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## Viewer Discretion is Advised: Disconnects between the Marketplace of Ideas and Social Media Used to Communicate Information during Emergencies and Public Health Crises

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NOTE

**VIEWER DISCRETION IS ADVISED:  
DISCONNECTS BETWEEN THE  
MARKETPLACE OF IDEAS AND SOCIAL  
MEDIA USED TO COMMUNICATE  
INFORMATION DURING EMERGENCIES AND  
PUBLIC HEALTH CRISES**

*Peter Maggiore\**

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## INTRODUCTION

Over the past few years, social media has become a useful way to disseminate information to a large group of people with little cost in terms of time and money.<sup>1</sup> Services such as Facebook, YouTube, Twitter, Flickr, and WordPress are no longer used exclusively by individuals for social networking or entertainment purposes. Groups and organizations—both public and private—are increasingly using social media sites as a way to inform interested individuals of ongoing developments, while allowing the public at large to instantly provide their own feedback.<sup>2</sup> In an emergency event or a public health crisis, the ability of organizations such as the Centers for Disease Control and Prevention (CDC) or the Federal Emergency Management Agency (FEMA)<sup>3</sup> to rapidly disseminate useful information may mitigate the severity of a disaster, prevent damage to property, and save lives.<sup>4</sup> Social media, when properly used by these organizations, has tremendous potential to shape the way our nation handles emergencies and public health crises.<sup>5</sup>

Individuals, the traditional users of social media networks, have also enhanced the development of emergency networks and assisted with public

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1. See Jared Kaltwasser, *Social Media an Effective Strategy for Tight Marketing Budgets*, NJBIZ, May 23, 2011, at 20; Kristina Lerman & Rumi Ghosh, *Information Contagion: An Empirical Study of the Spread of News on Digg and Twitter Social Networks*, in PROCEEDINGS OF THE 4TH INTERNATIONAL AAAI CONFERENCE ON BLOGS AND SOCIAL MEDIA (2010), available at <http://www.aaai.org/ocs/index.php/ICWSM/ICWSM10/paper/viewPDFInterstitial/1509/1839>; see also Sue Ann Kern, *Why Solid Social Media Strategy Is a Cost-Effective Marketing Tool*, FACEITSOCIALMEDIA (Aug. 02, 2010), <http://www.faceitsocialmedia.com/2010/08/why-social-media-is-a-cost-effective-marketing-tool/>.

2. E.g., Christine A. Lukes, *Social Media*, 58 AAOHN J. 415 (2010).

3. See J. Nicholas Hoover, *FEMA to Use Social Media for Emergency Response*, INFORMATIONWEEK (Jan. 19, 2011, 4:00 PM), <http://www.informationweek.com/news/government/info-management/229000918>.

4. See Raina M. Merchant et al., *Integrating Social Media Into Emergency-Preparedness Efforts*, 365 NEW ENG. J. MED. 289–91 (July 28, 2011), available at [www.nejm.org/doi/pdf/10.1056/NEJMp1103591](http://www.nejm.org/doi/pdf/10.1056/NEJMp1103591) (discussing recent usages of social media during emergencies and emergency-preparedness efforts and the potential for improved emergency services before, during, and after an emergency or crisis).

5. *Id.*

health crises through social media networks.<sup>6</sup> These social media networks have proven to be useful forums for individual users to provide instantaneous feedback on the latest news at the site of the incident.<sup>7</sup> Additionally and perhaps more importantly, these social media networks serve as a resource for those seeking help or advice on how to handle the emergency or crisis.<sup>8</sup> In a sense, social media has become the ideal manifestation of the “Marketplace of Ideas” (hereinafter “Marketplace”) that Chief Justice Oliver Wendell Holmes articulated.<sup>9</sup> The Marketplace concept will be discussed in greater detail below, but in brief, it is the theory that truth will surface over falsehoods when all opinions and ideas are freely expressed, because the value or worth of that opinion or idea will be determined on the market of public opinion.<sup>10</sup>

Part I of this Note will examine the Marketplace concept through the works of various legal and philosophical theorists. Chief among them is Frederick Schauer’s work *Free Speech: A Philosophical Enquiry*, in which he discusses the Marketplace theory and the concept’s reliance on freedom of speech in order to pursue the truth and increase knowledge.<sup>11</sup> Schauer points out two major assumptions that are critical to the Marketplace theory: 1) that reason prevails amongst all members of society and 2) that open debate and discussion are always beneficial because society will eventually be guided towards the truth.<sup>12</sup> Schauer argues that neither of these assumptions are necessarily true, and in the instance of an emergency, the Marketplace theory breaks down entirely.<sup>13</sup> However, Schauer and other Marketplace

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6. *Id.* at 290 (discussing the general public’s role as part of a “large response network, rather than remaining mere bystanders”).

7. *Id.*

8. *See, e.g.*, Leysia Palen, *Online Social Media in Crisis Events*, 3 *EDUCAUSE Q.* 76 (2008), available at <http://net.educause.edu/ir/library/pdf/EQM08313.pdf> (noting the ability of “disaster survivors, curious observers, and those who wish to help victims[—]to connect to one another and to participate in events, including through seeking and providing information peer-to-peer”).

