Catholic University Journal of Law and Technology

Volume 31
Issue 2 *Spring 2023*

Article 4

2023

§230 and Tinfoil Hats: What Conspiracy Theories Teach Us About the Marketplace of Ideas and Online Speech

Connor B. Flannery
Cornell Law School

§230 AND TINFOIL HATS: WHAT CONSPIRACY THEORIES TEACH US ABOUT THE MARKETPLACE OF IDEAS AND ONLINE SPEECH

Connor B. Flannery[*]

[*] *Juris Doctor* Candidate, Cornell Law School (degree anticipated May 2023); *Master of Science*, Manhattan College, 2018*; Bachelor of Arts*, Manhattan College, 2016; Senior Note Editor, *Cornell Journal of Law and Public Policy*, Vol. 32.

I am incredibly grateful to Professor Thomas Manahan for his support and advice throughout the various iterations of this article, to my classmates and professors who indulged me in conversations about Section 230 and the First Amendment, and to my friends and family who patiently listened while I cobbled together the piecemeal, unorganized thoughts from which this article began. Finally, I want to thank the entire *Catholic University Journal of Law and Technology* staff for their insight, hard work, thoughtful suggestions, and assistance. All errors remain my own. Please direct any questions to cbf52@cornell.edu.

> On May 22, 1962, a space probe landed on Mars and confirmed the existence of an environment that could support life. Not long afterward the construction of a colony on the planet Mars began in earnest. Today I believe a colony exists on Mars populated by specially selected people from different cultures and occupations taken from all over the Earth. A public charade of antagonism between the Soviet Union and the United States has been maintained over all these years in order to fund projects in the name of national defense when in fact we are the closest allies.
>
> At some point, President Kennedy discovered portions of the truth concerning … the aliens. He issued an ultimatum in 1963 to Majesty Twelve. … He informed the Majesty Twelve that he intended to reveal the presence of aliens to the American people within the following year and ordered a plan be developed to implement his decision. … President Kennedy's decision struck fear into the hearts of those in charge. His assassination was ordered by the Policy Committee and the order was carried out by agents in Dallas. President John F. Kennedy was murdered by the Secret Service agent who drove the car in the motorcade and the act is plainly visible in the Zapruder film. WATCH THE DRIVER AND NOT KENNEDY WHEN YOU VIEW THE FILM. All of the witnesses who were close enough to the car to see William Greer shoot Kennedy were themselves all murdered within two years of the event. The Warren Commission was a farce, and Council on Foreign Relations members made up the majority of its panel. They succeeded in snowing the

> American people. Many other patriots who attempted to reveal the alien secret have also been murdered throughout the years.[1]

President Kennedy's assassination, and the theories surrounding it, have come to represent the prototypical conspiracy theory. The excerpt above employs a unique bravado but follows familiar tropes of a conspiracy theory: a hyper-powerful, clandestine group pulling the strings; a convoluted web of lies; an official cover-up of a significant secret; assassination, drugs, and even aliens. Perhaps, an image of a recluse—donned with a tin-foil hat—working frantically to connect grainy black-and-white photos with a web of red twine comes to mind. Today, it is almost certain this stereotypical conspiracy theorist (our "tin-foil hat" aficionado) uses the Internet to share the major secret he or she has uncovered.

The term "conspiracy theory" is often discussed, yet rarely defined with precision.[2] Scanning the literature, one can develop a formal definition of conspiracy theory: a conspiracy theory is a specious idea, or set of ideas, promulgated to explain significant events, by assigning blame to the actions or intentions of powerful people or groups who have managed to conceal their role.[3] While a conspiracy theory can include good faith attempts to uncover government misconduct,[4] I bracket those instances to focus on insidious

---

1 MILTON WILLIAM COOPER, BEHOLD A PALE HORSE 215 (perm. ed., rev. 2020) [hereinafter BEHOLD A PALE HORSE]. Any conversation of conspiracy theory would be remiss without discussion of Milton William (Bill) Cooper. Cooper is known by many nicknames: "the Granddaddy of American Conspiracy Theorists," and "Titan of Tinfoil Hats," among them. Mark Jacobson, *Who Was William Cooper? The Man Behind One of the Most Controversial Books of Our Time*, PUBLISHERS WKLY. (Sept. 21, 2018), https://www.publishersweekly.com/pw/by-topic/industry-news/tip-sheet/article/78072-who-was-william-cooper-the-man-behind-one-of-the-most-controversial-books-of-our-time.html; Mark Jacobson, *The Granddaddy of American Conspiracy Theorists*, ROLLING STONE (Aug. 22, 2018) https://www.rollingstone.com/politics/politics-features/william-cooper-conspiracy-theory-711469/; *see also* Andrew Stuttaford, *'Pale Horse Rider' Review: A Huckster at the Mic*, WALL ST. J. (Sept. 19, 2018) https://www.wsj.com/articles/pale-horse-rider-review-a-huckster-at-the-mic-1537398045. Nicknames aside, Cooper is regarded as the forefather of modern American conspiracy theory. MARK JACOBSON, PALE HORSE RIDER: WILLIAM COOPER, THE RISE OF CONSPIRACY, AND THE FALL OF TRUST IN AMERICA 24 (2018).

2 *See* Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202, 205 (2009).

3 *See id*.; Karen M. Douglas et al., *The Psychology of Conspiracy Theories*, 26 CURRENT DIRECTIONS PSYCH. SCI. 538, 538 (2017) [hereinafter *Psychology of Conspiracy Theories*].

4 For example, President Nixon did, in fact, bug the Watergate hotel. *Watergate*, FBI, https://www.fbi.gov/history/famous-cases/watergate (last visited Apr. 3, 2023). The Central Intelligence Agency did, in fact, administer psychotropic and hallucinogenic drugs in attempt to develop mind control techniques in Project MKULTRA. *Project MKULTRA, The CIA's Program of Research in Behavioral Modification: Joint Hearing Before the Select Comm. on Intel., Subcomm. on Health and Sci. Rsch. of the Comm. on Hum. Res*., 95th Cong. 4 (1977) (statement of Admiral Stansfield Turner, Director, Central Intelligence). The

conspiracy theory. Insidious conspiracy theory is an amalgamation of "fake news" (an accusation of conspiracy, intended to convey "that mainstream news media are secretly colluding" to defeat a common political foe),[5] alternative facts (a refusal to recognize objective truth for the sake of injecting falsehoods into a topic),[6] disinformation (a category of information, of which conspiracy theory, fake news, and alternative facts fall into, that denotes intentional misleading of the recipient), and any other term that demonizes "skepticism, of intellectual humility and openness to the possibility of error and correction."[7] For the purposes of this article, I use the term "conspiracy theory" as shorthand for insidious conspiracy theory.

In the United States, individuals' right to speak freely is derived from the First Amendment of the Constitution's Free Speech Clause.[8] "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[9] Social discourse relies on free speech, because free speech legitimizes social discourse by ensuring access to socially "fertile" speech—speech of political, religious, ethical and cultural significance.[10] Fertile speech carries the "issues with which voters have to deal,"[11] and thus, ensures successful operation of the political process.[12]

The Marketplace of Ideas is a theoretical system of checks-and-balances that ensures ideas proven to benefit society are heard and discussed, while ideas proven to be detrimental to society are removed from social discourse. In theory,

---

United States Public Health Service did, in fact, leave syphilis untreated in African American sharecroppers during the Tuskegee syphilis study. *The U.S. Public Health Service Syphilis Study at Tuskegee*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/tuskegee/index.html (Jan. 9, 2023).

5 RUSSELL MUIRHEAD & NANCY L. ROSENBLUM, A LOT OF PEOPLE ARE SAYING: THE NEW CONSPIRACISM AND THE ASSAULT ON DEMOCRACY 112 (2020).

6 Aaron Blake, *Kellyanne Conway Says Donald Trump's Team Has 'Alternative Facts.' Which Pretty Much Says It All*., WASH. POST (Jan. 22, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/22/kellyanne-conway-says-donald-trumps-team-has-alternate-facts-which-pretty-much-says-it-all/. (Famously, the term "alternative facts" is attributed to former counselor to the President, Kellyanne Conway, who said: "[y]ou're saying it's a falsehood, and they're giving — our press secretary, Sean Spicer, gave alternative facts to that.").

7 MUIRHEAD & ROSENBLUM, *supra* note 5, at 117.

8 U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

9 "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."

10 R. George Wright, *A Rationale from J.S. Mill for the Free Speech Clause*, 1985 SUP. CT. REV. 149, 156.

11 *Id.* at 152 (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 93–94 (1948)).

12 *Id*. at 153 (quoting ALEXANDER BICKEL, THE MORALITY OF CONSENT 62 (1975)).

this mechanism ensures robust debate and scrutiny of competing ideas, which in turn, leads to society's arrival at information superior to that which could be achieved without such competition.

According to John Stuart Mill—the progenitor of the Marketplace of Ideas—the ability of the public to test "good ideas" against "bad ideas," is like a market economy. That is, "we, as rational consumers, choose freely what we want from among those available after careful weighing of their relative quality. We consider price, quality of manufacturing, how the product fits our needs, tastes, convenience, and so on."[13] The Marketplace of Ideas functions identically; we consider quality, fit, needs, tastes and convenience in weighing the relative quality of a given idea. In instances which truth and falsity are inexorably linked (as often is the case with any idea in infant stages):

> John Stuart Mill [] argued that repression may interfere with the market's ability to seek truth: first, if the censored opinion contains truth, its silencing will lessen the chance of our discovering that truth; secondly, if the conflicting opinions each contain part of the truth, the clash between them is the only method of discovering the contribution of each toward the whole of the truth; finally, even if the censored view is wholly false and the upheld opinion wholly true, challenging the accepted opinion must be allowed if people are to hold that accepted view as something other than dogma and prejudice; if they do not, its meaning will be lost or enfeebled. [14]

Justice Oliver Wendell Holmes invoked Mill's Marketplace of Ideas in his dissent in *Abrams v. United States*.[15] Since then, the Marketplace paradigm has underscored free speech doctrine.[16] But this Marketplace-inspired jurisprudence "presupposes an information-poor world," that no longer exists.[17] Today, the theoretical undercurrent of the Marketplace remains, but social discourse has changed. Social media platforms like Facebook and Twitter have become the primary modes for accessing real-time social discourse. Their influence on the way in which Americans (and human beings, in general) exchange information and interact with one another is undeniable.

Why do conspiracy theories matter, and what connection do they have in the Marketplace of Ideas? What do conspiracy theories tell us about the Marketplace

---

13 Jill Gordon, *John Stuart Mill and the "Marketplace of Ideas"*, 23 SOC. THEORY & PRAC. 235, 235 (1997).

14 Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 6 (citing John Stuart Mill, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 46–47 (R. McCallum ed. 1948)).

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

16 *See infra* Part IV.

17 Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. COLUM. U. (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete.

of Ideas in 2023? Further, what effect will the Marketplace of Ideas have in the future?

First, the conspiracy theory relies on the Marketplace of Ideas in unique ways. Thus, conspiracy theory operates as a valuable test case for the effectiveness of the Marketplace of Ideas. Consider Cooper's *Behold a Pale Horse*, excerpted at the beginning of this article.[18] Written in 1991, Cooper offered "evidence" that the Illuminati issued "a formal Declaration of War . . . upon the Citizens of the United States of America," that the "[Freemasons] are major players in the struggle for world domination," and "the CIA inculcated the desire in [mental health patients] to open fire on schoolyards and thus inflame the antigun lobby."[19] Notably, Cooper begins *Behold A Pale Horse* with the following entreaty:

The ideas and conclusions expressed in this work are mine alone. It is possible that one or more conclusions may be wrong. The purpose of this book is to convince you (the reader) that something is terribly wrong. It is my hope that this work will inspire you to begin an earnest search for the truth. Your conclusions may be different but together maybe we can build a better world.[20]

Cooper's note to the reader and Holmes' invocation of Mill's Marketplace of Ideas echo: "an earnest search for the truth," and the hope of "build[ing] a better world,"[21] on the one hand, "the best test of truth is the power of the thought to get itself accepted in the competition of the market," and on the other, "the ultimate good desired."[22]

As Russell Muirhead and Nancy L. Rosenblum explain in their book *A Lot of People Are Saying*, the process of conspiracy theory creation and dissemination "mimics collaboration and peer review: someone posts a hypothesis and others ignore it, reject it, or accept it. Something is accepted when others on the [online forum] repeat it and build on it."[23] Simply, a conspiracy theory co-opts the Marketplace to create a substandard version of it. Notably, this bastardized-

---

18 *See supra* Part I (excerpting BEHOLD A PALE HORSE at 213).

19 BEHOLD A PALE HORSE, *supra* note 1, at 37, 78, 225.

20 *Id.* Cooper's appeal to his readers is notable because it distinguishes his style of conspiracy from the insidious sort that I discuss in subsequent pages. Admittedly, the chances of President Kennedy being murdered to keep intergalactic peace are far-fetched, but Cooper's theory is not malicious, insidious, or posited with an intent to create chaos or delegitimize foundational understanding of fact and fiction. Cooper's conspiracy theories are the inspiration for the insidious conspiracy theory I explore, but are not examples of such theories.

21 BEHOLD A PALE HORSE, *supra* note 1.

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

23 MUIRHEAD & ROSENBLUM, *supra* note 5, at 134; *see also* Karen M. Douglas et al., *Understanding Conspiracy Theories*, 40 ADVANCES POL. PSYCH. 3, 8–10 (2019) [hereinafter *Understanding Conspiracy Theories*] (discussing social motives involved in conspiracy theories).

marketplace differs from the motivation of the Marketplace of Ideas; to find epistemic truth. The Marketplace-of-Conspiracy-Theory prioritizes other motives, *viz*., reducing anxiety and powerlessness, defending an individual or group from culpability, or making sense of negative or unexpected events.[24]

Second, conspiracy theories have renewed their place at the forefront of social discourse,[25] and conspiracy theories have a particular strength in the United States.[26] Arguably, the circumstances of the American Revolution "conditioned Americans to think of resistance to a dark subversive force as the essential ingredient of national identity"[27] and structured American thought "in such a way that conspiratorial explanations of complex events became normal, necessary, and rational."[28] To be sure, statements of inaccurate information, even conspiracy theories, are not novel phenomena.[29] Classic conspiracy was featured in American social discourse even before the United States declared independence.[30] However, a new subset of conspiracy theory looms. Muirhead

---

24 *Psychology of Conspiracy Theories*, *supra* note 3, at 538–40; Jan-Willem van Prooijen & Karen M. Douglas, *Conspiracy Theories as Part of History: The Role of Societal Crisis Situations*, 10 MEMORY STUD. 323, 325 (2017); *Understanding Conspiracy Theories*, *supra* note 23.

25 W. Lance Bennett & Steven Livingston, *The Disinformation Order: Disruptive Communication and the Decline of Democratic Institutions*, 33 EUR. J. COMMC'N. 122, 122 (2018) ("Many democratic nations are experiencing increased levels of false information circulating through social media and political websites that mimic journalism formats."); Brie Sherwin, *Anatomy of a Conspiracy Theory: Law, Politics, and Science Denialism in the Era of COVID-19*, 8 TEX. A&M L. REV. 537, 540 (2021) (exploring increased conspiracy theory proliferation in response to COVID-19 pandemic); MUIRHEAD & ROSENBLUM, *supra* note 5, at 1 ("Conspiracist thinking that was once on the margins of American political life now sits at its heart.").

