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### Panel 1: Robotic Speech and the First Amendment

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Panel 1:  
Robotic Speech and the First Amendment

*Moderator: Professor Gregory Silverman*

*Panelists: Bruce E. H. Johnson, Helen Norton, and David Skover*

**Silverman:** We kick off today's symposium with a panel on Robotic Speech and the First Amendment. The focus of this first panel is the soon-to-be-published book by Professors Skover and Collins. Professor David Skover is the Fredric C. Tausend Professor of Law here at Seattle University, and he will represent the authors on this morning's panel. The book is *Robotica*.<sup>1</sup> The first half of the book lays out an argument extending First Amendment protection to robotic speech. The second half of the book has five commentators who give their reactions to the first half, followed by the response of Professors Skover and Collins to the commentators. Our format this morning is going to mirror the structure of the book. I will begin by offering my own summary of the argument set out by Professors Skover and Collins. That will be followed by two of the five commentators here today, Attorney Johnson and Professor Norton. And then Professor Skover will offer his response to the two commentators.

Attorney Bruce Johnson is one of the nation's leading First Amendment litigators. He is a partner at Davis Wright Tremaine here in Seattle. Professor Helen Norton holds the Ira C. Rothgerber, Jr. Chair in Constitutional Law at the University of Colorado, Boulder. Among her many works she has recently written an article entitled, *Siri-ously? Free Speech Rights and Artificial Intelligence*.<sup>2</sup>

The central insight and premise from which Professors Skover and Collins begin is that any new and effective technology of communication transforms society and the law by changing the calculus of its values and

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1. RONALD L. COLLINS & DAVID M. SKOVER, *ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE* (Cambridge Univ. Press 2018).

2. Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169 (2016).

recalibrating its notions of harm.<sup>3</sup> The buttress that supports his claim in the early part of the book was the brief social history of several disruptive technologies of communication: scribal writing, the printing press, radio, television, the computer, and the internet. From the perspective of this history, they recognize, in the present, the emergence of a new, disruptive communications media: robotic communication—communication mediated by robots. In robotic communication, robots either communicate directly with human beings or act as proxies for human beings when they communicate with other robots. For example, on the Internet of Things, an intelligent refrigerator tells us that we are low on eggs and then, on our behalf, communicates with a robot situated on the supermarket server. So, we have both forms of robotic communication in that example.

After identifying robotic communication as a new medium of communication, Professors Skover and Collins asked whether First Amendment coverage given to traditional forms of speech should be extended to the data processed and transmitted by robots. To answer this question, they distinguished robotic communications addressed to humans on the one hand and those transmitted to other robots on the other. Regarding robotic communications addressed to humans, they argue that First Amendment law protects words, text, images, sounds, and data because of its expressive meaning. Drawing on the work of reader response and reception theorists who claim that the meaning of a text arises from the interpretative acts of the reader rather than from the author's intentionality or from the form of the text itself, Professors Skover and Collins locate the expressive meaning of the communication in the interpretive act of its recipient. In this respect, they see no difference between the expressive meaning of human and robotic speech.

Accordingly, they conclude that robotic communication addressed to a human should be covered by the First Amendment because “for constitutional purposes, what really matters is that the receiver experiences robotic speech as a meaningful and potentially useful end value.”<sup>4</sup> They call such robotic speech intention-less free speech and buttress their argument by noting how locating expressive meaning covered by the First Amendment in the interpretive act of the recipient explains otherwise inexplicable First Amendment doctrines regarding nonobscene pornography, corporate commercial speech, and violent video game speech.

Regarding robot-to-robot communications, Professors Skover and Collins distinguish, at least implicitly, between those that are ultimately addressed to humans and those that, while not addressed to humans, are

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3. See COLLINS & SKOVER, *supra* note 1.

4. *Id.*

initiated by them. For a chain of robot communications ultimately addressed to a human, they extend their earlier argument. Namely, a chain of robot communications ultimately received by a human being is infused within expressive meaning by that human recipient. And as such, the entire transmission chain that generated that communication should be covered by the First Amendment.

Now, for a chain of robot communications not ultimately addressed and received by a human being but instead initiated by one, Professors Skover and Collins argue that the robots act as proxies for that human being, and so long as that person's acts are for a lawful purpose, the chain of robot communications warrants the same First Amendment coverage as would that person's—that human being's—communications.

In making this argument, they claim that they are making explicit the principle adopted by the Supreme Court in *Sorrell v. IMS Health Inc.*, a 2011 case.<sup>5</sup> Having concluded by considering those forms of robot communication, that the First Amendment should cover robot communications generally, Professors Skover and Collins ask: what is the free speech protection that might be accorded to robotic expression?<sup>6</sup> Now that we know the First Amendment applies to robotic speech, they ask, how much protection is robotic speech actually due?

While they do not offer a final answer to this question, they suggest that the protection should be significant and begin the important work of developing a framework for a full answer. Rather than developing yet another message-centric, normative model of free speech protection that attempts to distinguish speech that is worthy of protection from speech that is not—and thereby ends up justifying the censorship of speech as much as its protection—Professors Skover and Collins adopt a medium-centric approach to First Amendment protection. They focus on robotic communication as a new, disruptive technology and medium of communication, the utility of which is so great that its robust protection is inevitable. They offer two reasons for this conclusion.

First, they argue that the tremendous utility of robotic communications alters the cost-benefit analysis traditionally applied in the First Amendment context and that the value added by robotic communication—in online shopping, booking travel, searching for goods, information, and titillating content, as well as myriad other internet services employing robots—is sufficiently great to cause us to tolerate harms such as defamation, invasion of privacy, and pornography that, in the past, we have used to justify curtailing the protection of non-robotic speech.

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5. *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

6. See COLLINS & SKOVER, *supra* note 1.

Second, they point out that the nature of the medium itself undermines the efficacy of prior restraints no matter how those prior restraints are justified, thus resulting in de facto nullification of any legal command to restrain robotic speech. As a result, rather than robotic speech being forced to conform to the existing norms of First Amendment jurisprudence, they argue in good, realist fashion that those legal norms will be forced to accommodate the functional realities of robotic speech.

Those are their arguments as to why robotic communication should be covered by the First Amendment on one hand and why it will receive robust protection on the other. So, having summarized the argument of the first half of the book, we turn now to our panel and we will hear first from Attorney Bruce Johnson. Take it away.

**Johnson:** My response to this argument was headlined “An Old Libel Lawyer Confronts *Robotica*’s Brave New World.” I’m an old libel lawyer. I’ve been practicing now for more than forty years, and I thought what I was reading was kind of unusual from my perspective. I’ll explain why. And also unusual, I think, from a First Amendment perspective. So, I took issue.