9. *See* *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (“[T]he 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. That at any rate is the theory of our Constitution.”); *see also* *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (“[T]he only meaning of free speech is that they should be given their chance and have their way.”).

10. *See* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 16 (1982).

11. *Id.* at 15–34 (exploring the justification for freedom of speech and expression in what Schauer calls the “argument from truth”; he consequently explores the Marketplace theory in great depth because of the theory’s prominence in the First Amendment’s free speech doctrine).

12. *Id.* at 26–30 (noting that the Marketplace is “plagued by two major flaws . . . [it] rests on an assumption about the prevalence of reason . . . [and] there is no reason to assume that open debate and discussion will automatically and in every case be beneficial”).

13. *Id.* at 30 (“When, because of emergency, passion, or anger, there is no opportunity to reflect on the wisdom of an expressed opinion, and there is no opportunity for counter-argument, there is no reason to rely on the argument from truth.”).

theorists' analyses do not end our inquiry into the disconnects between the Marketplace model and the utilization of social media during emergencies and public health crises. This Note next explores the use of limited regulatory structures in an adaptive Marketplace in the new environment of digital speech.<sup>14</sup> This Note will examine the argument that freedom of speech in the digital age should have some form of regulatory structure in place, based on principles normally associated with collective self-government, to manage discourse and structure public debate.<sup>15</sup> Additionally, this Note will explore Supreme Court opinions by former Chief Justice Rehnquist and Justice Brennan, in which the justices articulate the existence of mini-marketplaces, with the possibility of different regulatory schemes depending on each unique marketplace.<sup>16</sup>

Having established the background necessary for an understanding of the Marketplace theory, Part II of this Note will next turn to the application of these concepts in the context of social media. Social media's design openly embraces the Marketplace theory; it enables virtually anyone to contribute his comments, thoughts, and ideas to the conversation. These characteristics are equally applicable to social media's use as a resource during emergencies and public health crises.<sup>17</sup> However, the intersection of social media and emergency situations is where the pure Marketplace theory begins to break down and the false assumptions of the model that Schauer exposed begin to show.<sup>18</sup> Part III of this Note explores three main disconnects with the Marketplace theory and its application to social media and emergencies: 1) time for vast quantities of information to filter through the system, 2) potential negative effects as a result of false or counterproductive information, and 3) vetting the trustworthiness of sources.

We will first deal with the issue of time and the social media Marketplace. While social media enables an instantaneous and efficacious presentation of various ideas and viewpoints in a short timeframe,<sup>19</sup> it is far from certain that social media will enable the Marketplace to arrive at the best, most efficient solution to an emergency incident in time for the solu-

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14. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004).

15. *Id.* at 3–4.

16. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting); *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 178 (1976) (Brennan, J., concurring); see also W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q., Spring 1996, at 40.

17. See Merchant, *supra* note 4 (describing recent usages of social media by individuals during emergencies and crises).

18. SCHAUER, *supra* note 10.

19. See ALAN CANN ET AL., *SOCIAL MEDIA: A GUIDE FOR RESEARCHERS* 40 (2011), available at [http://www.rin.ac.uk/system/files/attachments/social\\_media\\_guide\\_for\\_screen\\_0.pdf](http://www.rin.ac.uk/system/files/attachments/social_media_guide_for_screen_0.pdf) (discussing the speed of communication and increased productivity of social media in the context of research).

tion to make a difference. This time constraint is further exacerbated by the increased quantity of user-generated information that social media produces and the Marketplace's need to filter this information<sup>20</sup> rapidly enough for it to be useful during an emergency or public health crisis.

Interrelated to the timeliness issue is the possibility that a social media Marketplace will promulgate false or counterproductive information and advice that has not had time to properly filter through the Market, which will be instantly relied upon because of the urgency created by a crisis or disaster.<sup>21</sup> The social media Marketplace is not designed to instantaneously produce the best ideas.<sup>22</sup> Arriving at the best answer often takes discussion, debate, and an ability to digest all available viewpoints;<sup>23</sup> a crisis or emergency does not present the opportunity to engage in any of these activities to the extent necessary for the Marketplace to properly function.<sup>24</sup> The result may be that individuals, groups, and organizations take conflicting, false, or inaccurate advice in an attempt to solve the crisis, ultimately inhibiting progress.<sup>25</sup>

The final issue that arises in the context of the social media Marketplace is separating trustworthy from non-trustworthy social media sources. This vetting of sources does not concern well-recognized agencies that are disseminating information and advice via social media. Rather, it arises when individuals post their own observations and ideas in the social media Marketplace. These individuals are likely unknown to social media users and likewise the veracity of their statements is unreliable.<sup>26</sup> Determining which sources to trust is seemingly impossible without undertaking an independent investigation into the veracity of their claims.

Lastly, Part IV of this Note will propose self-regulation as a potential solution to the disconnects between the Marketplace and social media's use during an emergency or crisis. This Note will argue for a system of freedom of expression where self-regulatory structures exist to manage discourse and structure public debate, rather than a dialectical free-for-all in a pure Marketplace model. Relying on the theories of Justices Brennan and

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20. See Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 902-03 (2000) (noting that in the context of financial message boards, too many participants offering their opinions in public discourse "may lead to truth, but it may also lead to the Tower of Babel").