26 Stuttaford, *supra* note 1 ("Conspiracism seeps through many cultures, nations and eras. It isn't uniquely American, but it can take distinctively American forms.").

27 MUIRHEAD & ROSENBLUM, *supra* note 5, at 24 ("Is it possible that the circumstances of the Revolution conditioned Americans to think of resistance to a dark subversive force as the essential ingredient of national identity?") (quoting DAVID BRION DAVIS, FEAR OF CONSPIRACY: IMAGES OF UN-AMERICAN SUBVERSION FROM THE REVOLUTION TO THE PRESENT 24–25 (2008)).

28 *Id.* at 22 (quoting Gordon Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, 39 WM. & MARY Q. 401, 421 (1982)).

29 *E.g.*, Sherwin, *supra* note 25 ("Conspiracy theories and science denialism are nothing new and have existed for centuries."); *Psychology of Conspiracy Theories*, *supra* note 3 ("Over a third of Americans believe that global warming is a hoax, and over half believe that Lee Harvey Oswald did not act alone in the assassination of John F. Kennedy.") (citations omitted).

30 Generally, this type of conspiracy theory is not dangerous, and functions to test the effectiveness of the Marketplace of Ideas; see MUIRHEAD & ROSENBLUM, *supra* note 5, at 2 ("Classic conspiracism—conspiracy *with* the theory . . . gives order and meaning to occurrences that, in [individual] minds, defy standard or official explanations."); *see generally Understanding Conspiracy Theories*, *supra* note 23; BEHOLD A PALE HORSE, *supra* note 1 (exemplifying this type of classic conspiracy theory about the Kennedy assassination); *Psychology of Conspiracy Theories*, *supra* note 3 (discussing epistemic,

and Rosenblum introduce "new conspiracism"—bare assertions, validated by repetition instead of evidence.[31] The most explicit example of the increased proliferation of new conspiracism is the popularization of the term "fake news." Popularized by former-President Trump, "[f]ake news is an accusation of conspiracy."[32] Indeed, the term—firmly cemented in the American vernacular[33]—describes a subset of conspiracy theory and suggests Americans' renewed interest in conspiracy theory and conspiracist belief.[34]

Conspiracy theories' current prevalence in contemporary social discourse is a consequence of modern communication technology.[35] Accordingly, conspiracy theories are uniquely situated for First Amendment Doctrine analysis as it pertains to the internet, and Section 230 of the Communications Decency Act ("Section 230").[36]

---

existential, and social motives for conspiracy theory); van Prooijen & Douglas, *supra* note 24, at 324–25.

31 MUIRHEAD & ROSENBLUM, *supra* note 5, at 3, 6–7.

32 *Id.* at 112.

33 *See Usage of the Search Term "Fake News" in the United States: 2004 - Present*, GOOGLE TRENDS, https://trends.google.com/trends/explore?date=all&geo=US&q=fake%20news (last visited Apr., 3 2023).

34 *See* Maria D. Molina et al., *"Fake News" Is Not Simply False Information: A Concept Explication and Taxonomy of Online Content*, 65 AM. BEHAV. SCI. 180 (2019) ("'Fake news,' or fabricated information that is patently false, has become a major phenomenon in the context of Internet-based media. It has received serious attention in a variety of fields . . . ."); *Misinformation, Misconceptions, and Conspiracy Theories in Communication*, UNIV. PENN. SOC. ACTION LAB, https://www.asc.upenn.edu/research/centers/social-action-lab/research/misinformation (last visited Apr. 3, 2023) ("In recent years, 'fake news' has been a dominant theme in our society, and indeed we can observe a constant flow of misinformation being disseminated through different forms of media."); *When Fake News Turns into Conspiracy Theories: The Viral Factor in Today's Media Landscape, and What We Can Do to Stop It*, SYRACUSE UNIV. SCH. INFO. STUDS. (Feb. 8, 2021), https://ischool.syr.edu/when-fake-news-turns-into-conspiracy-theories-the-viral-factor-in- todays-media-landscape-and-what-we-can-do-to-stop-it/ [hereinafter *When Fake News Turns into Conspiracy Theories*] (comparing fake news to popular contemporary conspiracy theories like Pizzagate and QAnon).

35 *See* Adam M. Enders et al., *The Relationship Between Social Media Use and Beliefs in Conspiracy Theories and Misinformation*, 2021 POL. BEHAV. (NATURE PUB. HEALTH EMERGENCY COLLECTION) 1, 2 ("Social media is a key player in the dissemination of conspiracy theories and misinformation. Dubious ideas about electoral fraud, COVID-19 vaccine safety, and Satanic pedophiles controlling the government, for example, swiftly navigate social media platforms, oftentimes avoiding censors all the while feeding the algorithms that further promote them.") (citations omitted); *see also About Us: Our Mission*, HARV. KENNEDY SCH. MISINFORMATION REV., https://misinforeview.hks.harvard.edu/our-mission/ (last visited Apr. 3, 2023) ("The widespread adoption of digital media and information technologies made it exponentially easier and faster to produce, disseminate, and be exposed to false, manipulated, and sometimes hateful content.").

36 *See* 47 U.S.C. § 230 (2018).

Finally, conspiracy theories are harmful—they pose a threat to individual health and safety.[37] For a particularly troubling example, the reader need look no further than January 6, 2021. Social media companies like Facebook provided the communication infrastructure utilized by "Stop the Steal" and similar conspiracy theories (some of which were amplified by then-President Trump).[38] Conspiracy theory on social media directly led to physical injury, property damage, death, and public disorder.

Physical and property harms aside, conspiracy theories pose a threat less visible, but perhaps more ominous. The Marketplace of Ideas relies on scientific institutions, experts, academia, and other epistemically-motivated institutions to scrutinize data and other objective evidence to determine what is fact and what is fiction. Conspiracy theories amount to a "direct, explicit, and wholesale attack on [these] shared modes of understanding and explaining,"[39] they subvert institutional legitimacy and destabilize collective understanding, academic consensus, and objective evidence.[40] Individuals become disoriented, distrustful, and overwhelmed by the chaos, and "citizen confidence in . . . the credibility of official information" erodes.[41] Over time, public confidence in scientific institutions, academic institutions, experts, and government fail.[42] By

---

37 *Understanding Conspiracy Theories*, *supra* note 23, at 18–21 (discussing conspiracy theories' ability to undermine safe sex practices, justify environmental destruction, dissuade voting, and increase radicalized and extremist behavior); *see also* Editorial Board, '*Pizzagate' Shows How Fake News Hurts Real People*, WASH. POST (Nov. 25, 2016), https://www.washingtonpost.com/opinions/pizzagate-shows-how-fake-news-hurts-real-people/2016/11/25/d9ee0590-b0f9-11e6-840f-e3ebab6bcdd3_story.html; Dave Davies, *Sandy Hook Ushered in a New Era of Conspiracy and Lies, Author Finds*, NAT'L. PUB. RADIO: FRESH AIR (Mar. 9, 2022, 12:19 PM), https://www.npr.org/2022/03/09/1084912392/sandy-hook-hoax-elizabeth-williamson ("[Elizabeth] Williamson's new book, *Sandy Hook: An American Tragedy and the Battle for Truth*, examines how conspiracists tormented the victims' parents by accusing them of being 'crisis actors.' In the years since the tragedy, the families have endured relentless online abuse, stalking and personal threats.").

38 *See* Jeff Horwitz, *The Facebook Whistleblower, Frances Haugen, Says She Wants to Fix the Company, Not Harm It*, WALL ST. J. (Oct. 3, 2021), https://www.wsj.com/articles/facebook-whistleblower-frances-haugen-says-she-wants-to-fix-the-company-not-harm-it-11633304122; Rebecca Klar, *Trump Supporters Organized the Capitol Riot Online*, THE HILL (Jan. 9, 2021), https://thehill.com/policy/technology/533450-trump-supporters-organized-the-capitol-riot-online/; Sheera Frenkel, *The Storming of Capitol Hill Was Organized on Social Media*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html; *see also When Fake News Turns into Conspiracy Theories*, *supra* note 34.

39 MUIRHEAD & ROSENBLUM, *supra* note 5, at 7.

40 *Understanding Conspiracy Theories*, *supra* note 23, at 3–4.

41 Bennett & Livingston, *supra* note 25.

42 Evan Osnos, *Dan Bongino and The Big Business of Returning Trump to Power*, NEW YORKER (Dec. 27, 2021) https://www.newyorker.com/magazine/2022/01/03/dan-bongino-and-the-big-business-of-returning-trump-to-power ("On America's balkanized airwaves, [Trump] supporters are using their platforms to spread disinformation, undermine faith in

deteriorating institutional legitimacy, conspiracy theories deteriorate the Marketplace of Ideas' fact-checking arm and the Marketplace of Ideas quickly loses its credibility. In this way, conspiracy theories make "democracy unworkable—and ultimately make[] democracy seem unworthy."[43]

The current speech landscape has undergone massive changes and shows no signs of slowing down. These changes—unaccounted for in First Amendment jurisprudence and federal legislation—have transformed the current speech landscape so that online speech is simultaneously irreplaceable and treacherous. Without an effective Marketplace of Ideas, society loses a fundamental checking mechanism and allows harmful, hateful, or otherwise nefarious information to pervade the informational ecosystem. Despite the damage, there still may be cause for cautious optimism—legislative, executive, and judicial intervention each offer potential solutions. The current state of affairs suggests vigilance and restraint, not resignation.

I. THE MARKETPLACE OF IDEAS

Justice Holmes solidified the importance of the Marketplace of Ideas in First Amendment doctrine in his dissent in *Abrams v. United States*, "the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[44] Indeed, this notion has had lasting impact in First Amendment doctrine.

A. As Imagined

The Marketplace of Ideas, as originally conceptualized and as referred to in First Amendment jurisprudence,[45] is supposed to act as a checking mechanism against the precise type of harmful speech conspiracy theories exemplify. When harmful yet protected speech—for example, expressing a demonstrably false conspiracy theory—enters the market, there should be little cause for alarm. In theory, the Marketplace of Ideas will review, test, and accept or deny the idea based on the veracity or benefit to society and social discourse. If the idea is beneficial, it will remain in social discourse. If the idea is detrimental or otherwise valueless, it will quickly be discarded from social discourse. Indeed, courts have relied on this check to justify decisions in which false speech is

---

governance, and inflame his followers.").

43 MUIRHEAD & ROSENBLUM, *supra* note 5, at 7.

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

45 *Id.*

protected.[46]

In theory, an effective Marketplace of Ideas is a prerequisite for a well-ordered, constitutional democracy.[47] Mill argued that "repression may interfere with the market's ability to seek truth."[48] This truth—the only truth that individuals can rely on—is used in social discourse to reach consensus and vote according to those convictions.[49] The importance of Marketplace-of-Ideas-tested truth to democratic process is apparent in the slogans and mission statements of major media outlets. Consider *The Washington Post's* slogan, "Democracy Dies in Darkness."[50] The Post's slogan alludes to the Marketplace of Ideas: darkness is understood as an absence of necessary information, Democracy cannot survive in its absence. If less than all necessary information is entered in the Marketplace, fundamental pieces of information will not subject to meaningful scrutiny.

Further, the Marketplace of Ideas solidifies and legitimizes consensus on important social issues. Albert Einstein understood the value of the Marketplace of Ideas: "[i]nto the village square we must carry facts of atomic energy."[51] According to Einstein, "[t]he nuclear age directly concerns every person in the civilized world . . . . [c]hoices about survival depend ultimately on decisions made in the village square."[52]

Admittedly, the Marketplace of Ideas as envisioned is not without its detractors. Professor Stanley Ingber notes that empirically, "current and historical trends have not vindicated the market model's faith in the rationality of the human mind."[53] However, the Court's commitment to the Marketplace of Ideas seems less concerned with the rationality of the human mind than it is concerned with avoiding the "specter that the government may effectively drive certain ideas or viewpoints from the marketplace."[54] Under the "Mill-Holmes approach," the Marketplace — albeit an imperfect method of fact-finding — is superior to government meddling in which ideas are granted admission to the

---

46 *See infra* Part IV.A.

47 S*ee* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 765–73 (1997) (arguing that "public reason" serves a similar role in maintaining a "democratic polity"); *See generally* MUIRHEAD & ROSENBLUM, *supra* note 5.

48 John Stuart Mill, *On Liberty*, *in* ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 46–47 (R. McCallum ed. 1948). *Accord* Ingber, *supra* note 14.

49 *See* Ingber, *supra* note 14, at 7 (citing ALEXANDER MEIKLEJOHN, FREE SPEECH AND IT'S RELATION TO SELF-GOVERNMENT 82–89 (1948)).

50 WASH. POST, https://www.washingtonpost.com/ (last visited Apr. 3, 2023).

51 MUIRHEAD & ROSENBLUM, *supra* note 5, at 119 (quoting FREDERICK A. O. SCHWARZ JR., DEMOCRACY IN THE DARK: THE SEDUCTION OF GOVERNMENT SECRECY 110 (2015)).

52 *Id.*

53 Ingber, *supra* note 14, at 7–8.

54 Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

Marketplace.[55]

The imperfections of the human mind need not impugn the Marketplace of Ideas, as envisioned. Under the "survival theory" approach, those views or ideas that surpass testing and are accepted in the Marketplace are defined as true; those rejected are, necessarily, false. [56] This approach is similarly unconcerned with objective, empirical assurance in the rationality of the human mind. The "survival theory" approach is more egalitarian than rational; individuals have a First Amendment right to determine veracity of a given idea.[57] This right is not premised on qualification, but on "a deduction from the basic American agreement that public issues shall be decided by universal suffrage."[58]

The Court seems unbothered by the limits of human rationality and objective veracity. In *New York Times Co. v. Sullivan*, the Court seems to align with both the Holmes-Mill approach ("[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials . . . .")[59] and the "survival theory" approach ("[w]hatever is added to the field of libel is taken from the field of free debate.").[60]

Regardless of the approach taken, courts seem to presuppose the importance of the Marketplace of Ideas. Without pause to consider the impact that modern communication technology has on the contemporary speech landscape, First Amendment jurisprudence has forged ahead to create a doctrinal landscape that is unfit for contemporary realities in speech. The Court's blind adherence to an idealized Marketplace of Ideas poses an urgent threat to the real-world Marketplace of Ideas.[61]

---

55 The "Mill-Holmes approach is attractive in a rapidly changing, diverse society that lacks a central orthodoxy." *See* Harry H. Wellington*, On Freedom of Expression*, 88 YALE L. J. 1105, 1131 (1979) (discussing that the approach would be the optimal normative way considering the nature of society at the turn of the 20th Century).