The first point, and I guess these are the three large points, I want to stress. The first point is while David and Ron focus on intention-less free speech, in fact, in the law—and particularly the First Amendment law—intentions matter for both good and for ill. And I’ll explain that this actually goes all the way back to probably 1789 in the United States Constitution drafting and extends as recently as *New York Times v. Sullivan*,<sup>7</sup> *Westboro Baptist Church*,<sup>8</sup> cases like that. And the First Amendment protections really do depend on good intentions versus bad intentions. Related to that, the law has warriors out there looking for liability, looking for cases, looking for payoffs. And as a consequence, they will be looking for the bad intentions. You can’t divorce robotic speech from the possibility that lawyers will be out there looking for a payday and trying to find bad actors, and the bad actors will be trying to insist that there is no payday because they are good actors. So, we are going to live in a world with a lot of intentions, and that’s a world which is very unusual for robots, obviously. It’s a human-centered world.

So, first of all, intentions matter. And that means I’m taking issue with Ron and David’s utilitarianism. I don’t think utilitarianism is something that is going to pass muster in a courtroom effectively because it is basically a much larger concept: trying to weigh good speech versus bad speech. In fact, the law basically creates a different kind of calculus, similar to what we see in *New York Times v. Sullivan*, which is what kind

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7. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

8. *Snyder v. Phelps*, 562 U.S. 443 (2011).

of intentions are behind this speech. Is it a lie or is it not a lie? Is it something where we want to encourage it or is it something we want to discourage?

Number two: Ron and David's book doesn't really deal with a concept called "public concern speech." In my libel work, I can tell you that the difference between speech on a matter of public concern and speech which is not on a matter of public concern is basically the difference between night and day. Public concern speech gives rise to a series of rules that are inherent, obviously in the defamation context, but we also saw it in the Jerry Falwell case<sup>9</sup> in the U.S. Supreme Court that even if you recast your torts as some kind of intentional interference claim, *New York Times v. Sullivan* will still apply.<sup>10</sup>

We saw it in the Westboro Baptist Church case, *Snyder v. Phelps*, several years ago in the U.S. Supreme Court.<sup>11</sup> An intentional infliction of pain on people, basically on the families of soldiers who were being buried, by this anti-gay church. I don't want to call it a church, more of a cult.<sup>12</sup> And the Court basically said, yes, we're going to allow that speech to basically be permitted,<sup>13</sup> in part, because it's speech on a matter of public concern.<sup>14</sup> We fought it briefly there in that case where we argued that the Westboro Baptist Church was like *Elmer Gantry*<sup>15</sup>—they have a right to basically go out and make fools of themselves—but that speech on what they considered to be religious was something that the Court and a jury should not touch.

So, that public concern aspect is something which is, by definition or not, not addressed by David and Ron, and I think it's a key ingredient in distinguishing speech for which liability can attach and speech for which liability does not attach. The conversant situation where there is no public concern is what I call the *Dun & Bradstreet* case,<sup>16</sup> from about thirty years ago. This was a credit report and it went to the U.S. Supreme Court, and the question was whether a libel claim would lie under basically *New York Times v. Sullivan* principles. And the U.S. Supreme Court said this is nothing that involves a matter of public concern; therefore, we are not going to touch it at all.<sup>17</sup> And basically, it left the liability claim governed

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9. *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

10. *New York Times*, 376 U.S. 254.

11. *Snyder*, 562 U.S. 443.

12. *See id.* at 448–50.

13. *See id.* at 458.

14. *Id.*

15. SINCLAIR LEWIS, *ELMER GANTRY* (1927).

16. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

17. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

by English common law,<sup>18</sup> which, if you know anything about English common law, libel at that time was basically strict liability. And therefore, no First Amendment claim would attach.

So, I think it's important to distinguish between public interest speech and non-public interest speech, and at least the dialectic as I hear it from Ron and David doesn't. I think that's an important consideration.

The third thing: it's really hard to deal with robotic speech without dealing with articles that appear. For example, this one, two days ago, in *The Washington Post*: "Russia Used Mainstream Media to Manipulate American Voters."<sup>19</sup> This was two days ago in *The Washington Post*. Of course, yesterday, February 16th, we saw the indictments issued by the Mueller investigation dealing with the Russian attempts to use robotic speech to affect the American political system with toxic views to influence the course of the 2016 election. I don't think you can separate robotic speech from the problems we saw in 2016. As a practical matter, the politicians will be dealing with that in one form or another for years to come.

It's interesting to me, when I grew up, I remember the inability to get information directly from foreign countries. I actually remember one day we were staying in Kalaloch on the beach on the Olympic coast, which got no telephone reception, no radio reception at all. So, I brought a shortwave radio with me—this was in 1991—because I could get Radio Moscow, and they had great music on Radio Moscow. This was August 1991. I can remember it very clearly. I was hearing this really odd music. It was the kind of music you heard when they were deposing Khrushchev and deposing Brezhnev, or at least moving Brezhnev out. It was almost funereal, and I said there has been a change of government in Moscow. And everybody looked at me silly. You know, we're on the Olympic coast beach. So, I went to Voice of America. Nothing. I went to BBC. Nothing. I was the only person in the United States who actually knew that there had been a coup in the Soviet Union, against Gorbachev. That's how unusual it was for international speech to be able to connect directly from something in Moscow and receive news directly from the Russians.

Today, on the internet, as we saw yesterday and with yesterday's indictments from the Mueller investigation, we are now getting this stuff pushing directly into the political bloodstream of America—directly from the troll factory in St. Petersburg. And I don't think the American political

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18. *Dun & Bradstreet*, 472 U.S. at 760–63.

19. Craig Timberg, *Russia Used Mainstream Media to Manipulate American Votes*, WASH. POST (Feb. 15, 2018), [https://www.washingtonpost.com/business/technology/russia-used-mainstream-media-to-manipulate-american-voters/2018/02/15/85f7914e-11a7-11e8-9065-e55346f6de81\\_story.html?utm\\_term=.98327f89f9f2](https://www.washingtonpost.com/business/technology/russia-used-mainstream-media-to-manipulate-american-voters/2018/02/15/85f7914e-11a7-11e8-9065-e55346f6de81_story.html?utm_term=.98327f89f9f2).

system has yet figured out how to deal with this—much less the American legal system—when and if somebody can be found to be blamed. So, I just want to highlight that, when you talk about robotic speech, we are going to have to talk about the 2016 election eventually.

So, anyway, the first point I took issue with was the strict utilitarian calculus. You can go back all the way to the initial arguments by Alexander Hamilton in the *Croswell* case in 1803.<sup>20</sup> Basically, defending a Federalist editor from a Jeffersonian prosecution, Hamilton basically argued that there should be protections available for anybody's right to publish "with impunity, truth with motives and for justifiable ends."<sup>21</sup> That's what Alexander Hamilton argued to the New York Court of Appeals in the Harry Croswell case.<sup>22</sup> He lost.<sup>23</sup> Actually, there was a three-to-three tie and, therefore, the lower court judgment was affirmed.<sup>24</sup> But with his death a year later, this statute became embodied in virtually every state constitution or every state law allowing that there should be protections available for people with good motives. In other words, we've been basically working since at least 1803 against the strict liability system that I think is inherent of the utilitarian calculus that David and Ron have argued about.