21. See SCHAUER, *supra* note 10, at 30.

22. See *id.* at 27 (noting that over long durations of time the traditional Marketplace theory will correct itself, but it is not an instantaneous process).

23. *Id.*

24. *Id.* at 30.

25. See BRUCE R. LINDSAY, CONG. RESEARCH SERV., R41987, SOCIAL MEDIA AND DISASTERS: CURRENT USES, FUTURE OPTIONS, AND POLICY CONSIDERATIONS 7 (2011).

26. Peter Steiner, *On the Internet, Nobody Knows You're a Dog*, THE NEW YORKER, July 5, 1993, at 61, available at <http://www.unc.edu/depts/jomc/academics/dri/idog.html> (depicting cartoon stating "On the Internet, nobody knows you're a dog.>").

Rehnquist,<sup>27</sup> this Note will then argue that social media use during an emergency or crisis creates its own mini-marketplace subject to its own unique regulatory scheme—a scheme of self-regulation. Having proposed this potential solution, Part V of this Note will then analyze case studies in which social media was used during an emergency or crisis. These case studies will reveal the use of self-regulation, thus demonstrating the Marketplace’s ability to adapt in order to overcome the disconnects that arise in the context of the use of social media during emergencies and crises.

## I. THE MARKETPLACE OF IDEAS

### A. Foundations: A Brief History and Underlying Assumptions of the Theory

Freedom of speech plays an important role in the Marketplace theory because it is believed to be the best means to achieve the desired result—discovery of the truth.<sup>28</sup> The Marketplace theory’s origins can trace as far back as John Milton,<sup>29</sup> Enlightenment thinkers like John Locke<sup>30</sup> and Adam Smith,<sup>31</sup> and judicial opinions on free speech theory by influential jurists like Chief Justice Holmes.<sup>32</sup> Holmes’ analysis is of particular relevance. He argued that the Marketplace theory underlies the principles of freedom of speech in the First Amendment.<sup>33</sup> He felt that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”<sup>34</sup> This theory is what we commonly refer to as the “Marketplace of Ideas.” It is a theory that “truth will most likely surface when all opinions may freely be expressed, when there is an open and unregulated market for the trade in ideas.”<sup>35</sup> The Marketplace theory relies on the value that our

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27. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting); *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp’t Relations Comm’n*, 429 U.S. 167, 178 (1976) (Brennan, J., concurring).

28. See SCHAUER, *supra* note 10, at 15 (“Open discussion, free exchange of ideas, freedom of enquiry, and freedom to criticize . . . are necessary conditions for the effective functioning of the process of searching for truth. Without this freedom we are said to be destined to stumble blindly between truth and falsehood.”).

29. See JOHN MILTON, *AREOPAGITICA* (Thomas H. Luxon ed., The Milton Reading Room 2008) (1644), available at [http://www.dartmouth.edu/~milton/reading\\_room/areopagitical/index.shtml](http://www.dartmouth.edu/~milton/reading_room/areopagitical/index.shtml).

30. See JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

31. See ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Edwin Cannan ed., U. Chi. Press 1976) (1776).

32. See *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting).

33. See *Hopkins*, *supra* note 16, at 41; see also SCHAUER, *supra* note 10, at 15–16.

34. See *Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting); see also Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2359–60 (2000).

35. SCHAUER, *supra* note 10, at 16.

society places in the adversarial process for finding the truth and on an understanding, akin to Adam Smith's "invisible hand" theory<sup>36</sup> that when all thoughts and ideas are allowed to enter the market, the best will prevail.<sup>37</sup> In addition to this basic premise, Marketplace theorists believe that freedom of speech is the best means of identifying and ultimately accepting the truth.<sup>38</sup>

This competition or "survival theory of truth" rests on two primary assumptions that are somewhat contested (and as we will later see, these assumptions are particularly troublesome when applied to social media and emergencies). First, the Marketplace theory assumes that reason will be able to discern what is true from what is false and that the entire public possesses the capability to use reason for that purpose.<sup>39</sup> Thus, only if the public is using reason, when contributing to and critiquing the ideas of others, will the model work.<sup>40</sup> Without the use of reason by all Marketplace participants, it would not take much imagination to envision a scenario in which a false idea could be accepted as true.

There are two counter-arguments that allow the Marketplace theory to survive this hypothetical, where reason is not employed by all participants. First, Schauer recognizes that the size and diversity of the public at large make it the ideal group to propose the variety of ideas necessary for the Marketplace theory to operate.<sup>41</sup> However, he diverges from traditional Marketplace theory because he does not believe that the public at large necessarily needs to be the group that decides whether the idea is true or not.<sup>42</sup> Therefore, this conception of the Marketplace does not rely as heavily on the reasoning power of the public. Rather, it relies on the reasoning power of a subset of the public at large. A second counter-argument to the hypothetical where reason is not employed by all participants is that the Marketplace theory is not designed to instantly produce the correct answer.<sup>43</sup> Reason will

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36. See Smith, *supra* note 31 (stating that the invisible hand theory is a term for the economic theory that competition in the marketplace for goods or services that is individual, unregulated, and motivated by self-interest will ultimately lead to prices that collectively reflect society's valuation of the individual goods or services).