56 *See* Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 187 n.46 (1956) (citing MAX LERNER, THE MIND AND FAITH OF JUSTICE HOLMES 290 (Modern Library ed., 1954)). Auerbach includes Lerner's comment: "This is a dangerous position in a time when the manipulation of symbols has become as highly organized as under the Nazi regime, and in the working of Nazi propaganda outside of Germany." *Id.* Auerbach then adds: "[f]or present purposes, I would substitute "Communist" for "Nazi" and "Soviet Union" for "Germany." *Id.* An interesting reflection of the times Auerbach and Lerner respectively wrote in. The diligent reader will recall the utility of the Mill-Holmes model in such circumstances; s*ee generally* Wellington, *supra* note 55.

57 Ingber, *supra* note 14, at 8 n.30.

58 *Id.* (quoting ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATIONS TO SELF-GOVERNMENT 27 (1948)).

59 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

60 *Id.* at 272.

61 *See infra* Parts III and IV.

B. As It Happened

This harm—explicit in the wide-spread proliferation of conspiracy theories, a particularly pernicious consequence of the internet-fueled information exchange—suggests we need to change our admiration of, and reliance on, the Marketplace of Ideas as an omnipotent check on information. To continue with the economic metaphor, the harms exemplified by conspiracy theory suggest a need for a self-imposed "bust"; a contraction on the information exchanged.[62]

However, convincing the conceptualized Marketplace of Ideas was, in the modern speech landscape it no longer holds the power envisioned for it.[63] The invention, proliferation, and popularization of the internet (and the social media platforms that have become synonymous with it) have enabled information exchange to explode. The Supreme Court has recognized social media platforms provide "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[64] But the Court failed to account for these platforms' collective effect on the Marketplace. These platforms have been revolutionary, and entirely transformed civic engagement, as if Peyton Place encapsulated the entire globe.[65] Their effect, amplified by Section 230,[66] resulted in an information boom with an incomprehensible scale. These platforms are the new medium for free speech; "Section 230 is a jarring megaphone that amplifies all speech, for better or worse."[67]

In the fourth quarter of 2020, "Facebook took action on over 105 million pieces of content (an average of about 1.1 million actions *per day*) and Instagram on over 35 million."[68] In the fourth quarter of 2021, Facebook removed 1.7 billion fake accounts.[69] 1.3 billion accounts were removed in the last quarter of

---

62 *See* Adam Hayes, *Boom and Bust Cycle: Definition, How It Works, and History*, INVESTOPEDIA, https://www.investopedia.com/terms/b/boom-and-bust-cycle.asp (Sept. 5, 2020).

63 *See infra* Part III for a detailed exploration.

64 Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

65 *See generally* GRACE METALIOUS, PEYTON PLACE (1956). The analogy of social media content to small town gossip is common. Perhaps unsurprisingly, this analogy is used to besmirch the function of the Marketplace of Ideas, often for personal or political gain; *see* Paul Kane, *'Is this Watergate or Peyton Place?': Clinton Impeachment Question Shadows Congress in Trump Era*, WASH. POST (Aug. 25, 2018) https://www.washingtonpost.com/powerpost/is-this-watergate-or-peyton-place-clinton-impeachment-question-shadows-congress-in-trump-era/2018/08/25/9d83f0a6-a7c4-11e8-97ce-cc9042272f07_story.html.

66 *See generally* 47 U.S.C. § 230(b) (enumerating policy rationales that favor access to, and use of, online platforms).

67 JEFF KOSSEFF, THE TWENTY-SEX WORDS THAT CREATED THE INTERNET 3 (2019) [hereinafter TWENTY-SIX WORDS].

68 Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 791 (2021) (quotations omitted).

69 *Fake Accounts*, META, https://transparency.fb.com/data/community-standards-

2022.[70] In the second quarter of 2021, Facebook displayed warnings on more than 190 million pieces of COVID-related content and removed more than 20 million pieces of content for COVID-19 misinformation.[71] And, this is just a small sample of the content Facebook *took action on*, the amount of content overall is difficult to even calculate. The massive scale of social media communication makes doing real harm trivially easy.[72] Without an effective check, pernicious disinformation, hate speech, and specious conspiracy theory run rampant; the consequences are excruciatingly clear. All of this begs the question: is the Marketplace of Ideas still able to function efficiently in today's speech landscape? It doesn't seem so.

III. THE CRASH OF THE MARKETPLACE OF IDEAS

The Marketplace of Ideas has crashed. External factors have coalesced to create the ideal informational ecosystem for conspiracy theory—an invasive species in online speech. In economics, if the competitive nature of free market competition is compromised or eliminated, the failed marketplace can "no longer be trusted to properly value a particular good or service."[73] External factors and "real world conditions often have prevented 'free' competitive economic markets from optimally allocating and producing goods and services."[74]

Real world conditions—legislative mishaps, blind doctrinal adherence, and unchecked market power—have prevented the Marketplace from functioning as envisioned. No longer does the Marketplace of Ideas properly evaluate ideas. In fact, the current model facilitates perpetuation of harmful and detrimental ideas, so long as they are engaging. Select examples illustrate the precise ways in which online speech and an ineffective Marketplace of Ideas have compromised contemporary social discourse.

---

enforcement/fake-accounts/facebook/ / (last visited Apr. 3, 2023).

70 *Id.*

71 Guy Rosen, *Community Standards Enforcement Report, Second Quarter 2021*, META (Aug. 18, 2021), https://about.fb.com/news/2021/08/community-standards-enforcement-report-q2-2021/.

72 Jamal Greene, Dwight Professor of Law, Columbia University Law School & co-chair, Facebook Oversight Board, Civil Discourse: The Peter '69 and Marilyn '69 Coors Series at Cornell Law School: Deplatforming: Does Big Tech Protect or Prevent Public Discourse (Apr. 14, 2022), https://news.cornell.edu/stories/2022/04/coors-lecture-highlights-content-moderation-issues.

73 Ingber, *supra* note 14, at 16 n. 74 (listing instances of active government involvement such as antitrust limitations, minimum wage, prohibition of consumer deception, among others).

74 *Id.*

A. Select Examples

If the Marketplace was functioning as envisioned, each of the following theories—all of which have been proven unequivocally false—would have been forced out of the Marketplace and out of social discourse.[75] Yet, these theories remain as if they were legitimate.

1. Barack Obama's Citizenship

Also known as the Birther conspiracy theory,[76] the theory posits Barack Obama was not born in the United States, is secretly a Muslim, and secretly a terrorist.[77] In August 2020, a similar theory was directed at Vice President Kamala Harris.[78] This version of the theory arose from an "op-ed [that] gave rise to a wave of vile Birtherism directed at Senator Harris."[79] In 2022, another version of the Birther conspiracy theory reared its ugly head. This new version targets Justice Ketanji Brown Jackson, and her "legitimacy, qualifications and pedigree[;]" it is substantially similar to the Birther conspiracy theory surrounding Vice President Harris and former President Obama.[80] The theory surrounding Justice Brown Jackson similarly slides into wild, inflammatory allegations of contempt for the American people.[81]

According to Professors Dorf and Tarrow: "[t]hat soundbite might have seemed preposterous when it issued from the mouths of Donald Trump and his ilk . . . [y]et in 2016, majorities of some sectors of the public still believed it."[82]

---

75 *See id.* at 6.

76 Michael C. Dorf & Sidney G. Tarrow, *Stings and Scams: "Fake News," The First Amendment, and the New Activist Journalism*, 20 J. CONST. L. 1, 30 (2017).

77 Adam Serwer, *Birtherism of a Nation*, ATLANTIC (May 13, 2020), https://www.theatlantic.com/ideas/archive/2020/05/birtherism-and-trump/610978/.

78 *See generally* John C. Eastman, *Some Questions for Kamala Harris About Eligibility*, NEWSWEEK (Aug. 12, 2020, 8:30 AM), https://www.newsweek.com/some-questions-kamala-harris-about-eligibility-opinion-1524483.

79 *Id.*

80 Charles M. Blow, *Demanding That Ketanji Brown Jackson 'Show Her Papers'*, N.Y. TIMES (Mar. 6, 2022), https://www.nytimes.com/2022/03/06/opinion/ketanji-jackson-tucker-carlson.html.

81 *See generally* Jane Mayer*, The Slime Machine Targeting Dozens of Biden Nominees*, NEW YORKER (Apr. 16, 2022), https://www.newyorker.com/news/a-reporter-at-large/the-slime-machine-targeting-dozens-of-biden-nominees (discussing allegations that Justice Brown Jackson is "pro-pedophile," and helping "liberal élites" abuse and traffic children; "reminiscent of the QAnon conspiracy").

82 Michael C. Dorf & Sidney G. Tarrow, *Stings and Scams: "Fake News," The First Amendment, and the New Activist Journalism*, 20 J. CONST. L. 1, 30 n. 165 (2017) (citing Josh Clinton & Carrie Roush, *Poll: Persistent Partisan Divide Over 'Birther' Question*, NBC NEWS (Aug. 10, 2016), https://www.nbcnews.com/politics/2016-election/poll-persistent-partisandivide-over-birther-question-n627446); *See generally* David Mikkelson, *Does This Video Show Barack Obama Admitting He Was Not Born in Hawaii?*, SNOPES

In 2019, "[d]espite repeated efforts to correct the record by the news media and political elites, and even after the release of two different versions of his birth certificate three years apart and several investigative reports by news organizations about the circumstances of his birth, a significant portion of the American public still believes" the birther conspiracy.[83] Why hasn't the simple truth provided a remedy nearly eight years after the lie was introduced into the Marketplace?[84]

Plainly, the simple truth was ineffective because the Birther theory was "reinforced by repetition."[85] Russell and Muirhead warn that sheer repetition can amplify the deleterious effects of bare assertion and innuendo.[86] If the power of repetition is the key, then "the best test of truth" is no longer "the power of the thought to get itself accepted in the competition of the market."[87] But why do the attempts to correct the record that repeat the legitimate statements[88] not overcome the illegitimate theory?

First, it's possible that attempted record-correction is frustrated by timing. The primacy effect, which "holds that the side of an issue presented first will have greater effectiveness than the side presented subsequently,"[89] suggests the Birther conspiracy theory still persists because individuals encountered the idea that Barack Obama was not born in the United States before they encountered the release of multiple versions of his birth certificate and the investigative reports concerning his birth (in Hawaii).[90] The persistence of Birther conspiracy theories may also be a result of the recency effect, "in which the most recently presented facts, impressions, or items are learned or remembered better than material presented earlier."[91] Recency effect suggests that Birther conspiracy theories persist because they are more recent than the attempted record

---

(Dec. 3, 2010), http://www.snopes.com/politics/obama/birthers/notborn.asp.

83 Ashley Jardina & Michael Traugott, *The Genesis of the Birther Rumor: Partisanship, Racial Attitudes, and Political Knowledge*, 4 J. RACE, ETHNICITY & POL. 60, 62 (2019).

84 *See* Dorf & Tarrow, *supra* note 82.

85 *Id.*

86 MUIRHEAD & ROSENBLUM, *supra* note 5, at 3.

87 *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); Jojo Varakukalayil, *Social Media and the Politics of Truth in the Post-Truth Era*, 1 NISCORT J. MEDIA, COMMC'N & RSCH. 1, 6 (2020). Repetition of falsity to feign legitimacy is no accident. The infamous Nazi propaganda maestro Joseph Goebbels, stated "a lie told once remains a lie, but a lie told a thousand times becomes the truth."

88 *See* Blow, *supra* note 80; Mayer, *supra* note 81; Dorf & Tarrow, *supra* note 82.

89 Vernon A. Stone, *A Primacy Effect in Decision-Making by Jurors*, 19 J. COMMC'N 239, 240 (1989) (explaining F. H. Lund, *The Law of Primacy in Persuasion*, 20 J. ABNORMAL SOC. PSYCH. 191 (1925)).

90 *See* Jardina & Traugott, *supra* note 83.

91 *Recency Effect, APA Dictionary of Psych., https://dictionary.apa.org/recency-effect (last visited Mar. 24, 2023).*

correction. Perhaps most compelling is a combination of both primacy and recency. The serial position effect "shows best recall of the first items from a list (see primacy effect) and good recall of the last items (see recency effect), while the middle items are less well recalled."[92] If people are remembering the first version of the Birther conspiracy theory (concerning former-President Obama), the second version (concerning Vice President Harris), and the most recent version (concerning Justice Brown-Jackson), attempted record correction is being overwhelmed because it is constantly relegated to the middle of the temporal chain.

Alternatively, illegitimate Birther conspiracy theory may just overwhelm record correction in quantity. Potentially, the multiple versions of Obama's birth certificate and investigative reports of his birth are being washed out by concerns his birth in Hawaii.[93] In 2020, the Birther conspiracy directed at Vice President Harris was "being shared in forums and social networks notorious for disinformation, conspiracy theories and racist hatred" in a matter of days after publication.[94] As we've seen, social media has a larger audience and quicker dissemination than traditional journalism and news media.[95] The multiple attempts of record correction may be overpowered by the sheer quantity and frequency of Birther conspiracy claims.

Regardless, the persistence of the Birther conspiracy theory illustrates the Marketplace of Ideas has departed from its theoretical function. Validation by repetition masquerades as the sort of intellectual legitimacy the Marketplace of Ideas is designed to promote, but repetition is not akin to the proper validation the market is supposed to endorse. Legitimacy by repetition is a flaw in the Market's function—repetition may correlate with legitimacy, but it does not *cause* legitimacy. If repetition alone allows an idea to remain in (or worse, gain traction in) the Marketplace of Ideas, the Market is operating incorrectly.

2. QAnon

The "QAnon" conspiracy is prominent in modern collective consciousness of America.[96] QAnon's prominence in contemporary social discourse—despite its

---

92 *Serial Position Effect*, APA DICTIONARY OF PSYCH., https://dictionary.apa.org/serial-position-effect (last visited Mar. 24, 2023).

93 *See* Jardina & Traugott, *supra* note 83.

94 Eastman, *supra* note 78.

95 *See supra* Part II.B.

96 A complete taxonomy of QAnon and its attendant theories and contours are beyond the scope of this article. For a full reading on QAnon, its origins, and its off-shoots, see, e.g., Amarnath Amarasingam & Marc-André Argentino, *The QAnon Conspiracy: A Security Threat in the Making?*, 13 CTC SENTINEL 37, 37 (2020); *see* Amanda Garry et al., *QAnon Conspiracy Theory: Examining Its Evolution and Mechanisms of Radicalization*, 26 J. FOR DERADICALIZATION 152, 156–58 (2021); Ethan Zuckerman, *QAnon and the Emergence of*

demonstrable falsity—may be the most explicit illustration of the Marketplace of Ideas' demise. "At first glance, QAnon [is] the bizarre assemblage of far-right conspiracy theories that holds that [former] U.S. President Donald Trump is waging a secret war against an international cabal of satanic pedophiles . . . ."[97] QAnon's sycophants believe "a meta narrative that knits together contemporary politics and hoary racist tropes with centuries of history behind them."[98] QAnon's core tenet is that "all American presidents between John F. Kennedy and Donald Trump" have been beholden to, and have worked alongside "a cabal of globalist elites . . . to undermine American democracy and forward their own nefarious agenda."[99]

QAnon has links to many prominent contemporary conspiracy theories. For example, QAnon inspired "wildly unsubstantiated claims [that Disney] supports grooming kids,"[100] a persistent rumor that the rich and powerful "torture children to harvest the chemical adrenochrome from their blood, which they then inject in order to stay healthy and young,"[101] and claims that organizations funded by the Bill and Melinda Gates Foundation engineered, patented, and weaponized the novel coronavirus (COVID-19) to undermine then-President Trump's chances of re-election in 2020.[102]

---

the Unreal, 2019 J. DESIGN & SCI. 1, 3.

