Markey, Ron Wyden, Kirsten Gillibrand, Tammy Baldwin, Richard Blumenthal, Tina Smith, Benjamin L. Cardin, Elizabeth Warren, Bernard Sanders, and Dianne Feinstein to Ajit Pai, Chairman of the Fed. Commc’n Comm’n (Dec. 7, 2018), <https://www.markey.senate.gov/imo/media/doc/Texting%20Title%201.pdf> [<https://perma.cc/95XR-QJJN>].
107. Zoë Beery, *The 2020 Democratic Candidates Who Voted in Favor of SESTA/FOSTA*, TEEN VOGUE (Apr. 2, 2019), <https://www.teenvogue.com/story/2020-democratic-candidates-sesta-fosta> [<https://perma.cc/6UPS-LLSH>].
108. Seidman, *supra* note 1, at 2223.
109. Eric Sirota, *Can the First Amendment Save Net Neutrality?*, 70 BAYLOR L. REV. 781, 814 (2018) (“ . . . ISPs operate with bandwidth licensed from the federal government and often operate pursuant to municipally sanctioned de facto monopolies . . . ISP censorship should generally be treated as a State action.”); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).
110. Adam Liptak, *Verizon Blocks Messages of Abortion Rights Group*, N.Y. TIMES (Sept. 27, 2007), <https://www.nytimes.com/2007/09/27/us/27verizon.html>.
111. U.S. Telecomm. Ass’n v. Fed. Commc’ns Comm’n, 855 F.3d 381, 430 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).
112. U.S. Telecomm. Ass’n v. Fed. Commc’ns Comm’n, 825 F.3d 674, 742 (D.C. Cir. 2016).

and equal access obligations . . . without raising any First Amendment question.”<sup>113</sup>

Unfortunately, the D.C. Circuit denied an *en banc* petition in that case over two dissents—one by then-Judge, now Justice Kavanaugh.<sup>114</sup> He wrote that “[i]nternet service providers possess a First Amendment right to exercise their editorial discretion over what content to carry and how to carry it.”<sup>115</sup> It seems appropriate, then, to extend another of Seidman’s arguments, originally about traditional media, into the universe of cheap speech—maybe “[i]n a completely different world” we would treat the owners of cheap speech infrastructure as though they were “state actors constitutionally required to provide others with speech opportunities. But that is nothing like our world.”<sup>116</sup>

---

113. *Id.* at 740.

114. *U.S. Telecomm. Ass’n v. Fed. Commc’ns Comm’n*, 855 F.3d 381, 430 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing *en banc*).

115. *Id.*

116. Seidman, *supra* note 1, at 2234.