37. SCHAUER, *supra* note 10, at 16.

38. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984); see also SCHAUER, *supra* note 10, at 16.

39. See Hopkins, *supra* note 16, at 44; see also SCHAUER, *supra* note 10, at 26.

40. See Ingber, *supra* note 38, at 15.

41. SCHAUER, *supra* note 10, at 27.

42. *Id.* at 28; see also *infra* Part I.E (discussing the existence of mini-marketplaces which would include subsets of the public at large as comprising the Marketplace participants as opposed to the public at large).

43. SCHAUER, *supra* note 10, at 27; see also Ingber, *supra* note 38, at 17–19 (discussing the insufficient time during an emergency situation and the subsequent deficiency of the Marketplace to arrive at the best answer); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 826 (2008) (noting the transaction cost of time to "find, evaluate, and obtain good ideas" and the fact that time is not accounted for in the traditional Marketplace metaphor).



prevail and correct the false view previously accepted as the truth over time.<sup>44</sup>

The second underlying assumption of the Marketplace theory is that bringing all ideas and opinions—both true and false—to the open market will lead to increased knowledge through competition.<sup>45</sup> By bringing all possible ideas and opinions to the market, knowledge will be increased over time as society sifts through all possible answers, using reason to ultimately arrive at the best one.<sup>46</sup> In regards to this assumption, John Stuart Mill noted that it is only once we have heard *all* views of others that we will know when a certain view is the best one.<sup>47</sup> Schauer begins to poke holes in this assumption of the Marketplace theory and in Mill's statement by noting that hearing a contradictory point of view may help us to accept the truth of a statement, but it is not a *necessary* condition to an acknowledgement of the statement's truth.<sup>48</sup> The recognition that contradictory viewpoints are not always necessary is just the beginning of Schauer's pushback on the traditional Marketplace theory's conception that there is a need for complete freedom of speech in the Marketplace.<sup>49</sup>

Having questioned the necessity for complete freedom of speech, many Marketplace theorists consider the potential benefits of suppressing or regulating some speech as an alternative to a pure Marketplace theory.<sup>50</sup> Just as false statements and opinions are not necessarily self-evidently false, neither are true statements and opinions self-evidently truthful—both need more than mere expression in order to be recognized for what they are.<sup>51</sup> It does not logically follow that truth is accepted—or falsity rejected—just because it is heard.<sup>52</sup> Because false statements and opinions will not automatically be recognized as false, and because the Marketplace theory requires that this speech be permitted regardless of its truth, it is possible that the Marketplace theory can actually inhibit the public's acquisition of knowledge.<sup>53</sup> Therefore, unless truth is always self-evident (which has already been dismissed as a possibility), Schauer believes that we cannot assume that open debate

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44. SCHAUER, *supra* note 10, at 27.

45. Ingber, *supra* note 38, at 6; *see also* SCHAUER, *supra* note 10, at 17, 24–25.

46. Ingber, *supra* note 38, at 6.

47. John Stuart Mill, *On Liberty and Considerations on Representative Government* 13–48 (R. McCallum ed., 1948); *see also* Ingber, *supra* note 38, at 6; SCHAUER, *supra* note 10, at 24.

48. SCHAUER, *supra* note 10, at 21.

49. *See* Post, *supra* note 34, at 2363 (discussing the possibility of Constitutional regulation of speech).

50. *Id.*

51. *See* SCHAUER, *supra* note 10, at 25.

52. *See* Hopkins, *supra* note 16, at 44–45; *see also* Ingber, *supra* note 38, at 15 (describing assumptions of the Marketplace, one of which is “truth must be discoverable and susceptible of substantiation”).

53. SCHAUER, *supra* note 10, at 33 (“[A]dditional propositions can retard knowledge as well as advance it.”).

and discussion will always result in information that is more beneficial, useful, and efficient than that which comes from a controlled Marketplace where speech is suppressed or regulated.<sup>54</sup> Given that open debate will not always prove beneficial to discovering the truth, Marketplace theorists next ask whether to consider suppressing certain information and, if so, what information may potentially be suppressed.

### B. *Suppression: Is All Information Good?*

Although contrary to the Marketplace theory, there may be instances in which the suppression of statements or ideas benefits the discovery of truth and knowledge.<sup>55</sup> As has already been asserted, neither true nor false statements are necessarily self-evident.<sup>56</sup> When neither truth nor falsity is self-evident in the Marketplace, it is inevitable that some false propositions will arise and gain popular acceptance in the Marketplace, until years later when new information arises that proves the old proposition to be false.<sup>57</sup> In the short-run, the false idea was perceived to be true, but over the long-run the Marketplace corrected itself as new information was introduced.<sup>58</sup> Schauer rejects this argument that truth and reason will prevail in the long-run, finding it meaningless to the discovery of truth unless the Marketplace's self-correcting mechanism is limited to a finite time period within which it will correct itself.<sup>59</sup> Therefore, he entertains the idea that the suppression of ideas perceived to be false is a way to better discover the truth and increase our knowledge.<sup>60</sup>

The negative implications of suppressing speech and ideas may be quite obvious to anyone raised in a society where freedom of speech is revered, as it is in the United States.<sup>61</sup> First and foremost, suppressing statements and ideas that we believe to be false in order to protect the Marketplace from adopting falsities will necessarily also suppress some statements that are in fact true.<sup>62</sup> Thus, suppressing speech is harmful because it cuts off access to possible knowledge.<sup>63</sup> Second, even if the asserted statement or opinion is in fact false, there is value in identifying the error of the argument.<sup>64</sup>

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54. *Id.*

55. *Id.* at 28 (“[T]he predominant risk is that false views may, despite their falsity, be accepted by the public, who will then act in accordance with those false views.”).