And that persists today, in the *Schenck*<sup>25</sup> case where we developed the "clear and present danger test," the *Brandenburg*<sup>26</sup> case in 1960 when we developed the notion that certain types of intention should not necessarily lead to liability for attempts to overthrow the government. Basically, that was an Ohio law that had a strict liability for advocacy of violence. To Justice Brennan's endorsement in *New York Times v. Sullivan*<sup>27</sup> of uninhibited, robust, and wide-open protections and the actual malice rule in favor of public interest speech, basically, for good or for ill, we have intentions built into our law dramatically, and even with the onrush of robotic speech, I don't expect that we're going to be able to get rid of that in favor of intention-less free speech.

The other thing to bear in mind is, I think, there's going to be this notion that abuse is inherent in what will be found liable under our legal system. That is simply the way the American legal system works. And it's going to be unusual to figure out how our system will deal with it. My view is that we're going to have a very robust protection for computer

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20. *People v. Croswell*, 3 Johns. Cas. 337 (1804).

21. *Id.* at 352.

22. *Id.*

23. *Id.* at 394.

24. *Id.*

25. *Schenck v. United States*, 249 U.S. 47 (1919).

26. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

27. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).



speech, which is not public interest-oriented. A few months ago, a joke circulated about Jeff Bezos: “Alexa, get me something on Whole Foods.” And the response: “Buying Whole Foods.” It would be interesting to imagine Jeff Bezos sort of made that comment one day and then bingo. Anyway, non-public interest speech will be absolutely protected. It will be basically an area where people will be very comfortable. The law will very easily regulate that type of speech. But in matters of public interest, in matters of public concern, the First Amendment doctrine is much more stringent and would likely block any such regulation.

For example, the bots that influenced our election in 2016. A series of “disinformation bots,” they are called, I think you are going to see a difficulty in the ability to regulate falsity that deals with public matters. There are a number of cases that have already come through the court system. The most recent one, which is cited in my materials in their book, is the Susan B. Anthony case, *Susan B. Anthony v. Kim*, a Sixth Circuit case where the state of Ohio sought to regulate false campaign speech and the court in the Sixth Circuit said, you can’t. You simply have no ability to regulate false campaign speech.<sup>28</sup>

We have a similar holding here in the state of Washington dealing with our public disclosure commission. So, in fact, the further along you go on the continuum of public interest, the higher you are in terms of public interest speech and the less likely it will be that government can influence it. Therefore, we will have what I wrote in the materials: a tsunami of botnet speech in all of our election campaigns to come without any serious ability to regulate it. And, as I concluded, I said, “This will not be Mr. Rogers’s neighborhood anymore. And in fact, in American campaign speech the death of discourse is clearly upon us.” In other words, we’re a dystopian view. Thank you.

**Silverman:** Thank you very much, Attorney Johnson. And now we have Professor Norton.

**Norton:** Good morning and thanks so much for sharing your morning with us. And thanks to Law Review for inviting me. I appreciate the graciousness of Maia, Brendan, and Mylla. I actually grew up in Seattle and I don’t get back very often. So, I appreciate the chance to come back even for a day, a day like today. It brings back fond memories of a very happy childhood. So, thanks for that.

I’m not a technologist. I’m a constitutional lawyer, scholar, and teacher. I know very little about technology, and I’m often uncomfortable with it. But I’ve been interested in studying, along with my co-authors, if you take a look at artificial intelligence or robotic speech, whatever you

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28. *Susan B. Anthony List v. Driehaus*, 134 S.Ct. 2334 (2014).

want to call it, what that tells us about free speech law and doctrine. In other words, we get the hard problem of new and unusual speakers. What does that tell us about why we protect speech or why we shouldn't protect speech?

So, in earlier work, first with my co-author Toni Massaro from the University of Arizona<sup>29</sup> and then a follow-up piece with Toni and my current colleague Margot Kaminski, we concluded, similarly to Ron and David, that very little in the First Amendment law poses a barrier to the coverage of robotic speech.<sup>30</sup> And this conclusion feels counterintuitive to many, but it has much more to do with the contemporary state of free speech law doctrine than with the nature of robots or the nature of technology.

So, for example, if you think about the positive free speech theories underlying the First Amendment arguments for why we affirmatively should protect speech, why is speech in the Constitution? Positive theories say, well, it's because speech provides us with good things. And the positive theories, for the most part, focus on protecting expression because it is thought to give listeners affirmative benefits in terms of facilitating a democratic self-governance—affirmative benefits in terms of exposure to new ideas and knowledge. This is the marketplace of ideas argument. And affirmative benefits in terms of informing listeners' own choices in their own time.

And we also looked at negative free speech theory, which is the idea that we don't protect speech because it's all that great; we protect speech because the government is so darn scary. So, this argument here is an argument that we protect speech to protect listeners from the government. And here too, we can understand that contemporary free speech law and doctrine, whether it takes a positive or negative focus, is primarily interested in what this means for listeners. Are they getting the positive benefits they deserve? Are they being protected from the dangers of government?

So, we concluded that free speech law and theory protects listeners' interests and free speech outputs rather than speakers' humanness or humanity in ways that make it very difficult to place robots or artificial intelligence speakers beyond the First Amendment speech. Ron and David have reached similar conclusions in their terrific book, *Robotica*.<sup>31</sup> One measure of a quality book is that you find yourself thinking about it long after you have read it, and that is true for me. I read their manuscript early

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29. Massaro & Norton, *supra* note 2.

30. Toni M. Massaro et al., *SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481 (2017).

31. COLLINS & SKOVER, *supra* note 1.

last summer, and I still think about it. So, thank you for that. And they too conclude, as both a descriptive matter and a normative matter, that we protect speech because of its affirmative value to listeners, and they define that value very broadly as listeners' utility. Speech is valuable to listeners. It is of utility to listeners when it makes our lives easier or more pleasurable, more entertaining, and more possible.

So far, I'm in complete agreement with David and Ron that the First Amendment, at least today, is largely, if not entirely, about serving listeners' interests in speech. It's listeners all the way down. So, what I might talk about for the next few minutes is ask you, what does a listener-centered approach to robotic speech mean? And I'm going to very briefly discuss the complicated and sometimes even dark side of robotic speech from a listener-centered perspective, if we take listeners seriously.