97 Amarasingam & Argentino, *supra* note 96.

98 Zuckerman, *supra* note 96.

99 *Id.*; *see* BEHOLD A PALE HORSE, *supra* note 1, at 213 (highlighting the parallels between "Kennedy's resistance to the cabal" – as alluded to in excerpted text at the beginning of this article: "[a]t some point, President Kennedy discovered portions of the truth concerning the drugs and the aliens. He issued an ultimatum in 1963 to Majesty Twelve."– and QAnon help to shape Cooper's statute as the forefather of modern conspiracy phenomenon).

100 *See* Jon Blistein, *Right-Wing Protesters Launch Extremely Ineffective Protest Outside Disney World*, ROLLING STONE (Apr. 18, 2022), https://www.rollingstone.com/culture/culture-news/right-wing-protesters-launch-extremely-ineffective-protest-outside-disney-world-1339181/?sub_action=logged_in.

101 Brian Friedberg, *The Dark Virality of a Hollywood Blood-Harvesting Conspiracy*, WIRED (July 31, 2020), https://www.wired.com/story/opinion-the-dark-virality-of-a-hollywood-blood-harvesting-conspiracy/ (spotlighting the antisemitic undertones in the adrenochrome conspiracy theory and how for a substantial proportion of its history, the creation and spread of conspiracies were dominated by the idea of a Jewish plot to take over the world); Fabienne Baider, *Covert Hate Speech, Conspiracy Theory and Anti-Semitism: Linguistic Analysis Versus Legal Judgement*, 35 INT'L J. FOR SEMIOTICS L. 2347, 2358 (2022); Zuckerman, *supra* note 96, at 3–4 (discussing how the antisemitic tropes in conspiracy theory pose another source of harm);); *see generally* JOVAN BYFORD, *Conspiracy Theory and Antisemitism*, *in* CONSPIRACY THEORIES: A CRITICAL INTRODUCTION 95 (2011).

102 *See* Marc-André Argentino, *QAnon Conspiracy Theories About the Coronavirus Pandemic are a Public Health Threat*, THE CONVERSATION (Apr. 8, 2020), https://theconversation.com/qanon-conspiracy-theories-about-the-coronavirus-pandemic-are-a-public-health-threat-135515; Nathan Bomey, *Debunked QAnon Conspiracy Theories*

According to Dr. Joan Donovan, Research Director of the Shorenstein Center on Media, Politics and Public Policy at the Harvard Kennedy School, the "big difference" between conspiracy theories that gave rise to QAnon—namely, PizzaGate[103]— and QAnon, as it exists today, "isn't the themes . . . it's the scale . . . [f]our years later it has reached so many more people."[104]

Theoretically, the Marketplace of Ideas would remove the outlandish claims of "Q" and QAnon's followers that are so easily proven false. Yet, these ideas reached more people, and gained more popularity in the time since they were disproven. The persistent problems posed by QAnon conspiracy theories illustrate that evaluation of ideas presented to the Marketplace of Ideas has shifted away from veracity or benefit to society—its intended function—and towards repetition, shock value, or some other metric. The current metric for validity on the Marketplace of Ideas notwithstanding, any departure from scrutiny of an idea's truth or benefit to society signals a fundamental breakdown in the Marketplace of Ideas.

3. #StopTheSteal

The phrase "Stop the Steal" was introduced first in 2016, and "has been a

---

are Seeping into Mainstream Social Media. Don't be Fooled., USA TODAY, https://www.usatoday.com/story/tech/2020/09/17/qanon-conspiracy-theories-debunked-social-media/5791711002/ (Oct. 2, 2020). For readers interested in the erratic, logically flawed, style of modern conspiracy theory, see *Billy Boy Negotiated $100 Billion Contact Tracing Deal with Democratic Congressman Sponsor of Bill Six Months BEFORE Coronavirus Pandemic*, HUMANS ARE FREE (Aug. 27, 2020), https://humansbefree.com/2020/08/bill-gates-negotiated-100-billion-contact-tracing-deal-with-democratic-congressman-sponsor-of-bill-six-months-before-coronavirus-pandemic.html (claiming that the Gates Foundation and U.S. Congressman Bobby L. Rush met in Rwanda to "hash out who would score the windfall from a government contact tracing . . . program."). This theory gained significant traction in the collective conscious: "[a] June 2020 Pew Research Center survey [found that] 71% of the participants said they had heard [some version of the Bill Gates-COVID] theory . . . one-third of that same group said it was 'definitely or probably true.'" Sherwin, *supra* note 25, at 555 (citing Amy Mitchell et al., *Three Months In, Many Americans See Exaggeration, Conspiracy Theories and Partisanship in COVID-19 News*, PEW RSCH. CTR. (June 29, 2020), https://www.pewresearch.org/journalism/2020/06/29/three-months-in-many-americans-see-exaggeration-conspiracy-theories-and-partisanship-in-covid-19-news/).

103 The QAnon Conspiracy is the progeny of PizzaGate—the theory that high-ranking Democratic officials were running a child-sex ring out of Comet Ping Pong, a pizza parlor in Washington D.C. *See, e.g.*, Amarasingam & Argentino, *supra* note 96, at 37–38; Garry et al., *supra* note 96; Brian J. Holoyda, *The QAnon Conspiracy Theory and the Assessment of Its Believers*, 50 J. AM. ACAD. PSYCHIATRY & L. 124, 124–25 (2022); *see also* WASH. POST, *supra* note 37.

104 Michael E. Miller, *Pizzagate's Violent Legacy*, WASH. POST (Feb. 16, 2021), https://www.washingtonpost.com/dc-md-va/2021/02/16/pizzagate-qanon-capitol-attack/.

hallmark of nearly every election throughout Trump's political career."[105] This particular conspiracy theory—that Democrats have colluded to prevent Trump from being elected, or re-elected, to political office—revives itself roughly every two years, despite the falsehood.[106] Even more unsettling, the conspiracy theory has come very close to influencing the United States Supreme Court.[107]

The precise contours of the phrase depend on the year, as the phrase has been used to allege several conspiracy theories.[108] In 2016, the phrase was "orchestrated first under the auspices of defending Trump's Republican primary nomination and later contesting a potential Hillary Clinton victory that never manifested."[109] In 2020, the phrase was co-opted to express the notion that Biden and the Democratic party executed a secret plan to disenfranchise Republican voters and "steal" the election from then-President Trump.[110] In 2021, the phrase was the call to action for the riot at the U.S. Capitol.[111]

The #StopTheSteal movement belies a conspiracy theory that undermines legitimacy in fundamental institutions of the United States' government. Despite its undeniable falsity, the core elements of the movement are consistently reinvigorated. If the Marketplace of Ideas were functioning as intended, and as the Supreme Court believes, demonstrably false ideas would not achieve such

---

105 Atlantic Council's DFRLab, *#StopTheSteal: Timeline of Social Media and Extremist Activities Leading to 1/6 Insurrection*, JUST SECURITY (Feb. 10, 2021), https://www.justsecurity.org/74622/stopthesteal-timeline-of-social-media-and-extremist-activities-leading-to-1-6-insurrection/.

106 *Id.* (recognizing the "Stop the Steal" concept was introduced in 2016, revived in 2018, and revived again in 2020); *cf.* MUIRHEAD & ROSENBLUM, *supra* note 5, at 3 (discussing the same timeline for the "presidential pronouncement[:] 'Rigged!'").

107 *See* Jane Mayer, *Legal Scholars Are Shocked by Ginni Thomas's "Stop the Steal" Texts*, NEW YORKER (Mar. 25, 2022), https://www.newyorker.com/news/news-desk/legal-scholars-are-shocked-by-ginni-thomass-stop-the-steal-texts [hereinafter *"Stop the Steal"*] (discussing Virginia "Ginni" Thomas, Justice Clarence Thomas's wife, and "her belief in baseless conspiracy theories." Such as her belief that "watermarked ballots in over 12 states have been part of a huge Trump & military white hat sting operation. At the time, believers in the extremist QAnon conspiracy were arguing that Trump had secretly watermarked ballots in order to detect fraud by Democrats."); *see also* Jane Mayer, *Is Ginni Thomas a Threat to the Supreme Court?*, NEW YORKER (Jan. 21, 2022), https://www.newyorker.com/magazine/2022/01/31/is-ginni-thomas-a-threat-to-the-supreme-court (noting Ginni Thomas "has declared that America is in existential danger because of the 'deep state' and the 'fascist left,' which includes 'transsexual fascists.'").

108 *See "Stop the Steal"*, *supra* note 107.

109 Atlantic Council's DFRLab, *supra* note 105 (quoting Michael Edison Hayden, *Far Right Resurrects Roger Stone's #StopTheSteal During Vote Count*, SOUTHERN POVERTY L. CTR. (Nov. 6, 2020), https://www.splcenter.org/hatewatch/2020/11/06/far-right-resurrects-roger-stones-stopthesteal-during-vote-count) (internal quotations omitted)).

110 *See id.*

111 *See* Molina et al., *supra* note 34; *Misinformation, Misconceptions, and Conspiracy Theories in Communication*, *supra* note 34.

prominence repeatedly.

4. The COVID-19 "Plandemic"

"Plandemic" is the name of "a slickly produced narration that wrongly claimed a shadowy cabal of elites was using the [COVID-19] virus and a potential vaccine to profit and gain power."[112] The video was posted on May 4, 2020, and "gathered steam in Facebook pages dedicated to conspiracy theories and the anti-vaccine movement," before it "tipped into the mainstream and exploded."[113] On May 7, 2020, BuzzFeed published a piece that led individuals to scrutinize the information more closely, and Facebook and YouTube removed the video for violating their respective misinformation policies.[114]

Superficially, the relatively quick action of Facebook, YouTube, and others to remove access to the conspiracy theory suggests the Marketplace of Ideas functioned as imagined. However, this was not so. It's clear that removing the post from social media platforms did not remove the idea from the Marketplace:

> [T]he *Plandemic* campaign to have been effective for two reasons. First, the campaign established a decentralized information sharing network on Twitter by coaching low-reach social media users to mass share the documentary, effectively subverting efforts to gatekeep its misinformation. Second, the campaign amplified negative sentiments regarding vaccination and containment measures among conspiracy theorists. These effects possibly have an indirect impact on the public's willingness to comply with public health measures.[115]

Despite the clear falsity of the piece, the publicized nature of the piece's falsity, and the public attention to the story surrounding the piece itself, the ideas expressed—and the ideas of other COVID-19 conspiracy theories—still damaged social discourse and continue to damage such social discourse today.[116]

---

112 Sheera Frenkel et al., *How the 'Plandemic' Movie and Its Falsehoods Spread Widely Online*, N.Y. TIMES (May 21, 2020), https://www.nytimes.com/2020/05/20/technology/plandemic-movie-youtube-facebook-coronavirus.html.

113 *Id.*

114 *Id.*

115 Shahin Nazar & Toine Pieters, *Plandemic Revisited: A Product of Planned Disinformation Amplifying the COVID-19 "Infodemic"*, 9 FRONTIERS PUB. HEALTH 1, 1 (2021).

116 Lotte Pummerer et al., *Conspiracy Theories and Their Societal Effects During the COVID-19 Pandemic*, 13 SOCIAL PSYCH. & PERSONALITY SCI. 49, 49 (2022) (finding that "believing in and being confronted with a COVID-19 conspiracy theory decreased institutional trust, support of governmental regulations, adoption of physical distancing, and—to some extent—social engagement."); *see also* I. Ullah et al., *Myths and Conspiracy Theories on Vaccines and COVID-19: Potential Effect on Global Vaccine Refusals*, 22

In context of the COVID-19 Pandemic, the Marketplace of Ideas cannot correct information or remove disinformation from the Marketplace, even when the misinformation or disinformation is detected. For example, in a study of COVID-19 misinformation on Twitter, researchers found the "number of tweets rejecting misinformation exceeded the number of tweets spreading misinformation [in the early stages of the Pandemic]; over time, however, tweets spreading misinformation outnumbered those rejecting it."[117] The Marketplace of Ideas challenged this misinformation, but in most cases, tweets rejecting misinformation "are not characterized by engaging in debates or putting forward arguments to convince misinformation spreaders of their misguided positions, but rather stigmatizing and ridiculing[,]" and are generally ineffective.[118] Thus, even in instances where the Marketplace *could* fulfill its intended function and assess information contemporaneously, the realities of modern debate render assessment useless.

B. The Real-World Consequences of Bad Ideas

The above examples of the Marketplace of Ideas' failure also exemplify the real-world harm that comes from even one failure of the Marketplace, this harm is intensified when the contemporary speech landscape provides unprecedented power of dissemination, amplification, and repetition. While content moderation algorithms are quick, they are not, and cannot be quick enough to prevent harm from a pernicious conspiracy theory. Content moderation operates post hoc—content that violates a platform's terms of use cannot violate anything until it is posted. Even then, content moderation algorithm relies on two processes.[119]

VACUNAS (ENG. EDITION) 93, 93 (2021) (exploring the "detrimental impacts of myths and conspiracy theories related to COVID-19 and vaccine[s]" on COVID-19, COVID-19 vaccine refusal, and vaccines in general); Amanda Makulec, *I Lost My Baby. Then Antivaxxers Made My Pain Go Viral*, N.Y. TIMES (May 11, 2022), https://www.nytimes.com/2022/05/11/opinion/vaccines-antivaxxers-pregnancy.html. ("I did not expect the moment of my deepest grief and pain to be weaponized against pregnant women and vaccines that could protect them from the worst consequences of Covid-19.").

117 Nicklas Johansen et al., *Ridiculing the "Tinfoil Hats:" Citizen Responses to COVID-19 Misinformation in the Danish Facemask Debate on Twitter*, 3 HARV. KENNEDY SCH. MISINFORMATION REV. 1, 2 (2022).

118 *Id.* at 6.

119 Note, the subsequent description describes Facebook's content moderation procedures. I rely on Facebook's model for content moderation as it is "[o]ne of the most popular of these [social networking] sites." *See, e.g.*, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/ (showing Facebook dominates the online landscape); Spandana Singh, *Everything in Moderation: An Analysis of How Internet Platforms Are Using Artificial Intelligence to Moderate User-Generated Content*, NEW AMERICA,

First, artificial intelligence predicts whether content violates the site's guidelines, then, a separate system determines "whether to take action."[120]

The sheer scale of online speech on social media platforms suggests that even the quickest algorithmic reaction will not prevent admission into the Marketplace of Ideas. In the time it takes to remove the harmful content (in the event it even gets removed) the content is viewed, shared, amplified, co-opted, internalized, or otherwise engaged with. If the idea is pernicious enough, or disguised well enough, it can produce harm before content moderation algorithms, users, or code can even detect it.