56. *Id.* at 33.

57. For example, for many years, people thought the world was flat until over time new information surfaced proving that this previously widely held belief was false.

58. SCHAUER, *supra* note 10, at 27.

59. *Id.*

60. *Id.* at 29.

61. See Ingber, *supra* note 38, at 4.

62. See Mill, *supra* note 47, at 13–48; see also SCHAUER, *supra* note 10, at 22 (discussing Mill's analysis); Ingber, *supra* note 38, at 6 (discussing Mill's analysis in ON LIBERTY).

63. See SCHAUER, *supra* note 10, at 29.

64. *Id.* at 25 (“The identification of error may not bring us closer to truth, but the identification of an error is still desirable, and the rejection of an erroneous belief is still an

However, even given these rationales against suppression, Schauer still leaves open the possibility that suppression may be warranted in circumstances where the expression of certain speech carries with it the possibility of harm.<sup>65</sup> He notes that in instances where speech is believed to be harmful, the appropriate question to ask is whether it is worth the risk of promulgating the statement compared to the small possibility that the statement will be beneficial.<sup>66</sup> He acknowledges that we are guessing when we decide to suppress a statement, but we are likewise taking a guess when we decide not to suppress a statement.<sup>67</sup> For this reason, he concludes that “[s]uppression is necessarily wrong only if the former harm is ignored. Therefore a rule absolutely prohibiting suppression is justified only if speech can never cause harm, or if the search for truth is elevated to a position of priority over all other values.”<sup>68</sup>

### C. Emergencies: Suppression Required?

One instance where theorists view suppression of false and harmful statements as beneficial—if not necessary—is in the event of an emergency.<sup>69</sup> Rational thinking, which the Marketplace theory assumes is present, is necessary for the model to work.<sup>70</sup> In instances where this key assumption breaks down, there is no reason to rely on the Marketplace model at all to justify free speech.<sup>71</sup> One such instance in which rational thinking breaks down occurs in an emergency.<sup>72</sup> As Justice Brandeis noted in his concurring opinion in *Whitney v. California*, “If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.”<sup>73</sup> An emergency situation thus may represent the possibility of a Marketplace failure.<sup>74</sup> Schauer elaborates on why an emergency can justify suppression:

When because of emergency, passion, or anger, there is not opportunity to reflect on the wisdom of an expressed opinion, and there is

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epistemic advance . . . allowing the expression of contrary views is the only rational way of recognizing human fallibility, and making possible the rejection or modification of those of our beliefs that are erroneous.”).

65. *Id.* at 29.

66. *Id.*

67. *Id.*

68. *Id.*

69. See, e.g., Ingber, *supra* note 38, at 18.

70. See Blocher, *supra* note 43 (discussing use of reason as an underlying assumption of the Marketplace theory).

71. See SCHAUER, *supra* note 10, at 30 (“Neither the argument from truth nor any other argument can be applied when the conditions for its validity are not present.”).

72. See, e.g., Ingber, *supra* note 38, at 18.

73. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

74. Blocher, *supra* note 43, at 833.

no opportunity for counter-argument, there is no reason to rely on the argument from truth. . . . At such times there is less justification for allowing expression of the apparently false opinion.<sup>75</sup>

The classic example of an emergency justifying suppression, relied upon universally by Marketplace theorists, is Holmes' articulation of "clear and present danger," where a theater-goer shouts "Fire!" in a crowded theater when there is no fire.<sup>76</sup> Schauer further notes that "[i]t would be most unreasonable to say that such expression should be permitted because others have the opportunity to express the opinion that there is no fire, followed by discussion and investigation to determine which of the two opinions was correct."<sup>77</sup> The costs of communication, particularly the cost of time, have the potential to prevent the proper operation of the Marketplace.<sup>78</sup> Thus, the potential for Marketplace failure in an emergency situation is greater and the cost of that failure is high.<sup>79</sup> Schauer makes a compelling case regarding the breakdown of the Marketplace model under emergency circumstances, but perhaps he and other legal and philosophical theorists go too far by suggesting that speech should be suppressed. Rather than suppressing speech in its entirety, perhaps freedom of speech in the Marketplace simply needs to be a bit more constrained in emergency situations.