A number of the folks who have spoken already have used the word disruption or disruptive, and I like that very much. I think the Dean talked about how some of these changes in technology are going to be disrupting industry. I certainly agree. I feel—and I think David does too—that the changes in technology that we're seeing are going to disrupt also First Amendment doctrine. I don't know how, but I think it is inevitable. And actually, Bruce gave you some examples of why this is the case, and I will continue on those. I am not going to solve the problem of how First Amendment doctrine should respond to these challenges. I'm going to worry about it and I'm going to complain about it a little bit, and I'm going to ask David hopefully to solve it. He's an expert. But I just want to introduce the concept here.

Now, cheap and plentiful speech is often of great utility to listeners. The more speech the better for listeners, usually—not always, but usually. Robotic speech is one of many examples of a source of cheap and plentiful speech. So, from one point of view, robotic speech and other cheap and plentiful speech is the ultimate in listener utility. But there is a dark side, as cheap and plentiful speech can pose new dangers either to some individual listeners or to the collective public. I will cite some recent thoughtful commentaries on this.

Rick Hasen, for example, tells us that cheap speech has dramatically lowered costs for those who want to draw upon people's fears and rile them up for violent purposes.<sup>32</sup> Tim Wu says that it is no longer speech itself that is scarce, but the attention of listeners. Emerging threats to public discourse take advantage of this change. The low costs of speaking have made it easier to weaponize speech as a tool of speech control. The unfortunate truth is that cheap speech may be used to attack, harass, and

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32. Richard Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3017598](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3017598).

silence as much as it is used to illuminate or debate.<sup>33</sup> Mark Verstraete and Derek Bambauer use a more flattering term than cheap speech.<sup>34</sup> They call this democratization of the information system. Then they go on to say that this transformation is not at all and in any way good. Facebook's goal is not the production of truth but rather the generation of increased traffic interaction by users. Falsity can be profitable if it is popular, and falsity is often popular. The new architecture of network information has a structurally corrosive effect. It is easier to generate doubt about narratives, even those produced by previously tested sources, than it is to create trusted content. Authors and distributors attract attention, which they monetize by casting doubt.

And then finally, Julie Cohen uses the term “infoglut” to describe this same dynamic: this era of cheap and plentiful speech fueled by robots and other technology. She says, “Information abundance also enables new types of power asymmetries that revolve around differential access to data and to the ability to capture, store, and process it on a massive scale.”<sup>35</sup>

Different terms—cheap speech, the abundance of speech, the democratization of information, infoglut—they are all describing abundant speech of the sort that robots and other technological developments make possible. And sometimes it is great for listeners, but that is not always the case. I want to give you a few other examples.

Sometimes, powerful speakers weaponize cheap speech to threaten listeners—for example, by exploiting their information and their power advantages and thus increasing the likelihood and severity of the harms that they can inflict on listeners. What do I mean by harms? Well, I'm thinking in particular the harms of deception, manipulation, and coercion. And powerful speakers' motives for exploiting their listeners are many and are complicated. Certainly, they include financial gain, political gain. Sometimes they do it for their own self entertainment, sometimes because they are interested in undermining the notion of truth itself in order to undermine democratic institution as well.

I too, like Bruce, am worried about the recent problem of Russian bot trolling, and I think it exemplifies the challenges, the dark side, of robotic speech. As Nathaniel Persily says,

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33. TIM WU, KNIGHT FIRST AMEND. INST., IS THE FIRST AMENDMENT OBSOLETE? (2017), <https://knightcolumbia.org/sites/default/files/content/Emerging%20Threats%20Tim%20Wu%20Is%20the%20First%20Amendment%20Obsolete.pdf> [https://perma.cc/8D74-JMJ4].

34. MARK VERSTRAETE ET AL., U. OF ARIZ., IDENTIFYING AND COUNTERING FAKE NEWS (2017), [https://law.arizona.edu/sites/default/files/asset/document/fakenewsfinal\\_0.pdf](https://law.arizona.edu/sites/default/files/asset/document/fakenewsfinal_0.pdf) [https://perma.cc/BFE5-64A8].

35. Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEO. INQ. L. 369, 384 (2016).

Bots can serve many purposes, some beneficent and others nefarious . . . . Of greatest relevance here, bots can spread information or misinformation, and can cause topics to “trend” online through the automated promotion of hashtags, stories, and the like. During the 2016 campaign, the prevalence of bots in spreading propaganda and fake news appears to have reached new heights.<sup>36</sup>

Tim Wu points to China as another example of a powerful speaker taking advantage of the cheap and abundant speech made possible by robots and other technology to threaten listeners’ interests, and there he describes what China has in place. The Chinese government has in place a regime less intent on stamping out forbidden content, but it is instead focused on distraction, cheerleading, and preventing meaningful collective action. This is another example of what Julie Cohen called infoglut: we will disempower listeners by flooding them with information. So, speakers are a threat to listeners.

Second, sometimes listeners themselves use cheap and abundant speech of the sort that robots make possible to threaten other listeners’ utility. And again, I agree with David and Ron that listeners are the focus of most contemporary free speech law and doctrine, but listeners of course themselves are neither monolithic nor homogenous. So, listeners’ interests themselves, both short- and long-term, are often in conflict. Think of trolling, for example. Whitney Phillips explains that trolls take perverse joy in ruining a complete stranger’s day.<sup>37</sup> They will do and say absolutely anything to accomplish this objective and, in the service of these nefarious ends, deliberately target the most vulnerable—or, as the trolls would say, exploitable targets. So, the trolls’ listeners include their targets, the targets of the troll. And certainly the targets of the troll don’t find that speech to be of utility enough and find it to be of great harm. But some of the trolls’ listeners include other members of the trolling community who derive pleasure and excitement—and again, I’m using her terms—watching others ruin a complete stranger’s day. In other words, these listeners find trolling to be enjoyable, of utility precisely because others find it so unpleasant. They find it enjoyable to watch and listen to that happen.

Relatedly, different listeners experience hate speech in different ways and disagree about its utility. Again, anonymous hate speech is of no utility to the targets of hate speech, but many bystanders enjoy it under our capacious understanding of utility. In returning to our earlier discussion of

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36. Nathaniel Persily, *Can Democracy Survive the Internet?*, J. DEM., Apr. 2017, at 63, 70, [https://www.journalofdemocracy.org/sites/default/files/07\\_28.2\\_Persily%20%28web%29.pdf](https://www.journalofdemocracy.org/sites/default/files/07_28.2_Persily%20%28web%29.pdf) [<https://perma.cc/KU9L-X2Z9>].