To be sure, conspiracy theories have led to real harm before the advent of the internet as the dominant mode of communication. In 1999, a 25-year-old Alex Jones—now, the poster child of insidious conspiracy theory—stoked fear with a sensationalist, and factually inaccurate reporting of a conspiracy theory involving the Y2K bug.[121] Bill Cooper, the "Titan of Tinfoil Hats," and author of the JFK-assassination-alien-cover-up theory with which this article begins,[122] is responsible for a conspiracy theory that resulted in devastating harm. Cooper's conspiracy theory—regarding a federal raid of the Branch Davidian religious group compound in Waco, Texas—likely influenced Timothy McVeigh, the Oklahoma City Bomber.[123] In 1995, McVeigh detonated a bomb that killed 168

---

https://www.newamerica.org/oti/reports/everything-moderation-analysis-how-internet-platforms-are-using-artificial-intelligence-moderate-user-generated-content/ (July 22, 2019) (noting in 2019, Facebook "rank[ed] third in global internet engagement[,]" according to Alexa's global internet engagement metric).

120 *How Enforcement Technology Works*, META: TRANSPARENCY CTR., https://transparency.fb.com/enforcement/detecting-violations/how-enforcement-technology-works (Jan. 19, 2022).

121 Matt Novak, *Remember That Time Alex Jones Tried to Start a Y2K Riot?*, GIZMODO (July 16, 2015), https://gizmodo.com/remember-that-time-alex-jones-tried-to-start-a-y2k-riot-1693454677; *see Y2K Bug*, ENCYC. BRITANNICA, https://www.britannica.com/technology/Y2K-bug (last visited Mar. 31, 2023).

122 *See* BEHOLD A PALE HORSE, *supra* note 1.

123 *See* Richard Ruelas & Rob O'Dell, *How William Cooper and His Book 'Behold a Pale Horse' Planted Seeds of QAnon Conspiracy Theory*, AZCENTRAL. (Oct. 1, 2020, 9:08 AM), https://www.azcentral.com/in-depth/news/local/arizona-investigations/2020/10/01/behold-pale-horse-how-william-cooper-planted-seeds-qanon-theory/3488115001/ ("Among fans of Cooper's shortwave show . . . Timothy McVeigh. According to the FBI, McVeigh owned a videotape about the botched federal raid of the Branch Davidian compound in Waco, Texas, called, 'Waco, The Big Lie,' that Cooper had promoted . . . McVeigh's copy had a Show Low, Arizona, address on it, indicating McVeigh ordered it from Cooper."); *see also Oklahoma City Bombing*, FBI, https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing (last visited Mar. 31, 2023) (discussing McVeigh's "anger over the events at Waco two years earlier"); Tara Isabella Burton, *The Waco Tragedy, Explained*, VOX, https://www.vox.com/2018/4/19/17246732/waco-tragedy-explained-david-koresh-mount-carmel-branch-davidian-cult-25-year-anniversary (Mar. 23, 2023).

and injured several hundred more.[124]

Today, to be an American "is to live in a petri dish ideal for growing conspiracy theories."[125] "[C]onspiracy theories occupy an increasingly commonplace part of mainstream political discourse . . . and neutral, trusted sources of information lose sway."[126] In contrast to the isolated instances of the early-internet-era, current headlines exhibit a preoccupation with conspiratorial thought, belief, and consequence. The increase in real-world harm, caused by such theories, evidences the crash of the Marketplace of Ideas. America's current speech landscape—dubbed the "Golden Age of Conspiracy Theories," in 2020[127]—suggest that while conspiracy theories themselves are not new, their popularity and prevalence is.[128]

The prevalence of COVID-19 disinformation, the rise of, and adherence to, QAnon, and other political conspiracy theories simultaneously illustrate the commonality of these theories in the contemporary American experience, and the harms such theories bring in tow. Harmful conspiracy theories are a result of an ineffective Marketplace of Ideas, but also perpetuate the problem. Conspiracy theory damages surface-level goals, but the insidiousness of conspiracy theory comes from its ability to erode legitimacy of societal foundations. Conspiracy theory obfuscates the boundaries between fact and fiction.[129] When the line separating those two categories is unclear, scrutiny and doubt become useless tools of assessment; the assertions of an expert with years of experience in medicine, science, ethics, or any other field become just as valuable as the assertions of an anonymous individual with a keyboard and a pet-project conspiracy theory.

---

124 *Oklahoma City Bombing*, *supra* note 123; *see generally* BEHOLD A PALE HORSE, *supra* note 1. Cooper's connection to the Oklahoma City Bombing does not change my previous classification of his theories, as Cooper's theories were not promulgated to undermine or harm American understanding of truth. That said, the attack on Oklahoma City is a horrific consequence of conspiracy theory, regardless of Cooper's original intent. Interestingly, the Oklahoma City Bombing and Section 230 share a bizarre synchronicity, by way of Zeran v. America Online, Inc., 958 F. Supp. 1124, 1126, 1129 (E.D. Va. 1997), *aff'd*, 129 F.3d 327 (4th Cir. 1997). *Zeran* marked the first time a U.S. court interpreted Section 230 in a written opinion; the case arose after an anonymous individual used Kenneth Zeran's name and phone number on an AOL forum to advertise t-shirts featuring tasteless slogans about the Oklahoma City Bombing, such as "Visit Oklahoma . . . It's a BLAST!!!" *See* TWENTY-SIX WORDS, *supra* note 67, at 79–85.

125 Zack Stanton, *You're Living in the Golden Age of Conspiracy Theories*, POLITICO (June 17, 2020), https://www.politico.com/news/magazine/2020/06/17/conspiracy-theories-pandemic-trump-2020-election-coronavirus-326530.

126 *Id.*

127 *Id.*

128 *See id.*

129 *See* MUIRHEAD & ROSENBLUM, *supra* note 5, at 116.

Specifically, COVID-19 disinformation not only frustrates vaccination efforts and enables "confusion and risk-taking behaviours that can harm health[,]"[130] it undermines the legitimacy of knowledge-producing institutions. "Delegitimation of authoritatively produced facts and conclusions has potentially dire consequences: the cumulative effect of long-standing attacks on vaccination . . . may be fatal."[131]

The traditional scientific method relies on observation, scrutiny of existing understanding, experimentation and epistemic humility.[132] Science denialism mimics the scientific method, ostensibly, but is distinct in that it relies on allegation and baseless disdain for collective understanding.[133] Science denialism is continuous questioning and scrutiny of widely accepted scientific facts, not for epistemic value, but to undermine and reduce use of legitimate information; it enables delegitimization of authoritative scientific-fact, encourages distrust in expertise, and "irreparably damage[s] the environmental and associated public health of our society."[134] QAnon and its attendant theories led to an assault on one of the core tenets of democracy, both literally—via the physical harm discussed above—and figuratively, undermining the validity of and respect for a peaceful transition of power.

III. How Did We Get Here?

The failure of the Marketplace of Ideas is a story of unintended consequences. That is, the current state of the American speech landscape is an unintended consequence of First Amendment doctrines that are incompatible with the scale

---

130 *Infodemic*, World Health Org., https://www.who.int/health-topics/infodemic/understanding-the-infodemic-and-misinformation-in-the-fight-against-covid-19#tab=tab_1 (last visited Apr. 1, 2023); *see also* Cross-Regional Statement on "Infodemic" in the Context of COVID-19, World Health Org., https://onu.delegfrance.org/IMG/pdf/cross-regional_statement_on_infodemic_final_with_all_endorsements.pdf (last visited Apr. 1, 2023); *see generally* World Health Org. & Infodemic Mgmt., Fifth Virtual WHO Infodemic Management Conference (2021).

131 Muirhead & Rosenblum, *supra* note 5, at 102.

132 *See Scientific Method*, Britannica, https://www.britannica.com/science/scientific-method (last visited Apr. 1, 2023).

133 *See* Sherwin, *supra* note 25, at 543.

134 *Id.*; For a starker example of conspiracy theory, science denialism, and an attempt to incite distrust in expertise, see generally, Robert F. Kennedy, Jr., The Real Anthony Fauci: Bill Gates, Big Pharma, and the Global War on Democracy and Public Health (2021). The threat posed by this sort of insidious conspiracy theory is particularly unsettling, as *The Real Anthony Fauci*, is currently the number one best seller in immunology books on Amazon. *The Real Anthony Fauci: Bill Gates, Big Pharma, and the Global War on Democracy and Public Health (Children's Health Defense)*, Amazon, https://www.amazon.com/Real-Anthony-Fauci-Democracy-Childrens/dp/1510766804 (last visited Apr. 1, 2023).

of online speech and legislation—namely Section 230—designed to protect a version of online speech from which we have long since departed.

Supreme Court precedent shows the Court understands the importance of the Marketplace of Ideas.[135] Despite the Court's efforts to the contrary, somewhere along the way, the metric used to test the value of an idea became untethered to the metric envisioned in Marketplace of Ideas paradigm. Today, ideas are valued only by engagement; the only metric that matters to the interactive computer services (ICSs)[136] that make their money based on internet traffic.[137] Speech is no longer weighed for its epistemic value, legitimacy, or intellectual humility and openness to correction. Today, the Marketplace seems to endorse content that reaches high levels of engagement. The speech with the most likes, retweets, comments, or re-posts is valued over all else.[138]

Dangerous conspiracy theory continues uninhibited. Taken together, First Amendment jurisprudence, legislative measures, and logistic challenges have resulted in an online speech landscape flooded with more content than the Marketplace of Ideas can handle. The Marketplace is overburdened and overwhelmed and thus, ineffective—if not inaccessible—for the average citizen. This influx of information shows no signs of slowing down; raising concerns that without thoughtful intervention, the Marketplace of Ideas can ever return to its intended function.

A. First Amendment Jurisprudence is Partially to Blame

Since Justice Holmes' 1919 dissent in *Abrams*,[139] Mill's Marketplace has been revered in First Amendment caselaw. [140] In 2012, all three opinions of

---

135 *See generally* United States v. Alvarez, 567 U.S. 709 (2012); *see also infra* Part IV.A.

136 47 U.S.C. § 230(f)(2) defines an interactive computer service as ". . . any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." I use "ICSs" and "online platforms" synonymously throughout this article.

137 *See generally The Dark Side of Social Media*, CTR. FOR HUMANE TECH., https://www.humanetech.com/infographic-dark-side-social-media (last visited Apr. 1, 2023).

138 *See generally supra* Part III.A; *see also The Attention Economy*, CTR. FOR HUMANE TECH., https://www.humanetech.com/youth/the-attention-economy#overview (Aug. 17, 2021); *See generally* Adrienne LaFrance, *The Largest Autocracy on Earth*, ATLANTIC (Sept. 27, 2021), https://www.theatlantic.com/magazine/archive/2021/11/facebook-authoritarian-hostile-foreign-power/620168/.

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

140 *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 866–67 (1982); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290,

United States v. Alvarez acknowledged the importance of the Marketplace of Ideas.[141] Understanding the Marketplace of Ideas' revered place in *Alvarez*, contrasted with its ineffective role, sheds light on our arrival at the contemporary speech landscape.

In *Alvarez*, Justice Kennedy's majority opinion, Justice Breyer's concurrence, and Justice Alito's dissent all explicitly refer to the Marketplace of Ideas.[142] Justice Kennedy and Justice Breyer rely heavily on the Marketplace of Ideas. For the Justices, the Marketplace of Ideas and its ability to test truth is fundamental in their reasoning to support their position that false speech is not unprotected. Justice Kennedy notes: "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[143] Justice Breyer, in his concurring opinion, says false statements—such as lying about receiving the Congressional Medal of Honor—are easily verifiable, and "are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas."[144]

Notably, Justice Kennedy references the Marketplace of Ideas as if it stands on hallowed ground. He even directly quotes Justice Holmes's dissent in *Abrams*.[145] Justice Breyer's reverence is less pronounced, but he trusts the Marketplace of Ideas "in technical, philosophical, and scientific contexts," where "examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth."[146] Still, the Marketplace is currently limping. Part of the injury comes from decisions of the same Court that revered the theory in *Alvarez*.

1. The Resistance to Chilled Speech

If a speaker is deterred from expressing an idea (engages in self-censorship) for fear of direct or indirect consequence, the speaker's speech is chilled; courts

---

295 (1981); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537–38 (1980); F.C.C. v. Pacifica Found., 438 U.S. 726, 745–46 (1978); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760 (1975); Bigelow v. Virginia, 421 U.S. 809, 826 (1975); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 248 (1974); Red Lion Broad. Co. v. F.C.C., 395 U.S. 367, 390 (1969); Time, Inc. v. Hill, 385 U.S. 374, 382 (1967).

141 United States v. Alvarez, 567 U.S. 709, 718, 728, 732, 746 (2012).

142 *Id.*

143 *Id.* at 727.

144 *Id.* at 732 (Breyer, J., concurring).

145 *Id.* at 728 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

146 *Id.* at 733 (Breyer, J., concurring).

often strike down statutes or laws that chill speech.[147] The disfavored status of chilled speech extends to private action by proxy—the likelihood of private harassment, and its chilling effect, also factors into First Amendment analysis.[148] Taken together, any public or private action that deters an individual or entity from expressing their respective ideas "has an unmistakable [sic] tendency to chill that free play of the spirit,"[149] and is resisted by courts.[150]

Underlying the resistance to chilled speech is a reliance on the Marketplace of Ideas. For the Marketplace to function as imagined, all information must enter the Marketplace. The resistance to chilled speech "reflect[s] the fear that certain laws over deter speech and thus lead to a suboptimal amount of total information disseminated in society."[151] Chilled speech inhibits "the free exchange of ideas."[152] In establishing a general principle that no action should be taken to influence speakers to self-censor, the Court effectively established a contraposition: actions should be taken to encourage "free play of the spirit."[153] That is, action should be taken that allow all information to be shared to the Marketplace of Ideas.

In effect, the resistance to chilled speech encourages overloading of the Marketplace. While the intuitive appeal of the resistance to chilled speech is clear, the practicality of the doctrine in the contemporary speech landscape is uncertain. The scale of social media, and the astronomic amount of content injected into to the Marketplace of Ideas overwhelms the Marketplace and prevents it from performing its intended function. In the best case, specious conspiracy theories are untested, but remain available, their plausibility is

---

147 Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1481, 1491–95 (2013); *see also* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"*, 58 B.U. L. REV. 685, 692 (1978).

148 Youn, *supra* note 147, at 1502–03; *see also* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 223–23
(2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365–66 (2010) (noting chilled speech
may occur between candidates and their supporters or by the supporters to the general public); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 510 (1985) ("Speech can be chilled and lost just as much through private sanctions as through public ones. Private discrimination causes and perpetuates social inequalities at least as pernicious as those caused by government action.").

149 Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); This mention of the "tendency to chill" is regarded as the first instance of the Supreme Court reference to a First Amendment chilling effect. Youn, *supra* note 147, at 1488.

150 *See, e.g.*, Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 874 (1997) (noting the potential to chill protected expression is a "danger").