#### D. Regulation

Professor Jack Balkin, in his article entitled *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, provides the theoretical basis for the application of a solution that is less severe than outright suppression of speech.<sup>80</sup> Balkin begins by noting that the digital age and the Internet have accentuated some of the characteristics of freedom of expression.<sup>81</sup> For one, he notes that the digital age has made us ever more aware of what he calls the "scarcity of audience attention" and "dilut[ion of] the audience share."<sup>82</sup> The arrival of the digital age is drastically lowering the costs of distributing speech.<sup>83</sup> As a result, more

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75. SCHAUER, *supra* note 10, at 30.

76. See, e.g., Blocher, *supra* note 43, at 833–34 (discussing *Schenk v. United States*, 249 U.S. 47, 52 (1919)) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

77. SCHAUER, *supra* note 10, at 30.

78. Blocher, *supra* note 43, at 834.

79. *Id.*

80. Balkin, *supra* note 14, at 3–4 (promoting a theory of freedom of speech that he calls the "democratic culture" which "is about individual liberty as well as collective self-governance").

81. *Id.* at 3.

82. *Id.* at 7, 10.

83. *Id.* at 7.

people are able to distribute content, which is also easier to receive, and competition for an audience's attention increases as the sheer quantity of content increases.<sup>84</sup> He notes that this phenomenon has highlighted "the importance of organizing, sorting, filtering, and limiting access to information."<sup>85</sup> All of these activities are very much regulatory in nature. While not directly advocating for such a system,<sup>86</sup> the importance Balkin places on the above activities implies the need to regulate content to some extent.

Balkin's subsequent analysis indicates that the dawn of the digital age coincided with a deregulation of freedom of expression. He notes that before the digital revolution, the information system in place used mass media entities and publishing houses as "traditional gatekeepers of content and quality."<sup>87</sup> These traditional media entities have always played a significant role in information regulation because they filter all information that they produce for the public.<sup>88</sup> In our digital age where anyone can rapidly distribute information to the public at large, the emerging online environment means that freedom of expression is no longer as closely intertwined with these gatekeepers.<sup>89</sup> However, Balkin notes that the Internet has not replaced traditional media entities, but rather has formed an additional layer of freedom of expression on top of the preexisting system.<sup>90</sup>

Balkin raises one final argument that will apply later in exploring the disconnects between the Marketplace theory and the use of social media as a resource during emergencies. He argues that freedom of expression in the digital age would be best served by promoting deliberation on public issues based on the idea of a "democratic culture."<sup>91</sup> In other words, freedom of speech in the digital age should be about individual liberty—which allows everyone to participate in the distribution of ideas—while having some form of collective self-governing regulatory structure in place, much like the political institution of a democracy, to manage discourse and organize public debate.<sup>92</sup> The need for the regulatory scheme exists because of the possibil-

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84. *Id.*

85. *Id.*

86. See Balkin, *supra* note 14; see also *supra* note 80 and accompanying text.

87. Balkin, *supra* note 14, at 9.

88. *Id.* at 10 (noting that access to mass media is limited to a few controlling entities).

89. *Id.* at 10–11 (commenting that the digital age has allowed users to rout around these traditional entities and reach audiences directly as well as "glomming on" or taking a product developed by a mass media entity and "appropriating things, commenting on them, criticizing, and above all, producing and constructing things with them: using them as building blocks or raw materials for innovation and commentary").

90. *Id.* at 9–10.

91. *Id.* at 28.

92. *Id.* at 3–4 ("Democratic culture is about individual liberty as well as collective self-governance; it is about each individual's ability to participate in the production and distribution of culture. Freedom of speech allows ordinary people to participate freely in the spread of ideas.").

ity of free speech market failures in certain instances such as emergencies<sup>93</sup> where the assumptions of the Marketplace theory break down.<sup>94</sup> As Balkin notes, “Democratic culture is a regulative ideal.”<sup>95</sup> Along with the regulatory need to sort, filter, and process the vast amounts of information with which we are presented,<sup>96</sup> this “democratic culture” concept of freedom of expression is a second manifestation of regulatory elements in an adapted Marketplace theory. Granted, this is not a pure Marketplace theory, but rather one that has adapted to the changing circumstances of the digital age.

#### E. Varying Regulatory Schemes in Mini-Marketplaces

Former Chief Justice Rehnquist and Justice Brennan have each implied (though never outright stated) in their judicial opinions that instead of one overarching Marketplace, there exist “mini-marketplaces,” each with the potential for their own regulatory schemes.<sup>97</sup> W. Wat Hopkins, in his article *The Supreme Court Defines the Marketplace of Ideas*, argues that critics of the Marketplace theory lump all ideas into one overarching marketplace and then critique the theory when truth doesn’t magically emerge.<sup>98</sup> Hopkins examines the judicial opinions of Rehnquist and Brennan and argues that contrary to the critics of the Marketplace theory, the Supreme Court implicitly recognizes the existence of mini-marketplaces instead of one overarching marketplace.<sup>99</sup>

Former Chief Justice Rehnquist, in his dissenting opinion in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, implicitly acknowledges the existence of different mini-marketplaces and varying regulatory schemes for each unique mini-marketplace.<sup>100</sup> Rehnquist notes that “in the world of political advocacy and *its* marketplace of ideas. . . . [t]he free flow of information is important in this context.”<sup>101</sup> Rehnquist makes it clear that he is talking only about the marketplace for the world of political advocacy and that the lack of a regulatory scheme is only applicable in that context; his use of italics for the word “*its*” further strengthens his point. Immediately following his analysis on the marketplace for political advocacy, Rehnquist states that “[t]he notion that more speech is the remedy to expose falsehood and fallacies is wholly out of

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93. Blocher, *supra* note 43, at 833.