37. WHITNEY PHILLIPS, THIS IS WHY WE CAN’T HAVE NICE THINGS: MAPPING THE RELATIONSHIP BETWEEN ONLINE TROLLING AND MAINSTREAM CULTURE 10 (2016).

how some speakers exploit cheap speech to undermine democratic institutions, again, some listeners enjoy such speech when it speaks to and confirms their own preferences, their own intuitions, their own fears, their own skepticisms. Lots of us like to listen to and read what's outrageous, and lots of us like to listen to and read stuff that confirms rather than challenges our preexisting intuitions. So, in other words, the utility of this sort of cheap and abundant speech made possible by robots and other technology is contestable. The utility of speakers and listeners may be in tension, and listeners themselves may disagree about the utility of contested speech. There are winners and losers here.

So far, I have been characterizing this as the dark side of listener utility in the context of robotic speech, but I'm going to try to turn to a more affirmative or positive frame. And I just want to spend a minute or two on what it would mean to protect and, thus, take listeners' interests seriously in the context of robotic and other technologically cheap speech. And I think that a truly listener-centered approach, if it is listeners all the way down, sometimes supports the regulation as well as the protection of speech to protect listeners' interests. And we have some precedent for this in the context of commercial speech, professional speech, and maybe employer speech.

The First Amendment is sometimes interpreted to commit government to regulate that speech to serve listeners' First Amendment interest. And doctrinal adjustments in those other contexts include, for example, requiring some speakers—like commercial speakers—not to lie, requiring some speakers—even in the campaign context—to verbally disclose their source because listeners find that knowing the source or the origin of speech is so helpful to them in trying to figure out the quality or credibility of that speech. In other words, in some other contexts that we might understand as listener-centered contexts, the courts have said: if we have to choose between speakers and listeners in this context, we choose listeners. Why? Maybe because speakers are exploiting information or power dynamics, but the doctrinal move there in that context sometimes is that government imposes duties of honesty, imposes duties of accuracy, and imposes duties of disclosure on comparatively powerful and knowledgeable speakers in order to protect listeners.

So, in the same way, we might conclude that government should be allowed under the First Amendment to regulate robotic speech, sometimes on the basis of content to privilege human listeners' interests and informed choices or in avoiding certain harms, like the harms of coercion, deception, and discrimination. In other words, free speech protection for robotic speakers does not rob the First Amendment of the human focus so long as

our understanding of the First Amendment attends to both the value and danger of robotic speech.

Now, how to actually do that as a doctrinal matter is the hard question. It's just the disruption question that I stated earlier. It's one that we're going to be grappling with for years to come. And for sure, sometimes the answer may not be legal regulation. Right? Sometimes we may prefer market, norms, or architecture as a better approach to protecting listeners' interests.

To close with one specific doctrinal possibility: I suggest that First Amendment law absolutely positively could and probably should support regulation that requires the disclosure of the source of speech as robotic if it is in fact robotic. Again, the source or origin of speech is extremely valuable information to listeners. Listeners rely on the source of speech as a heuristic, as a proxy for expression's quality and credibility. It's true, sometimes speakers prefer to be anonymous, sometimes anonymity is in speakers' interest for all sorts of reasons. On occasion, we might find those reasons compelling, for example, when the speaker is a whistle-blower and is otherwise vulnerable to coercion. But for the most part, speakers who seek to hide their true identity from listeners are doing so because they are trying to exploit or manipulate listeners.

So, disclosing and requiring the disclosure of the origin of the speech I think is appropriate if you truly do take a listener-centered approach to the First Amendment. In fact, precisely for that reason, the Supreme Court has repeatedly upheld government regulations that require disclosures in a campaign speech context. They require disclosure of the source of certain campaign contributions or communications. Why? Because that information is so important to listeners. And they uphold those disclosures in a context—the campaign speech context—where, of course, otherwise they are very loath to permit government regulation.

So, I acknowledge that identifying the threats that robotic speech may impose to listeners' interests is much easier than resolving or responding to those threats in a satisfactory way. And my point is simply that celebrating listener utility—and there is plenty to celebrate and I very much appreciate David and Ron's contribution to that—but my point is that celebrating has a dark side of its own and it creates some problems even while it solves others.

**Silverman:** Great. David, your responses now.

**Skover:** First, I am deeply indebted to my colleagues and friends Bruce Johnson and Helen Norton, first for their participation as commentators in my book co-authored with Ron Collins called *Robotica*:

*Speech Rights and Artificial Intelligence*.<sup>38</sup> Their challenging and very astute commentaries were published in the second half of the work, along with the fine introductory piece for the book authored by your keynoter today, Ryan Calo.<sup>39</sup> Those commentaries deserve to be read in full. I hope that you will do so when *Robotica* finally appears in print in May or June of this year. And this will be my last commercial advertising ploy for the day.

I also am grateful to them for agreeing to discourse with me today as panelists, thus foreshadowing for you some of the most salient points of contention that they take in their soon-to-be-published commentaries. Finally, my thanks to Greg Silverman, my colleague at the law school for agreeing to read *Robotica*, in manuscript form no less, and to moderate this panel today.

To begin, I remind you all that a robust exchange of ideas is one of the most revered aspirations for the First Amendment. And in that spirit, I am very fortunate to have the informed engagement of such thoughtful individuals as Ryan, Bruce, and Helen. Of course, on some points I differ from my colleagues. But hearty intellectual rough-and-tumble is not only true to free speech principles, but it also expands the borders of our thinking. And it can be just darn fun.

Before directly addressing Bruce and Helen's arguments, there are a few important matters which I call tenets that I wish to mention so as to clarify your understanding of *Robotica*'s larger purposes and themes and to set their critiques in perspective.

*Tenet I: On Technology and Theory.* *Robotica* does not offer a new and generalized theory of free speech.<sup>40</sup> The principal aim of the book is to address the relationship between robotic technologies and the First Amendment, and to demonstrate how robotic expression stands to reconfigure free speech theory.<sup>41</sup> Accordingly, Part One of the book delivers, in Ryan Calo's words, "an historical tour of communications, technologies, the transition from oral to written language, the invention of a printing press, and the arrival of the electronic communications finally arriving at the age of robotics."<sup>42</sup>

In all of this, Ron and I highlighted several takeaway points—some of which Greg mentioned, but all of which merit reinforcement:

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38. See COLLINS & SKOVER, *supra* note 1.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*



- No communication technology is likely to overtake its predecessor unless its utility, however defined, is great. Thus, for example, printed books, including the *Gutenberg Bible*, eclipse scripted documents because of their greater cost effectiveness and their functionality.
- When utility is great, a new communications technology promotes values that may well override the values of its predecessor, including political and moral ones. To continue my religious example, the printing press enabled the Protestant Reformation, challenging the religious stranglehold of the Catholic Church in Western Europe.
- Governmental censorship is likely to push back against new communications technologies in the interest of preserving old values. Thus, the Catholic Church censored heretical books, controlled printing presses, and persecuted heretics.
- When its utility is substantial, a new communications technology can override censorial efforts. Thus, despite the Church's Index of Forbidden Books and its Inquisition, the religious and nonreligious book industry grew and thrived.
- And in all of this, the link between the mode of communication and its utility is the driving force for free speech protection, either legally or functionally. Accordingly, the First Amendment explicitly forbids religious establishments, protects the freedom of religious thought and practices, and safeguards the press.