151 *See* Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 568 (1991).

152 United States v. Williams, 553 U.S. 285, 292 (2008).

153 *Updegraff*, 344 U.S. at 195 (Frankfurter, J., concurring).

mistaken for credibility, and repeated via retweet, shares, or re-posts. The shared content further floods the Marketplace and reinforces the undeserved pseudo-credibility. In the worst case, pernicious conspiracy follows the same course; the dangerous ideas are reiterated, repeated, and reinforced before the Marketplace of Ideas can interject to assess them. In either case, false information is not removed from the Marketplace. This presence feigns legitimacy or veracity, and the information is amplified, undeservedly.

2. The Content Neutrality Doctrine

In *Police Dep't of City of Chicago v. Mosley*, the Court held "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[154] To be neutral, a decision-maker must not differentiate between two similar items; in this case, the decision-maker must not differentiate between two similar ideas or viewpoints. The decision-maker must treat idea one (A_1) the same as idea two (A_2). That is, the actor must not discriminate between A_1 and A_2 to be neutral. Accordingly, content-based restrictions are presumed to be unconstitutional.[155] Viewpoint-based restrictions are also presumptively unconstitutional, as "[v]iewpoint discrimination is [] an egregious form of content discrimination."[156] The concept of neutrality features into the Forum Doctrine,[157] and applies to online speech.[158]

Similar to the resistance to chilled speech, content neutrality and viewpoint neutrality overwhelm the contemporary Marketplace.[159] Again, there is a clear intuitive appeal to content neutrality; the Marketplace of Ideas would be toothless if the government told society which ideas are allowed (restricted speech on the basis of content), or which views are allowed (restricted speech on the basis of viewpoint). If the government were only letting certain ideas or certain views into the Marketplace, the Marketplace of Ideas would test not for

---

154 Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).

155 Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992)); *see* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991).

156 Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995). For clarity, I will refer to both doctrines using the umbrella term "content-neutrality" or "content-neutrality doctrine."

157 *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).

158 Packingham v. North Carolina, 137 S. Ct. 1730, 1739 (2017).

159 *Cf*. Catherine A. MacKinnon *Weaponizing the First Amendment: An Equality Reading*, 106 VA. L. REV. 1223, 1224–25 (2020) (arguing that content neutrality and viewpoint neutrality doctrines began the First Amendment's transformation from a "vaunted entitlement of structurally unequal groups," to a tool of "dominant groups to impose and exploit their hegemony").

the most accurate, most valuable information, but for the best available—"[t]o allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth."[160] The information in non-content neutral Marketplace would reflect nothing more than a selection bias, and raise the "specter that the government [had] effectively drive[n] certain ideas or viewpoints from the marketplace."[161]

The content neutrality doctrine applies to online speech and social media platforms governance, despite their status as private speakers.[162] Social Media platforms like Facebook "might not have directly imported First Amendment doctrine, [but] the normative background in free speech had a direct impact on how they structured their policies."[163] The content neutrality doctrine applies to government regulation of speech,[164] but Facebook has imposed its own version of content neutrality.[165] Twitter has a philosophy of qualified content neutrality that follows Constitutional content neutrality jurisprudence.[166]

As noted previously, legitimate scrutiny of government is strikingly similar to conspiracy about government.[167] Because of their similarities, the content neutrality doctrine requires decision-makers treat these theories equally, under the First Amendment. Content and viewpoint neutrality require courts (and social media by self-imposed standards) to ignore the pertinent differences between legitimate political scrutiny and conspiracy theory. But the substantive similarities between political scrutiny and conspiracy theory present a gray area,

---

160 Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 538 (1980).

161 Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

162 *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1609–13, 1621, 1661 (2018).

163 *See id.*

164 *See* Police Dep't of Chicago v. Mosley, 408 U.S. 95, 99 (1972); *see also* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346 (2020).

165 Meta Transparency Center, *Facebook Community Standards*, https://transparency.fb.com/policies/community-standards (last visited March. 22, 2023) ("Meta wants people to be able to talk openly about the issues that matter to them, even if some may disagree or find them objectionable. …[w]e allow content…if it's newsworthy and in the public interest").

166 Twitter Help Center, *Our Approach to Policy development and Enforcement Philosophy*, https://help.twitter.com/en/rules-and-policies/enforcement-philosophy (last visited March 22, 2023) ("Twitter is reflective of real conversations happening in the world and that sometimes includes perspectives that may be offensive, controversial, and/or bigoted to others. While we welcome everyone to express themselves on our service, we will not tolerate behavior that harasses, threatens, or uses fear to silence the voices of others") [hereinafter Twitter Help Center]. Note, the last sentence of this excerpt suggests that Twitter follows a resistance to chilled speech.

167 *See* Sunstein & Vermule, *supra* note 2, at 205; Douglas et al., *supra* note 3, at 538; MUIRHEAD & ROSENBLUM, *supra* note 5, at 112, 117; Blake, *supra* note 6.

because conspiracy theory may become legitimate political scrutiny in hindsight. If so, preventing the idea from reaching the Marketplace would be patently unconstitutional.[168] Effectively, the content neutrality doctrine forces social media platforms and legislators to err toward an "all content is welcome" position.[169] This deference to neutrality translates to preference for permitting more content into the Marketplace of Ideas than less. In this case, citing content or viewpoint neutrality doctrine, a bad-faith-actor may easily disguise pernicious conspiracy theory as protected speech. With an incantation of the correct words (an accusation of censorship or content discrimination) at the correct time, the bad-faith-actor shrouds pernicious ideas behind a thin veil. Consequently, this malignant idea gains admission to an overworked Marketplace. Once inside, the practicalities of the current system are insufficient to stop harm. The pernicious idea is essentially admitted and unsupervised, free to undermine democratic principles because it was couched as expressions of ideas about government conduct.[170]

3. Limitations to the State Action Doctrine

The First Amendment states "Congress shall make no law…abridging the freedom of speech" by its own terms, the First Amendment applies only to laws enacted by Congress and not to the actions of private persons.[171] The language of the First Amendment, combined with the State Action Doctrine—holding the government, not private entities, are liable for constitutional violations—generally ensures infringements on speech by private actors are not protected by the Constitution.[172] Effectively, social media platforms like Facebook and Twitter are not subject to the same prohibitions imposed on Congress when it comes to speech posted on the platform.

This lack of protection poses practical problems, as Constitutional violations

---

168 *See, e.g.*, Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity).

169 *See* Erwin Chermerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53–54 (2000). Note, this is a qualified all content is welcome approach. Certain content, like spam advertisements are universally banned from social media platforms.

170 *Cf.* MacKinnon, supra note 159, at 1227 (exploring a similar phenomenon with respect to social power and inequality).

171 U.S. CONST. amend I; *Amdt1.2.2.4 Procedural Matters and Freedom of Speech: State Action*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1_2_2_4/ (last visited Apr. 15, 2022).

172 : Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 561–62 (2008).

often occur at the hands of private entities such as Facebook and Twitter.[173] "Speech can be chilled and lost just as much through private sanctions as through public ones. Private discrimination causes and perpetuates social inequalities at least as pernicious as those caused by government action."[174] Perhaps recognizing the threat of private violation of one's First Amendment rights, the Court has been amenable to new and expanding conceptions of state action.[175] State action has been found under both rationales of public function and entanglement.[176]

Public function cases find state action when private entities perform a traditional function of the government.[177] The public function rationale is clear in the Court's opinion in *Marsh v. Alabama*.[178] In *Marsh*, the Court found state action in a company-owned town's regulation of a Jehovah's Witness distribution of religious literature.[179] Justice Hugo Black, writing for the majority, noted "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[180] Justice Black introduced a balancing test in which the property rights of the company are pitted against the speaker's constitutional right to free speech.[181] The imposition of a balancing test suggests an opening for finding state action in social media platforms' behavior. Clearly, social media companies (private actors) open their property (the social media website) for use by the public. But, the public function doctrine, and the balancing test inherent in it, is narrow.[182]

In *Jackson v. Metropolitan Edison Co.*,[183] the Court closed off any potential avenue that *Marsh* presented. In *Jackson*, the Court held "[t]he mere fact that a business is subject to state regulation does not by itself convert its action into [state action]."[184] The *Jackson* Court continued, noting that "the fact that the regulation is extensive and detailed, as in the case of most public utilities" does

---

173 *See* Chermerinsky, *Rethinking State Action*, supra note 148, at 503–04.
174 *Id.* at 510.
175 Joseph William Singer & Isaac Saidel-Goley, *Things Invisible To See: State Action & Private Property*, 5 TEX. A&M L. REV. 439, 456–64 (2018).
176 *Id.* at 456, 464–65.
177 Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Service Human Needs*, 52 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 145, 159 (2017).
178 Marsh v. Alabama, 326 U.S. 501, 507 (1946).
179 *Id.* at 508.
180 *Id.* at 506.
181 *Id.* at 508.
182 *See* Singer & Saidel-Goley, *supra* note 175, at 457, 464.
183 Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974).
184 *See id.*

not convert a private actor's actions into state action.[185] Despite a later resurgence of the *Marsh* balancing approach in *PruneYard Shopping Center v. Robins*,[186] the *Jackson* decision makes clear that the public function doctrine encompasses only those activities "that have been *traditionally and exclusively* the responsibility of the state."[187] This limitation is explicit in Justice Kavanaugh's decision in *Manhattan Community Access Corp. v. Halleck*.[188] In *Halleck*, the Court solidified the State Action Doctrine's inapplicability to social media platforms, stating "[p]roviding some kind of forum for speech is not an activity that *only* governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor."[189]

The entanglement cases "involve situations in which [the] government authorizes, encourages, facilitates, or becomes significantly involved with private" conduct.[190] Here too, the Court has been hesitant to label private actors as state actors, barring some exceptions.[191] While there is an argument that Section 230 could amount to government encouragement or facilitation of social media platforms' conduct, thereby establishing state action, the avenues for applying state action to social media platforms are beyond the scope of this article, and I do not explore the nuances of the entanglement cases here.

The Court's dogmatic limitations to the State Action Doctrine leave no clear path to hold social media platforms liable for constitutional violations to individuals' First Amendment rights. While a narrow State Action Doctrine does not overwhelm the Marketplace of Ideas like content-neutrality or the resistance to chilled speech, a narrow State Action Doctrine nonetheless erodes the power of the Marketplace of Ideas. The limitations of state action insulate social media platforms from judicial enforcement of individual rights, and raise concerns that "Facebook, not users, have power and control."[192] The power and control that Facebook and its cohorts exert emboldens these platforms in their misguided

---

185 *Id.* at 350–51

186 PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980) (applying another balancing test to favor rights of access for free speech over a private property owner's right to exclude when the private property is and should be open to the public.).

187 *See* Singer & Saidel-Goley, *supra* note 175, at 464 (emphasis in original).

188 Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019).

189 *Id.* at 1930 (emphasis added).

190 Singer & Saidel-Goley, *supra* note 175, at 464–65 (The authors regard *Shelley v. Kraemer*, as the "most famous entanglement case."); The authors regard *Shelley v. Kraemer*, as the "most famous entanglement case." Shelley v. Kraemer, 334 U.S. 1 (1948).

191 *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283–84 (1964) (application of common law in state action); *see also* Matal v. Tam, 137 S. Ct. 1744, 1752–53 (2017) (enforcement of a valid trademark under the Lanham Act creates a federal cause of action).

192 Minow, *supra* note 177, at 157.

adherence to the quasi-First Amendment doctrine,[193] while simultaneously restricting an individual's ability to challenge the conduct of social media platforms.

Holistically, the First Amendment doctrines that resist a chilling effect, mandate content-neutrality and restrict an individual's ability to seek recourse against private online speech platforms coagulate into a body of law that presupposes the constitutional validity of social media platforms' conduct and content moderation. Normatively, this has encouraged online platforms to allow more content than they prohibit, and while the intuitive appeal of a permissive approach to content is clear, the practical result has been rife with harm.[194]

B. Section 230 Shares the Blame

Section 230 of the Telecommunications Act of 1996[195]—also known as Section 230 of the Communications Decency Act ("Section 230")—amplifies the normative effect of the First Amendment doctrine.[196] In fact, Section 230 may be the larger culprit in facilitating the downfall of the Marketplace of Ideas. As Jeff Kosseff states, "[t]he dynamic, communal, and vicious public square exists because of one federal law."[197] Section 230's outsized influence on the Marketplace is a byproduct of its influential role in the development of modern internet.[198] Specifically, its influence comes from Section 230(c)(1)—the twenty-six words that "created the modern Internet"[199]: "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[200]

In essence, Section 230(c)(1) provides online platforms with a liability shield from "defamation, invasion of privacy, and virtually any other lawsuit that arises

---

193 *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Klonick, *supra* note 162; *see also* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346 (2020); Twitter Help Center, *supra* note 166; Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Chermerinsky, *supra* note 169, at 50.

194 *See supra* Part III.

195 Telecommunications Act of 1996. Pub. L. No. 104–104, 110 Stat. 56 (1996).

196 47 U.S.C. § 230; Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 858–61 (1997) (showing that though the Court struck down most of the Communications Decency Act in this case, Section 230 remained.); *see also* Jeff Kosseff, *The Gradual Erosion of the Law that Shaped the Internet: Section 230's Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 2 (2016) [hereinafter Kosseff, *The Gradual Erosion*].

197 TWENTY-SIX WORDS, *supra* note 67, at 1.

198 *See* Kosseff, *supra* note 196, at 2–3; *see* TWENTY-SIX WORDS, *supra* note 67, at 79, 85, 93.

199 TWENTY-SIX WORDS, *supra* note 67, at 2.

200 47 U.S.C. § 230(c)(1).

from user-provided content."[201] That shield is emboldened by the following subsection, which holds that no provider or user shall be liable for:

> any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or any action taken to enable or make available to information content providers or others the technical means to restrict access to material . . ..[202]

While online platforms' liability protection may not amount to a "bullet-proof immunity for online intermediaries," the protections afforded under Section 230 are robust.[203] Understandably so, Congress enacted Section 230 to meet twin aims: "free-market innovation and voluntary content moderation."[204] Though it is a qualified immunity, it's a haven. In conjunction with Supreme Court precedent that limits the scope of The State Action Doctrine in the context of the First Amendment,[205] online platforms enjoy a status remarkably close to bullet-proof. Starting in 1996, any online platform worth its ad revenue, organized or reorganized to fall under the ambit of Section 230 and actualize the safe harbor it provides. Platforms are protected regardless of their actions on user-generated content; the liability exemption applies to platforms that take down content,[206] and those that leave content available for others to view.[207] The shield of Section 230 quickly became a sword that platforms wielded to cut down competitors, aggregate users, and grow at exponential rates.[208]

Users rushed to the sites. Bolstered by a positive externality[209]— in this case,

---

201 Kosseff, *supra* note 196, at 2.

202 47 U.S.C. §§ 230(c)(2)(A)–(B).

203 Kosseff, *supra* note 196, at 3.

204 47 U.S.C. §§ 230(b)(1)–(2) (noting the policy of the United States is "[T]o promote the continued development of the Internet and other interactive computer services [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services…"); 47 U.S.C. § 230(b)(3) (continuing that the policy of the United States is "[T]o encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services"); Kosseff, *supra* note 196, at 7.