94. *See supra* Part I.A.

95. Balkin, *supra* note 14, at 49.

96. *Id.* at 28.

97. Hopkins, *supra* note 16, at 46–47 (“Members of the Court, then, have implied that broadcasting, governmental negotiations, and local communities inhabit their own mini-marketplaces, as do commercial and political speech.”).

98. *Id.* at 45.

99. *Id.* at 46–47.

100. *Cent. Hudson Gas & Electric Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 598 (1980) (Rehnquist, J., dissenting).

101. *Id.*

place in the commercial bazaar.”<sup>102</sup> Rehnquist is directly contrasting the need for complete freedom of speech in the context of political advocacy with the need for a stricter regulatory scheme in the context of the commercial bazaar or marketplace.<sup>103</sup> Thus, Rehnquist explicitly articulates the existence of different regulatory schemes for certain types of speech and in doing so implicitly acknowledges that these distinct mini-marketplaces exist via their relation to the different regulatory schemes.

Likewise, Justice Brennan, in his concurring opinion in *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, recognizes the existence of differing free speech regulatory schemes for different contexts.<sup>104</sup> Brennan does so by first acknowledging that, in the specific context of a closed bargaining session, there is nothing unconstitutional about restricting who can speak to those designated representatives of the union.<sup>105</sup> In this context, the regulatory scheme is permissible. Brennan then immediately applies this permissible regulatory scheme to the context of a public forum.<sup>106</sup> When applied in the context of a public forum, he finds this regulatory scheme is violative of the First Amendment.<sup>107</sup> Brennan implicitly recognizes the distinct mini-marketplace of a closed bargaining session and the constitutionality of the unique regulatory scheme that applies to it.

While it is beyond the scope of this Note to discuss at length the exact mini-marketplaces that the justices envision (e.g., commercial speech, broadcast industry, political speech, individual classrooms, etc.) and the differences among them, it is significant that members of the Supreme Court acknowledge the existence of these mini-marketplaces that may each have their own unique regulatory scheme.<sup>108</sup> The existence of mini-marketplaces allows the Marketplace theory to better function in light of the issues surrounding the Marketplace’s two major assumptions.<sup>109</sup> If the participants in

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102. *Id.*

103. *See Bazaar*, THE SAURUS, <http://thesaurus.com/browse/bazaar> (last visited Mar. 28, 2012) (noting that marketplace is a synonym for bazaar).

104. *City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp’t Relations Comm’n*, 429 U.S. 167, 178–79 (1976) (Brennan, J., concurring).

105. *Id.* at 178 (“[T]here is nothing unconstitutional about legislation commanding that in closed bargaining sessions a government body may admit, hear the views of, and respond to only the designated representatives of a union selected by the majority of its employees.”).

106. *Id.* at 178–79 (“But the First Amendment plays a crucially different role when, as here, a government body has . . . determined to open its decisionmaking processes to public view and participation. In such case, the state body has created a public forum dedicated to the expression of views by the general public.”).

107. *Id.* at 179 (quoting *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972)) (“Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”).

108. *Hopkins*, *supra* note 16, at 46.

109. *See Balkin*, *supra* note 14 (discussing the two major assumptions of the Marketplace that (1) all participants are acting rationally and (2) that open debate is always beneficial).

a mini-marketplace are regulated—either by external regulations or by self-regulation—then it seems more likely that those participating in the regulated mini-marketplace will be knowledgeable in the subject matter or context of the mini-marketplace. If those individuals come to the mini-marketplace knowledgeable in the subject matter, it seems more likely that their contributions to the mini-marketplace of ideas will be more thoughtful, rational ideas. If they are better thought-out rational ideas, it also seems more likely that the open debate among these ideas is much more likely to be beneficial in the search for the truth. The importance of the Court's recognition of this concept will be discussed in Part V, where I will apply the concept of the mini-marketplace and argue that social media, when used during an emergency or crisis, creates its own mini-marketplace subject to a unique self-regulatory scheme.

#### F. *Conclusions on the Marketplace of Ideas*

The works of Schauer, Balkin, Holmes, Rehnquist, Brennan, and various other legal and philosophical theorists result in varying conceptions of the role that freedom of expression plays in the Marketplace theory.<sup>110</sup> Marketplace theorists note the necessary assumptions of rationality and open discourse that the Marketplace theory in its purest form relies on, but these theorists also express skepticism that these assumptions will necessarily be true.<sup>111</sup> Of particular importance is the argument that the assumption of rationality completely breaks down when the Marketplace theory is applied to an emergency context.<sup>112</sup> Theorists predict little chance of the Marketplace functioning in such an event, and many dismiss the possibility that truth can be determined and knowledge increased because of the particular urgency of the situation.<sup>113</sup> But perhaps Schauer and other theorists assume too much by finding that the Marketplace entirely breaks down in these circumstances. Perhaps instead the Marketplace theory can survive while slightly adapting to the factual circumstances of an emergency that alter some of the assumptions of the theory. A regulatory scheme—a structure that helps guide the “invisible hand” in its selection of the truth and expansion of knowledge—may be all that is necessary to avoid scrapping the Marketplace theory altogether.