So, you see, the main purpose of this book, again, is not to deliver a new general theory of the First Amendment, but to explore the connection between robotic technologies and technologies of the past and censorial governmental efforts.<sup>43</sup>

*Tenet II: The Coverage versus Protection Distinction.* Central to *Robotica* is a distinction, which Greg did mention, between those speech activities that might be covered by the First Amendment as distinguished from those that are to be protected by the First Amendment.<sup>44</sup>

In Part Two of the book, Ron and I present a theory of when a claim of First Amendment coverage can be made, which we call “intention-less free speech” (IFS).<sup>45</sup> We argue that when a reasonable receiver understands a transmission of information to be a meaningful expression,

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43. *Id.*

44. *Id.*

45. *Id.*

then First Amendment coverage exists. In other words, unless the receiver finds some expression meaningful, the transmission will not be deemed speech at all. Only if a robotic transmission satisfies the IFS standard will First Amendment protection analysis come into play.

Part Three of the book then proposes that protection may be determined by a contextualized evaluation of the utility secured and disutility or harm incurred by the robotic expression in question.<sup>46</sup> At that point, the norm of utility operates as a justification for First Amendment protection. Whether utilities are offset by governmental demonstrations of harm will ultimately determine whether the robotic expression is given First Amendment protection. Speech will not eat the world under a maxim of utility because speech is not to be determined by utility but rather by IFS, the intention-less free speech standard. And protected speech is not to be determined by utility alone but rather by evaluation of competing utilities and harms.

*Tenet III: On Utility—A Conceptual Framework for Protecting Robotic Speech.* In order to clear away some analytical brush, it may be useful to stress what our utility norm is not.

It is not exclusionary. Our utility norm can work in tandem with other First Amendment normative values as long as they reinforce one another. This is, in a sense, a partial response to Bruce, who is concerned about our norm of utility and our standard of intention-less free speech as ignoring intentions. Other norms that safeguard intentions can still operate in tandem with utility. We would say the likelihood is that utility will take over when those other norms conflict with it.

Our utility norm is not hypocritical. It aims to avoid the hypocrisy of many writers in the First Amendment arena who stretch Enlightenment theories—everything from the search for truth to self-governance—almost to the breaking point in order to protect outlier forms of expression, including robotic expression.

Our norm of utility is not synonymous with other First Amendment principles. It should not be understood to collapse into other normative value theories. A robotic expression that serves even private interests, as contrasted with public ones, might be protected in the absence of any significant competing harms.

Bruce seems to be somewhat unmindful of this point when he critiques Ron and me for failure to address the bedrock principle providing First Amendment heightened protection to speech relating to matters of public concern. I offer several responses. First, public concern is not an inquiry that is relevant to First Amendment coverage for robotic

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46. *Id.*

expression under our IFS theory. It only becomes relevant under our utility calculus for First Amendment protection. The more robotic expression is useful for the general public, the more protectable it may be; or the more the public interest is harmed, the less protectable it might be.

Second, notions of public interest might already be subsumed within the utility calculus. This resonates with my earlier observation that the utility norm is not exclusionary but may work in tandem with other First Amendment normative values.

Third, public interest is sometimes defined vis-à-vis other First Amendment norms, such as Alexander Meiklejohn's theory of self-governance. The Supreme Court suggested as much in *Garrison v. Louisiana* when it equated speech concerning public affairs with "the essence of self-governance."<sup>47</sup> To the extent this occurs, public interest analysis may dilute the utility norm and thereby diminish First Amendment protection.

Fourth, as Bruce explicitly concedes in his written commentary (though he did not mention it today), public interest is an unruly norm inviting confusion.<sup>48</sup> Indeed, some of Professor Norton's line-drawing concerns would be equally applicable to the public interest analysis that Bruce touts.

Fifth, given the aegis of the First Amendment, the public interest in robotic communication technologies may well be defined primarily as the maximization of the free flow of digitized information, ideas, and opinions.

Sixth, insofar as our utility norm may invite the Huxleyan dystopia that Bruce suggests, the same could be said of existing First Amendment doctrines. That was a larger message of Ron's and my first book together, *The Death of Discourse*.<sup>49</sup> Apparently, Bruce forgot that we first coined that term. And though I am largely sympathetic to Bruce's fears of political and cultural pollution, a governmental cure to such a problem can itself be viewed as a form of Orwellian tyranny.

Finally, the utility norm is not canonical. Like all other theories, the utility norm must have some play in the joints in order to be effective. Because of that play, there will necessarily be hard questions of line drawing. Moreover, *Robotica* offers only a few pages to considerations of First Amendment protection, furnishing only a preliminary setting of generalized principles for analysis rather than a treatise-like framework for deciding specific issues of protection.<sup>50</sup> Even though she is truly mindful

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47. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

48. COLLINS & SKOVER, *supra* note 1.

49. RONALD L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* (2d ed. 2005).

50. COLLINS & SKOVER, *supra* note 1.

of this point, Helen is nonetheless troubled by the hard line-drawing problems that “the dark side” of utility imposes. It bears emphasizing, however, that there are some meaningful limitations built into the robotic free speech proposal. In addition to the intention-less free speech threshold that I earlier described for coverage, there is the harm principle. In other words, evaluation of one person’s utility and another person’s disutility and harms are all part of the calculus of First Amendment protection. And the precise point at which the line is drawn is often far too contextualized to be determined a priori.

Of course, the idea of rights in conflict is nothing new to the First Amendment. Indeed, it is commonplace; but not all rights or interests are created equal. Put into our context, one person’s utilities may be more functional and less harmful to society than another person’s. And if so, the First Amendment utility norm supplemented by other doctrines such as content discrimination, vagueness, substantial overbreadth, etcetera, may point to enhanced protection. Given the nature of robotic expression, its mind-boggling speed, and its wide range and reach, some legal tests might need to be rethought. *Brandenburg*’s incitement standard, for example, might be reconfigured given the instantaneous speed and wide-ranging reach of robotic expression.<sup>51</sup> The *Brandenburg* imminence test might be revised with much more emphasis on the “likely to produce action” prong. All of this may call for a technological fix rather than a regulatory one. Which leads me to my last tenet.