205 *See supra* Part IV.A.3.

206 47 U.S.C. § 230(c)(2)(A).

207 Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) (holding Congress made the policy choice to provide "immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others").

208 TWENTY-SIX WORDS, *supra* note 67 (quoting an interview between Kosseff and Wyden on June 6, 2017) (Even the authors of § 230 are surprised at the power they conferred to social media platforms and other ICSs. Ron Wyden, one of the original authors, said: "I always thought the bill was going to be useful, but I never thought that its reach would be this dramatic.").

209 *Positive Externality*, ENCYCL. BRITANNICA,

the explosion of users resulted in non-users' friends and family members joining the social media sites, which made the sites more valuable to prospective users and perpetuated growth—social media quickly became "the most powerful mechanisms available to a private citizen to make his or her voice heard."[210] With the advent of more and more users, ICSs scaled up at breakneck speed.[211] Section 230 created enormous economic incentives for ICSs, and while the statute aims to encourage ICSs to self-moderate,[212] it protects platforms regardless of their actions on content. The economic incentives facing ICSs, perpetuate the information overload to the point of the Marketplace of Idea's demise. Recalibrating those economic incentives via legislative, executive or judicial intervention may present an opportunity to change course.

IV. MARKETPLACE INTERVENTION AND CORRECTION

Surely, the Marketplace of Ideas is an important thread in the fabric of the First Amendment, Representative Democracy, and Liberal Political Theory. If this thread is not completely torn, it is certainly frayed; the Marketplace of Ideas is in dire need of repair. Harmful conspiracy spawns in communications-rich environments that are too saturated or too ambivalent to act. To control insidious conspiracy theory—and the harms that stem from them—there must be a change *viz*. the adoption of rules, policies, and practices that prioritize an efficient and effective Marketplace of Ideas over blind adherence to the status quo. However, traditional avenues of government action present challenges. Any remedy designed to address a broken Marketplace requires Constitutional authority and a practical plan of action.

Constitutional authority to remedy the Marketplace of Ideas is squarely within the ambit of the First Amendment's protection of free expression. Still, any remedy must account for fundamental principles of First Amendment jurisprudence. First, social media platforms are private corporations that have their own speech rights.[213] A remedy by government action may not unduly burden the First Amendment rights of such corporations.[214] Second, a measure

---

https://www.britannica.com/topic/positive-externality (last visited Mar. 27, 2023) ("A positive externality exists if the production and consumption of a good or service benefits a third party not directly involved in the market transaction.").

210 Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

211 *See supra* Part.II.B.

212 Kosseff, *supra* note 196, at 8; TWENTY-SIX WORDS, *supra* note 67, at 101.

213 *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 347–56 (2010); The State Action Doctrine amounts to a limitation here too, *see supra* Part III.A.iii.

214 *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 170 (2015); Ward v. Rock Against Racism, 491 U.S. 781, 782–83 (1989); Packingham, 137 S. Ct. at 1732.

that reduces the amount of information input into the market is likely a prior restraint on speech, as it would prohibit insidious conspiracy theories before the speech is posted to social media. Thus, any remedy must address the fundamental First Amendment principle that opposes prior restraints.[215]

This complicates remedial action for an overburdened Marketplace of Ideas, as the most effective remedy is a legislative measure that reduces the amount of information input into the Marketplace. These two principles of First Amendment doctrine, as well as the doctrines discussed previously,[216] suggest a deference to social media platforms and their respective procedures for content moderation. But even a cursory glance at the events of the past few years provides compelling reasons to discard reliance on social media platforms to effectively self-police.[217] Indeed:

> The cost of doing nothing about misinformation and conspiracy is now so high that social media companies are finally forced to abandon their most coveted value of unmoderated "free speech," and recognize that socially and scientifically harmful campaigns have used their platforms as infrastructure. The hoaxes, lies and deception so prevalent during this infodemic of 2020 can no longer be conflated with first amendment protections. There is no such personal right to be misinformed, and the public should no longer suffer this lie to help these massive companies salvage their brand's reputations.[218]

In *Whitney v. California*, Justice Brandeis reiterated that for false speech, "the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression."[219] Indeed, prior restraint may be imposed if the government can satisfy "a heavy burden of showing justification for the imposition of such restraint."[220] The crash of the Marketplace of Ideas is an

---

215 *See* Near v. Minnesota *ex rel*. Olson, 283 U.S. 697, 713 (1931); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity"); Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979) ("state action to punish the publication of truthful information seldom can satisfy constitutional standards").

216 *See supra* Part IV.A.

217 *See supra* Part II.

218 *Misinformation, Conspiracy Theories, and Infodemics: Challenges and Opportunities for Stopping the Spread Online: Hearing before the House Permanent Select Committee on Intelligence,* 116th Cong. (2020) (statement of Joan Donovan, Research Director, Shorenstein Center on Media, Politics, and Public Policy, Harvard Kennedy School) [hereinafter *Misinformation, Conspiracy Theories, and Infodemics*].

219 Whitney v. Cal., 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

220 *See* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (citing Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)) (noting the Government may overcome the presumption against constitutional validity if it overcomes a "heavy burden"); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (finding the presumption against constitutional validity of a prior restraint is lower when educators are overseeing a student-run publication).

emergency and compelling justification for government action, even if such action is a prior restraint; precedent supports regulation of otherwise protected speech in times of crisis.[221] The failure of the Marketplace is a failure of one of the core principles of the First Amendment.[222] The damage to such a core foundation of the First Amendment, and the Bill of Rights is unequivocally a Constitutional crisis. Already, an overwhelmed Marketplace resulted in death, injury, property damage, distrust in core institutions of democratic self-governance, and the delegitimization of the peaceful transition of power.[223]

The practical plan for action depends on the branch of government best suited to enact the rules, policies, and practices that prioritize an efficient and effective Marketplace of Ideas. I address each of the three branches in turn.

A. The Legislative Branch: Congressional Realism

Intuitively, Congressional action seems to be the first choice to remedy the broken Marketplace of Ideas. Congress certainly has the Constitutional authority.[224] The potential of online speech regulation is a question of deep "economic and political significance;" the type of major policy question Congress is intended to address.[225] Indeed, legislative action is partially responsible for the current state of the Marketplace of Ideas.[226]

This intuitive appeal shrinks upon closer analysis of the practical considerations. Congressional attempts to revise or change Section 230 are *difficult*. Previous attempts have been wholly unsuccessful. The Allow States and Victims to Fight Online Sex Trafficking Act of 2017 (FOSTA),[227] was

---

221 Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C., 518 U.S. 727, 741 (1996) (noting the Supreme Court has "consistently held that government may directly regulate speech to address extraordinary problems, where its regulations are appropriately tailored to resolve those problems without imposing an unnecessarily great restriction on speech"); *see* Schenck v. United States, 249 U.S. 47, 51–52 (1919); Abrams v. United States, 250 U.S. 616, 627–28 (1919) (Holmes, J., dissenting); West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 639 (1943); New York Times, 403 U.S. at 714; Texas v. Johnson, 491 U.S. 397, 418–20 (1989).

222 *See* Wright, *supra* note 10, at 152–53, 156; Gordon, *supra* note 13, at 235.

223 *See supra* Part II.B.

224 U.S. CONST. art. I, § 8 (Congress is empowered "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof.").

225 King v. Burwell, 576 U.S. 473, 486 (2015) (acknowledging Congress should answer questions of deep "economic and political significance"); *see also* Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014).

226 *See supra* Part III.B.

227 The Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115–164, 132 Stat. 1253 (2018).

deemed "one of Congress' worst achievements in Internet regulatory policy."[228] In 2019, the Ending Support for Internet Censorship Act faced similar criticism.[229] To date, a flurry of legislation has been introduced to address Section 230.[230]

Even if Congress were able to overcome the practical challenges of revising Section 230, it is unlikely that any legislation could comprehensively address the issues necessary to effectively remedy the Marketplace of Ideas. The resistance to chilled speech and content-neutrality doctrine are limitations on Congressional regulation of speech and are non-negotiable. Congress is clearly a state actor. Further, the First Amendment's prohibition on laws "abridging the freedom of speech" applies directly to Congress.[231] To pass judicial scrutiny, legislation designed to remedy the Marketplace of Ideas could not discriminate against content nor viewpoint.[232] Practically, this requirement could compel legislation that is over-inclusive—allows more speech into the Marketplace of Ideas than it restricts—and does little to remedy the problem of information overload. It is also dangerously easy for legislation to over-correct and inadvertently place immense pressure on online platforms to take down controversial, valuable speech.[233] The resistance to chilled speech and content-neutrality doctrine are non-negotiable limitations on Congressional regulation of speech for good reason, robust debate and free expression are healthy and necessary to effective democracy. Realistically, expecting legislation that is fine-tuned to address insidious conspiracy theory and protect controversial-yet-necessary speech seems far-fetched (so too, does expecting legislators to set aside political differences and agree on effective legislation).

Further, Section 230 is not the sole reason the Marketplace of Ideas has

---

228 Eric Goldman, *The Complicated Story of FOSTA and Section 230*, 17 FIRST AMEND L. REV. 279, 292 (2019) ("FOSTA appears to have caused more misery for sex workers and sex trafficking victims with zero offsetting policy benefits.").

229 S. 1914, 116th Cong. (2019); For a full analysis of the Ending Support for Internet Censorship Act's ineffectiveness, if not unconstitutionality, see Lily Coad, Note, *Compelling Code: A First Amendment Argument Against Requiring Political Neutrality in Online Content Moderation*, 106 CORNELL L. REV. 457, 457 (2021).

230 For a comprehensive list of legislative proposals concerning § 230, see Meghan Anand et al., *All the Ways Congress Wants to Change Section 23*, SLATE, https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html (March 23, 20212).

231 U.S. CONST. amend. I.

232 *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972); Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (citing R.A.V. v. St. Paul, 505 U.S. 377, 395 (1992); Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)); *see also supra* Part IV.A.2.

233 *See, e.g.,* Press Release, Senator Ron Wyden, Wyden Remarks at Section 230 Briefing Hosted by EFF (Mar. 8, 2023) https://www.wyden.senate.gov/news/press-releases/wyden-remarks-at-section-230-briefing-hosted-by-eff [hereinafter *Wyden Press Release*].

crashed; First Amendment doctrine plays a major role in the current, failed state of the Marketplace.[234] No matter how skilled a legislative remedy may be, it cannot rewrite an entire tradition of First Amendment jurisprudence.[235]

B. Executive Brach: The Administrative State

Considering the practical drawbacks of legislative correction, we must consider alternatives to legislation. Logically, the executive branch seems to be a natural second-best choice. Empowered by the Take Care Clause, the executive branch is responsible to carry out and enforce the laws of the United States.[236] Under this power, the executive branch may intervene to correct the Marketplace of Ideas. While there is no explicit law requiring an effective Marketplace of Ideas, there is an entire corpus of Supreme Court precedent that presupposes, relies, or attempts to protect the Marketplace paradigm.[237]

Practically, this power is likely to be delegated to an administrative agency. Creation of a new administrative agency requires legislation of an organic statute,[238] adherence to the Non-Delegation Doctrine,[239] and observance of the Separation of Powers doctrine.[240] Creation of a new agency also introduces the challenges inherent to legislative action concerning freedom of speech.[241] Considering these challenges, the path of least resistance suggests recruiting a pre-existing administrative agency to regulate the Marketplace of Ideas.

---

234 *See supra* Part IV.A.

235 *See* Neal Devins, *Congressional Responses to Judicial Decisions*, WM. & MARY L.S. SCHOLARSHIP REPOSITORY, 2008, at 400, ("[Congress has power] to respond to Supreme Court decisions . . . [but there is] significant controversy about the scope of Congress's power to respond [to constitutional questions]."); Bethany Blackstone, *An Analysis of Policy-Based Congressional Responses to the U.S. Supreme Court's Constitutional Decision*s, 47 L. & SOC'Y REV. 199, 199 (2013) ("Congress regularly tries to modify the impact of constitutional decisions with ordinary legislation…but is limited in its ability to overcome the Court's legal rules.").

236 U.S. CONST. art. II, § 3 ("[The President] shall take care that the laws be faithfully executed."); *Executive Branch of the U.S. Government*, USA.GOV, https://www.usa.gov/branches-of-government#:~:text=The%20executive%20branch%20carries%20out,president%20through%20free%2C%20confidential%20ballots. (last visited Apr. 9, 2023) (explaining that the Take Care Clause extends to the entire executive branch).

237 *See* cases cited *supra* note 140.

238 Nat'l Fed'n of Indep. Bus. v. Occupational Safety and Health Admin., Nos. 21A244 and 21A247, slip. op. at 5 (U.S. Jan. 13, 2022) ("Administrative agencies are creatures of statute. They accordingly possess only the authority that Congress has provided.").

239 Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892); J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928).

240 *See generally* Nat Stern, *Separation of Powers, Executive Authority, and Suspension of Disbelief*, 54 HOUS. L. REV. 125, 128–29 (2016).

241 *See supra* Part IV.A.

Existing executive agencies may be better suited to regulate social media and its respect for the Marketplace of Ideas, than previously considered. While some have tabbed the Federal Trade Commission (FTC) as the agency to solve the cyberspace woes caused by profit-minded corporations,[242] the agency best-suited to correct corporations' disregard for an effective Marketplace of Ideas is one that's less concerned with trade and more concerned with communication: the Federal Communications Commission (FCC). In fact, the agencies' respective statutory authority makes the argument for swapping the letter "T" for the letter "C", a strong one.[243]

Notably, the FCC has plenary jurisdiction over interstate and foreign communications by wire or radio.[244] As discussed above, most major conspiracies originate, garner attention, and proliferate on networks subject to the FCC's regulatory authority;[245] notwithstanding the regulatory status of the owners and users of the networks, or the manufacturers of equipment attached to, or developers of the software, firmware, or hardware distributed in commerce by communications.[246] No entity, specifically no corporate entity, has a right to interconnect and cause harm to the network for any purpose.[247] The FCC has the

---

242 *Cf.* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014), *but see* Sam Bieler & Randy Mitch, *Cybersecurity in One Voice: Leveraging CISA Programming to Improve FTC Cybersecurity Enforcement*, LAWFARE (Dec. 5, 2019), https://www.lawfareblog.com/cybersecurity-one-voice-leveraging-cisa-programming-improve-ftc-cybersecurity-enforcement.

243 *Compare* the FTC Act, 15 U.S.C. § 45 (2006) (empowering the FTC to prohibit unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce) *with* the Communications Act of 1934, 47 U.S.C. § 151 (1996) (creating the FCC and empowering the commission to regulate foreign and interstate commerce in wire and radio communication).

244 47 U.S.C. § 151 (1996).

245 Kevin Werbach, *The Federal Computer Commission*, 84 N.C. L. REV. 1, 1 (2005) ("Federal Communications Commission ('FCC') rules touch every personal computer ever made.").

246 *Cf.* Leonard J. Kennedy & Heather A. Purcell, *Wandering Along the Road to Competition and Convergence—The Changing CMRS Roadmap*, 56 FED. COMM. L. J. 564, 568 (2004) (acknowledging wireless networks fall within the FCC's statutory ambit and suggesting the FCC possesses jurisdictional authority to regulate commercial mobile radio services (CMRS)); Mike Sherling, *The Likely Regulators? An Analysis of FCC Jurisdiction over Cybersecurity*, 66 FED. COMM. L. J. 567, 584 (2014) (making a similar argument for FCC's jurisdictional authority to regulate cyber security).

247 For social media platforms, harm to the Marketplace of Ideas may constitute as a breach of the fiduciary duty of good faith—a requirement that directors and officers advance the interests of the corporation. *In re* The Walt Disney Co. Derivative Litig., 906 A.2d 27, 49, 65 (Del. 2006). Though beyond the scope of this article, remedying the Marketplace of Ideas may be achieved via application of corporate law doctrine. Arguably, social media platforms breach this duty by disregarding the Marketplace of Ideas. The disregard overburdens the market, which allows for the proliferation of harmful content and

power to condition the right to connect.[248] Arguably, the FCC's conditional power can be wielded to revive the Marketplace of Ideas through regulation of online speech—circumventing the issues of state action that have made certain social media outlets untouchable. The FCC's exercise of its conditional power could deny the right of interconnection to recalcitrant parties, and impose a strong incentive for compliance with a regulation that protects the Marketplace of Ideas. Interconnection policies made the internet possible; the FCC's statutory authority requires it ensure the online speech landscape is functioning, vibrant, and efficient.

C. Judicial Branch: Judicial Intervention

The practical challenges of legislative correction to the Marketplace of Ideas and the lackluster results of legislation thus far suggest we have reached a legislative point-of-no-return. While the executive branch and the administrative state pose a potential source for remedy, administrative agency interference in such a high-profile area of public life is sure to invite concern and harsh scrutiny.[249] Further, the high-stakes economic interests in maintaining the status quo for social media platforms risks elected officials—of which the executive and legislative branches are comprised of—may be compromised by personal interest in garnering political favor with corporations that can and do contribute to election campaigns.[250]

If legislative and executive officials are compromised, we may need unelected judges to rescue the Marketplace of Ideas. The judicial branch certainly possesses the authority to act.[251] Practically a judicial remedy would fall into one of two categories: judicial activism, or a commitment to strict interpretation of relevant statutory provisions. The interpretive approach would begin with a focus on Section 230, but if such remedy is adopted, it is important for courts to adhere to a consistent interpretive regime for subsequent legislation that threatens the Marketplace.[252] A remedy via judicial activism poses a quicker

---

subsequent alienation of users. This alienation harms the company's interests in a broad and diverse user-base.

248 *See* United States v. Southwestern Cable Co., 392 U.S. 157, 175–78 (1968); Comput. Commc'n Indus. Ass'n v. FCC, 693 F.2d 192, 210 (D.C. Cir. 1982); *see also* 47 U.S.C. §§ 201–231, 251 (2020).

249 *See* Werbach, *supra* note 245, at 68 ("The problem with the FCC's computer regulation…is that there are no standards to guide FCC decisions about when and how to engage in such regulation. The Federal Computer Commission exists in the shadows of communications policy, its very existence routinely denied").

250 *See* Citizens United v. FEC 558 U.S. 310, 478 (2010).

251 *See* U.S. CONST. Art. III.

252 *See, e.g.,* Peter E. Quint, *Toward First Amendment Limitations on the Introduction of*

solution, albeit more drastic.

1. Judicial Activism: Weaponizing the First Amendment

Judicial activism, more drastic in time and more dramatic by name, may remedy the Marketplace of Ideas and prevent a further divergence from first principles. But courts must proceed with caution. If Section 230 is effectively abrogated from the bench, "it would be harder for marginalized voices to call out wrongdoing by powerful people. And easier for the government to set the terms of public debate."[253]

In *Janus v. American Federation of State, County & Municipal Employees, Council 31*, Justice Kagan wrote, in dissent: "[t]here is no sugarcoating today's opinion. The majority . . . prevents the American people, acting through their state and local officials, from making important choices about workplace governance. And it does so by weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy."[254] If Justice Kagan is correct, and the *Janus* decision does unleash a previously restrained judiciary, there's call for cautious optimism. While Justice Kagan's point is well-taken, especially considering the public perception that the Court is politically-motivated,[255] weaponization evokes a duality—a weapon's danger depends on who controls it. A sword can also be used to liberate.[256] Still, if the sword is held by "not, like, the nine greatest experts on

---

Evidence: The Problem of United States v. Rosenberg, 86 YALE L.J. 1622, 1627 n. 13 (1977) (suggesting a twist on FED. R. EVID. 403 to protect speech and association rights. Strict interpretation of existing rules is substantively similar to creative interpretation of legal rules.).

253 Wyden Press Release, *supra* note 233.

254 Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting); *see also* MacKinnon*, supra* 159, at 1224 n. 3.

255 *See* Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 14 (2020) (Thomas, J., statement respecting the denial of certiorari); *contra* Berin Szóka & Corbin Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, LAWFARE, (Apr. 14, 2021) https://www.lawfareblog.com/justice-thomass-misguided-concurrence-platform-regulation ("Thomas's concurrence [in Biden v. Knight First Amend. Inst. Colum. Univ] . . . speculates about what legal theories might justify curtailing social media websites' First Amendment rights—but conservatives are celebrating it as a roadmap for reining in the social media giants.") (internal quotations omitted); *see also Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022) https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ (finding "[t]he share of Americans who say the Supreme Court is conservative has steadily risen over the last two years.").

256 For an example that figuratively hits close to Cornell Law School, consider Odysseus, the king of Ithaca; *Odysseus*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Odysseus (last visited May 8, 2022) (In Homer's epic poem, Odysseus—" a man of outstanding wisdom and shrewdness, eloquence,

the internet" there are flashing warning signs.[257]

It is imperative that the Supreme Court not super-legislate and strongarm a harried online speech landscape into a wasteland. Weaponization of the First Amendment in this context can suppress marginalized groups.[258] Worse, it can remove valuable counter speech and *inject* "the specter" that the courts will "drive certain ideas or viewpoints from the marketplace."[259]

If the judiciary were "unleashed," opposition seems likely. In fact, this sort of intervention could be an anathema to one of the core tenets of judicial review - it could be Lochnerism.[260] We can take some solace in this, but not much, if the goal of judicial weaponization of the First Amendment is to remedy a fractured and ineffective Marketplace of Ideas, judicial activism of this sort may fall squarely into the exception envisioned in *Carolene Products*.[261] *Carolene* suggests the Court will subject legislation to "more exacting judicial scrutiny" when a law "appears on its face to be with a specific prohibition of the Constitution," restricts political processes, or "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[262] A laissez-faire approach to Section 230 has undermined the Marketplace of Ideas, and undermined the First Amendment itself. Thus, Section 230 certainly restricts the political process and curtails the operation of political processes that protect minorities.[263]

---

resourcefulness, courage, and endurance"—uses a sword to liberate companions from Circe; later Odysseus frees his wife, Penelope and son, Telemachus from cruel suitors who had infiltrated their home.); P. J. MacDonell, *The Tactics of Odysseus*, 5 CAMBRIDGE UNIV. PRESS 103, 114 (1936).

257 Transcript of Oral Argument at 44:19-20, Reynaldo Gonzalez v. Google LLC (2023) (No. 21-1333), https://www.supremecourt.gov/oral_arguments/audio/2022/21-1333.

258 *See* Wyden Press Release, supra note 233; *see generally* MacKinnon*, supra* note 159, at 1224.

259 *Cf.* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*,* 502 U.S. 105, 115–16 (1991) (cautioning against any action that grants government the "ability to impose content-based burdens on speech").

260 Sorrell v. IMS Health Inc., 564 U.S. 552, 602–03 (Breyer, J. dissenting) (Lochnerism is an allegation that the Court is "substituting judicial for democratic decisionmaking where ordinary economic regulation is at issue."); *see* Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915, 1915 (2016) (full exploration of *Lochner* in the First Amendment context); *see also* Elizabeth Sepper, *Free Exercise Lochernism*, 115 COLUM. L. REV. 1453, 1453 (2015); *see, e.g.,* Jamal Greene, *The Anticanon,* 125 HARV. L. REV. 379, 417–22 (2011) (symbolic force of *Lochner* in constitutional interpretation).

261 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

262 *Id.*

263 *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHICAGO L. REV. 20, 20 (1975); MacKinnon, *supra* note 159 at 1227 (2020); Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality,* 12 DUKE J. CONST. LAW & PUB. POL'Y 13, 14 (2017) ("free speech, along with rights of assembly and press, are

Note, economic incentives and hegemony drive the behaviors that led to the Marketplace of Idea's tattered state. If those interested in maintaining the status quo have as much power as Justice Thomas, Professor Kosseff, Professor MacKinnon, and others suggest, it is difficult to overcome such power imbalances with traditional options such as legislation and regulation.[264] If Congress is compromised, and they likely are (it's not hard to imagine self-interested members of Congress maintaining a lucrative status quo),[265] it's tempting to look to the courts to intervene. That temptation does not mean we need to unleash the courts, nor should we invite an untethered Court to tinker with a complex statutory regime. Put differently, perhaps we need to the courts to correct course in a restrained (and constitutionally firm) manner.

2. Strict Interpretation: Limiting Section 230's Scope

One of Section 230's twin aims is to encourage voluntary content moderation.[266] Plain meaning in the language in Section 230 suggests the law was designed to condition immunity from civil liability on Good Samaritan efforts from ICSs.[267] Notably, the "statute does not itself define what it means to act in good faith."[268] By conditioning exemption from civil liability on Good Samaritan practices, but leaving the operative term undefined,[269] it is reasonable to assume that Congress meant to encourage voluntary content moderation that would protect those most vulnerable, protecting vulnerable groups underlies the very reason for an immunity.

This assumption is supported by viewing the entire Communications Decency Act of 1996. Though Section 230 is the only piece of the Act that remains after *Reno v. ACLU*,[270] the Act's fate does not change the animating notion: decency. The Communications Decency Act—Section 230 included—was designed and

---

powerful means of advocating for, and to some extent achieving, equal treatment under [the] law"); TIMOTHY C. SHIELL, AFRICAN AMERICANS AND THE FIRST AMENDMENT (2019) ("First Amendment values, particularly freedom of expression, have been—and continue to be—essential allies in the struggle for racial equality and justice").

264 Malwarebytes, Inc. v. Enigma Software Grp. USA, LLC, 141 S. Ct. 13, 14 (2020) (Thomas, J., statement respecting the denial of certiorari); TWENTY-SIX WORDS, *supra* note 67, at 88–89; MacKinnon, *supra* note 159, at 1224, 1224 n. 3 (noting that the challenges posed by legislation and regulation are exacerbated by the political accountability inherent in such measures.).

265 *See* MacKinnon, *supra* note 159, at 1270, 1272.

266 TWENTY-SIX WORDS, *supra* note 67, at 86.

267 47 U.S.C. § 230(c) ("Protection for 'Good Samaritan' Blocking and Screening of Offensive Material").

268 VALERIE C. BRANNON & ERIC N. HOLMES, CONGRESSIONAL RESEARCH SERVICE, SECTION 230: AN OVERVIEW, No. R46751, 20 (2021).

269 *Id.*

270 Reno v. Am. Civ. Liberties Union, 521 U.S. 844, 882 (1997).

drafted to protect internet users from indecent content on the early internet.[271] Even viewing the term good-faith in isolation, the use of a legal term of art suggests Congress expected, if not invited judicial interpretation.[272]

This invitation to the judicial system poses a valuable opportunity to revive the Marketplace of Ideas, but courts still must take care. An expansive interpretation of Section 230 without recognition of the Marketplace's practical limitations could be disastrous. A narrow interpretation could militate against free and full debate.[273] So long as judicial interpretation considers the realities of the contemporary speech landscape, it could revive the more robust "Good Samaritan" requirement Section 230's authors envisioned into precedent. Limiting the immunity by requiring a more vigorous showing of good faith could incentivize social media platforms to rally around substantive content moderation policies that value the underlying mechanism of free speech—the Marketplace of Ideas—instead of policies that conflate "hoaxes, lies and deception…with first amendment protections."[274]

Admittedly, this interpretive approach is likely to limit some speech from entering the Marketplace of Ideas, but that is precisely the point. Courts, and consequently, social media platforms, over-estimate the efficacy of the Marketplace of Ideas in addressing issues of disfavored—but nonetheless protected—speech. When the Marketplace functioned as imagined, social media platforms could afford to be less vigilant in content moderation. But social media platforms leaned on their Section 230 immunity and left content up, leaving the Marketplace of Ideas to do the heavy lifting. [275] Reading the full force of the Good Samaritan requirement back into precedent may motivate online platforms to start pulling their weight.

The reliance on Section 230 and the Marketplace of Ideas blinded platforms from the decline in the Market's efficiency, then efficacy, then function. The platforms neglected to assess the aggregate impact of "could-be-true ideas," sheer repetition, and overall scale. Overtime, the "gray area content"—well-disguised—incrementally eroded the Marketplace of Ideas. A renewed

---

271 S. REP. NO. 104–23, at 59 (1995); Pub. L. No. 104–104, § 501, 110 Stat. 133–43 (1996).

272 The use of a legal term of art often signals Congress intended any interpretive question involving the term should be answered by the courts; Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) ("[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms").

273 Wyden Press Release, *supra* note 233 ("[i]f Section 230 were repealed tomorrow, there would be immense pressure on websites to quickly take down content that offends people with power, and anything else outside of the comfortable and the mainstream.").

274 *Misinformation, Conspiracy Theories, and Infodemics, supra* note 218.

275 *See* Blumenthal v. Drudge, 992 F. Supp. 44, 50 (1998).

commitment to good faith as a prerequisite for immunity from civil liability incentivizes social media platforms to scrutinize "gray area content" more closely, and certainly incentivizes platforms from taking the Marketplace of Ideas for granted. Incentivizing vigilance may result in more "gray area content" being precluded from the Marketplace, and the interpretive approach will take time to activate meaningful change to a desperate Marketplace of Ideas. It may not be a perfect solution, but the alternative is far worse.

V. CONCLUSION

Without an efficient Marketplace of Ideas, there's little hope of effective and efficient civil discourse. The United States, its democratic institutions, and conceptual identity all teeter on the edge of a Constitutional crisis. The severity of the crisis demonstrates a need for change and suggests a severe response.

Each branch of government has a viable path to remedy the broken Marketplace of Ideas. While I pose some suggestions, I do not provide an exhaustive list of options. If nothing else, calling the Marketplace of Ideas' fractured state to the attention of academics, social commentators, and concerned citizens alerts the legislative, executive, and judicial branches to acknowledge the mess they collectively made. Relying on the judiciary to take a more active role in a speech landscape that seems to have run itself into disorder may be a step in the right direction, but it cannot be the only step. Any step must prioritize the free speech needs of pluralistic society, safety, and Constitutional validity. As we continue to hurdle through the contemporary information age, I hope this article can inspire constructive conversation, debate, and, ultimately, change.