*Tenet IV: On Functional Fixes.*<sup>52</sup> First Amendment law typically disfavors regulatory responses when private sector technology can be fixed. In First Amendment law, this is called a less restrictive means. This occurs when technological fixes are both reasonably available and adequate. Such may be the case with robotic technologies that have the capacity to outstrip the pragmatic potential of regulatory responses. When Helen and Bruce bemoan, as they do in their written commentaries, a dissemination of fake news by robot trolls or bots, this tenet on technological fixes takes on enhanced force.<sup>53</sup>

On the one hand, false statements or misinformation about private individuals or commercial products are already regulated by numerous federal and state consumer protection and defamation laws. On the other hand, the problem is much more complicated, as Bruce noted, when the fake news occurs in the public arena. If nefarious groups deploy trolls or bots in order to spread misinformation there, it may be incumbent on

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51. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

52. COLLINS & SKOVER, *supra* note 1.

53. *Id.*

opposing groups to respond in technological kind and employ anti-trolls to correct the record with more truthful information.

When Bruce decries the destruction of democratic discourse by robots that completely escape governmental control, Ron and I cry out for robotic fixes that trump the potential of regulatory responses alone.<sup>54</sup>

As one of the authors of *The Death of Discourse*, I greatly sympathize with Bruce's angst over the electronic pollution of enlightened and rational political discourse.<sup>55</sup> Our cultural critique in *The Death of Discourse* notwithstanding, as a legal matter, we nod to arguments against governmental monitoring of bot-generated political falsehoods.<sup>56</sup> Of course, falsehoods have been long purveyed by human agents of political campaigns using earlier technologies. Only consider William Randolph Hearst's notorious manipulation of print news in order to fuel public fury and fervor for the Spanish–American War of 1898. Radio and television ushered in an era of even more widespread political misinformation than the printing press ever provided. Surely, the First Amendment would prevent the government from censoring false political speech on those technologies. That should arguably be so regardless of the technology. Notably, the technological fix is an instantiation of Justice Louis Brandeis's First Amendment maxim that the answer to false speech is not censorship but counter-speech.

Even if entities spend huge amounts of time and money to influence and manufacture our preferences, as Helen lamented in her written commentary,<sup>57</sup> should we admit to government regulation of political campaigns? Could this not be a stark example of governmental paternalism run amok? Ours is a First Amendment that abhors a governmental Ministry of Truth.

Evolution does not respect constitutions, customs, or creeds. It washes over them like waves erode shorelines. What does that mean to us? It means that we must approach robotic communication with a certain open-mindedness, a preparedness to question our presuppositions and a willingness to embrace, although guardedly, what seems inevitable. The inevitable may not always synchronize well with today's view of the law, or even with today's societal values associated with what it means to be human and engage in communication. But in the end, it is well to recall the sage advice of Francois-Marie Arouet Voltaire: Doubt is not a pleasant condition, but certainty is an absurd one.

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54. *Id.*

55. COLLINS & SKOVER, *supra* note 49.

56. *See generally id.*

57. COLLINS & SKOVER, *supra* note 1.

Once again, I thank my fellow panelists for their thorny and stirring challenges to *Robotica*.<sup>58</sup> Ron's and my book is far better for their critiques, and the same can surely be said of the discourse we've heard today.

**Silverman:** Great. Thank you, David. So, now we have about fifteen minutes for questions and answers. That means you, the audience, get to pepper our panel with any questions you might have. And of course, we can ask questions of one another as well. But I know we are running a little long and so I want to jump right into Q&A with the audience. State your name if you will.

**Amanda:** Hi, my name is Amanda. Thanks so much. I can try to summarize the question. My background is working in data visualization and big data, and for the past five years, I have been working to sell things at Wal-Mart and have viewed that world. And so, when we talk about intentionality, it's really towards everyone, but I see this more when this is leveraged to your example, "Alexa, buy something from Whole Foods." I don't see it as just person-to-person, robot-to-person; this comes from somewhere. It's coming from a human somewhere. It's Google, it's Facebook. And at the very least, even if we are not extremely skeptical—I happen to be very skeptical, but even if we're not—we want to sell products, services. Do any of you have a comment about that? About the way that the intentionality is to push something, to sell or at least to keep us online, to keep us on Facebook. Just, again, if you have some thoughts on that. It's an enormously broad question.

**Johnson:** I actually co-authored a treatise on commercial speech that basically takes issue with the notion that commercial intentions are suspect.<sup>59</sup> I actually think commercial speech is probably among the safest speech around because you are going to find out pretty early on whether you have a bad product or not. That doesn't happen in the political world, unfortunately. It may take a year, two years, three years, or four years, but you may have disastrous results in the meantime. So, in a sense, I don't distrust the notion that somebody wants to sell me something. On the other hand, you are right: big data is a danger. There are forces that are very powerful in terms of pushing technology on us. The social media situation is, to my mind, fraught with all sorts of risk about how much access we have to it versus how much access is being manipulated by other forces than us. So, I see a risk there. On the other hand, if you grew up in a world of four broadcast networks, or three broadcast networks, this is very familiar to us. This is a much more limited space of large speakers

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58. *Id.*

59. STEVEN G. BRODY & BRUCE E. H. JOHNSON, ADVERTISING AND COMMERCIAL SPEECH: A FIRST AMENDMENT GUIDE (2017).

controlling the way we communicate. Broadcast's role in 1960 was not that different from what we're dealing with in terms of the technology world in 2018.

**Amanda:** I guess not just a question of service and product, the fact that they know every single thing about me. I work at Target; they advertise it. They know your age, your income, your political views, and the way they swing that it is more than that. Are there concerns around it? That's more it.

**Skover:** I think we're going to see that with the Mueller investigation because if there were actually efforts to communicate between the Russians and the Trump campaign or Cambridge Analytica in terms of whom to target with the misinformation, we will be seeing some very significant discussions about that point. Let me just address your question from another angle, and that is from the perspective of First Amendment protection. When in *Virginia Pharmacy* in 1976 the Supreme Court first gave serious First Amendment protection to commercial speech,<sup>60</sup> it did so in a way that Ron's and my book called a vindication of the intentionless free speech coverage theory.<sup>61</sup> It did so by saying that the important value in the commercial communication is not the intentions of the speaker. The Court assumed that every corporate speaker intended to sell a product, but it said that what was important was the listeners, i.e., the consumers—that is, what they received as information and how it might affect their decisions to purchase in the marketplace.

So, from a First Amendment standpoint, your concerns have been rendered almost irrelevant—not entirely irrelevant—but that is not the focus of First Amendment protection. First Amendment protection is based on a reception theory or the reader response theory that Ron and I relied on in our book. It is the meaning of the information to the consumer that the Court valued for granting First Amendment protection to commercial speech.

**Howard:** My name is Howard Chizeck. I'm going to push on Amanda's question a little bit more. Right now, should companies involved with Alexa or Siri, possibly Cortana, learn things about you from the discourse? For example, by watching your response and voice tone and stress patterns in response to comments and images, your sexual orientation can be determined with high accuracy, as can your political leanings as well as information that is available in databases about your network and your buying patterns. So, it seems that the discourse that is going on is not just to sell and to acquire information about you, which can

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60. *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 760–73 (1976).

61. COLLINS & SKOVER, *supra* note 1.

then be sold to other companies. And that is not necessarily in the expectation of the user. And yet it is commercial free speech. So, I'm wondering how that fits in to your First Amendment analysis and other related privacy issues legally.

**Norton:** Yeah, I'll take that. Thank you both of you. I agree and share your concern. If you go back to the emergence of the contemporary commercial speech doctrine in the 1970s, it was transparently listener-focused. Meaning commercial speech is not protected when it is false, misleading, or related to illegal activity. Why? Because listeners have no interest in commercial speech that is false, misleading, or related to illegal activity. And all other commercial speech, regulation of all other commercial speech—truthful, non-misleading, non-illegal commercial speech—receives intermediate scrutiny. Basically, the idea is that the regulation should live or die based on whether or not the regulation serves listeners' interest. That was the 1970s statement on commercial speech. And I think it's very fair to wonder if that still describes how the commercial speech doctrine is working today. If you think about the *Sorrell* case, you think about some others, it seems like the Court today is very, very comfortable striking down regulations of commercial-related speech that were designed to protect listeners—for example, designed to protect listeners' privacy—in the name of protecting speech. That really serves the commercial speakers' interest. So, I think we started down the right path with commercial speech doctrine, but I'm uncomfortable with where we are currently. We have lost our focus on listeners' interests.

**Johnson:** I'll just add one word. Helen is quite right: characterizing the change as the focus. But in the *Sorrell* case, the Supreme Court essentially equated commercial speech with all other forms of speech when it came to its content discrimination principle.<sup>62</sup> That is the First Amendment, right? It does not allow the government to discriminate on the basis of content or viewpoint, at least without showing a serious harm.<sup>63</sup> And so, in the *Sorrell* case there was no, there really wasn't any evidence, any great evidence of harm involved with the sale of the information, which was pharmaceutical purchases by customers.<sup>64</sup> And without a record of invariably provable harm, the content discrimination that was on the face of the regulation there was deemed unconstitutional.<sup>65</sup>

**Ruth:** Hi, Ruth Atherton from the Gates Foundation. So, I'm very interested in—and I think this is directed to Helen and David—I'm interested in thinking about the Brandeis principle that more speech is the

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62. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011).

63. *Id.* at 572.

64. *Id.*

65. *Id.* at 563–64, 572.



solution. I'm interested in your thoughts about the use of the anti-troll measures—which, I love this concept—as a way to correct speech, but in light of the fact that cheap speech is such a lower threshold to produce than evidence-based data. Can you both comment on that?

**Skover:** All right, I'll take this first. Let me just point out that this problem is not entirely endemic to robotic technology. We have the problem you're talking about with television—certainly since the age of cable. My mother never watched any other station than Fox News. She refused to watch any channel that did not confirm to her own biases—her own views of the world. So, these phenomena preexisted robotics. What's important about the anti-troll or the anti-bot proposal is that it would be a technological fix, not something that the government arranged, but that some corporation might produce and purvey to those who want to hear the other side of the argument. But that assumes a certain openness of mind. That's really the issue. In fact, part of the problem that Bruce is talking about—the death of discourse—occurs in large part because, in this information club that you talk about, many of us just simply cut out the noise and focus entirely on what confirms our views of the world. In such a scenario as that, we may not be getting the benefit of the anti-troll proposal.

**Norton:** Yes, very quickly. I appreciate the question. I don't know the solution. I think once we acknowledge that cheap speech has value and danger, in addressing the dangers, I am open to all solutions. I am open to legal solutions, technological, etcetera. I don't have the answer today. My goal today is, because this worries me and keeps me up at night, I want you all to be up at night too. But in terms of legal response, I do think that we've lost our way. I think *Sorrell*—no doubt we disagree in this room about *Sorrell*—I think *Sorrell* was a step away from the right direction.<sup>66</sup> I think in terms of the history of hypocrisy—and another plug for David and Ron's book is that it's a terrific history of technology and a terrific history of hypocrisy that I found very compelling. But I think the Court's contemporary free speech doctrine in this area is in fact itself hypocritically claiming to protect listeners' interests when it's really not. It's protecting powerful speakers' interests.

**Silverman:** In the back? State your name.

**Chris:** It's Chris. Do you see your anti-trolling technology as something disseminating information?

**Skover:** Well, I'm not an engineer. I'm not a technologist. But I would assume that it could be either. It depends entirely on the need that is presented and how the technology is designed. I'm speaking completely

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66. See generally *id.*

off the cuff here, but arguably one could achieve somewhat of the same result either way depending on what the information is. If I filter out information entirely from foreign bots, I may be achieving the same result as if I produce truthful information that counters the misinformation that was purveyed during the 2016 elections. So, I would say: What's the difference if the end result is the elimination of foreign influence in our elections?

**Silverman:** I think we have time for one more question. Ryan, did you have a question earlier? You pass? Okay.

**Mike:** I'm Mike. I think I too am in favor of more information is better. This goes by the technological fix, just kind of adding on. Given the information asymmetries and access like the Russian government, for example, I'm just wondering if you are going against foes that are putting out this information that had that kind of access to the data, access the technology and the know-how, how does that work in real life? I'm putting too much on you.

**Skover:** Again, I'm not a techie. I'm not an engineer. But as I understand the Russian problem, what would make it more difficult to identify and limit the misinformation from a foreign bot is that the information was coming through social media platforms with American identities. The bots were identifying themselves and setting up accounts as American citizens. So, I see how the news reports on the Russian interference play into what you are talking about. I certainly don't have a technological answer for it at this point, but here I completely agree with Helen on the matter of disclosure. I don't think there is a First Amendment problem, as a general matter, with the disclosure of bot-producing speech, assuming we understand that the bot is "speaking" for itself.

**Johnson:** I actually agree with David that there is a technological fix. When I wrote my materials about a year and a half ago, I hadn't seen evidence of this, but if you look at things like Hamilton 68 generated by the German Marshall Fund of the United States, ironically, the Marshall Fund was created by the United States government to restore Germany's democracy in 1947 and 1948, and the German Marshall Fund was created to help, as it turns out now, America to sort of preserve its democracy. It created a mechanism for finding out—I check every day—what the bots are doing these days based upon the analysis done by Hamilton 68, which was created by the German Marshall Fund of the United States. So, I can figure out what level of speech is being pushed. A few weeks ago, it was "release the memo." So, I knew that the newest memo deal was one that the Russian bots were very much behind, and that gave me a chance to evaluate exactly what was going on in that particular activity. So, I think we're starting to develop these types of technological fixes. They are not

perfect, but they are certainly better than government regulation, which, as all of us will concede, is fairly generally ill-considered in this context.

**Silverman:** Well, I think that wraps up the panel.