Balkin's work on freedom of speech in the new digital age helps illustrate the possibility that an adapted Marketplace theory fits the needs of our current media structure.<sup>114</sup> Balkin's belief that our current conception of freedom of expression in the digital age would be best served by promoting deliberation on public issues based on the idea of a “democratic culture” is

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110. *See supra* Part I.

111. *See supra* Part I.

112. *See supra* Part I.C.

113. *See supra* Part I.C.

114. *See supra* Part I.D.



of particular note.<sup>115</sup> The “democratic culture’s” role in the Marketplace is twofold; it encourages individual liberty of freedom of speech as well as collective self-governance.<sup>116</sup> As Balkin notes, “Democratic culture is a regulative ideal.”<sup>117</sup> Going forward, Balkin’s work provides an intermediate approach between the pure Marketplace theory and total abandonment of the Marketplace theory when faced with an emergency situation.

Lastly, the judicial opinions of Chief Justice Rehnquist and Justice Brennan offer the possibility of sub-categorizing the Marketplace into mini-marketplaces that can each be examined in their own particular context.<sup>118</sup> Additionally, these mini-marketplaces are potentially subject to unique regulatory schemes,<sup>119</sup> which enable each Marketplace to adapt to the unique context and challenges that freedom of expression faces in each situation.

## II. THE MARKETPLACE’S APPLICATION TO SOCIAL MEDIA IN GENERAL: SOCIAL MEDIA EMBRACES MAJOR CHARACTERISTICS OF THE MARKETPLACE OF IDEAS

Social media may be the purest application of the “Marketplace of Ideas” theory. Social media takes the essential element of freedom of speech and provides a forum for expression with greater breadth and depth than ever before. Anyone with an Internet connection is able to register a free account with a social media provider, which then allows the user to express his thoughts and share his comments on any topic.<sup>120</sup> Social media embraces several core Marketplace concepts: (1) the competition of ideas; (2) the public at large as the best provider of ideas; and (3) the value of exposure to contradictory points in the search for truth.<sup>121</sup>

The concept of the competition of ideas on the open market is the key component to the Marketplace theory,<sup>122</sup> and social media wholly embraces the competition of ideas and its test for truth. Scholars have long championed an idealized version of the Internet as the living embodiment of the Marketplace.<sup>123</sup> The Internet and social media allow the user to generate content that can be distributed locally and globally with little to no cost to the user.<sup>124</sup> By enabling more individuals to express their views and by giving the user’s speech or expression access to a larger audience,<sup>125</sup> social

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115. See *supra* Part I.D.

116. See *supra* Part I.D.

117. Balkin, *supra* note 14, at 49.

118. *Supra* Part I.E.

119. *Supra* Part I.E.

120. See Kern, *supra* note 1.

121. See *supra* Part I.A.

122. See *Abrams v. United States*, 250 U.S. at 630–31. See also Post, *supra* note 34, at 2359–60.

123. See Lidsky, *supra* note 20, at 893.

124. See Balkin, *supra* note 14, at 13.

125. *Id.* at 7.

media expands the test for truth. An idea or statement gaining nearly world-wide acceptance on an open and unregulated market of ideas is strong evidence of the truth of the proffered idea or statement.<sup>126</sup> Exposure, acceptance, and survival of that idea or statement over time further solidifies its truth and leads to an overall increase in society's knowledge.

Underlying the concept of the competition of ideas on the open market is the understanding that the public at large is the best provider of ideas for the market.<sup>127</sup> It is easy to see how social media wholeheartedly embraces this key component of the Marketplace. The Internet and social media reduce barriers to entry in the Marketplace and consequently allow a greater number of people to contribute their ideas to the market.<sup>128</sup> However, it is not just a high volume of people that the Marketplace seeks.<sup>129</sup> Rather, the Marketplace seeks diverse opinions and beliefs.<sup>130</sup> By expanding exposure and contribution of ideas on a global scale, social media is able to encompass the widest possible range of diverse opinions.<sup>131</sup> The Internet helped remove the preexisting barriers that prevented one from expressing himself through speech, and it also removed barriers to that speech being heard by others.<sup>132</sup>

The role of traditional mass media entities like newspapers and television, regardless of their acceptance of a wide range of viewpoints, has always troubled pure Marketplace theorists.<sup>133</sup> Specifically, mass media entities, in the interest of time and limited resources, have to act as gatekeepers with regards to content and quality of the issues discussed.<sup>134</sup> Traditional mass media entities still have a significant impact on the quality and content of discussion topics.<sup>135</sup> However, because the Internet and social media are widely available to the public on a global scale, they are able to draw from mass media, broaden exposure to issues up for debate, discuss issues that mass media entities do not raise, and generate a greater number and a more diverse selection of ideas.<sup>136</sup> By stripping control of information from traditional mass media and increasing the public's control over content, the

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126. See *Abrams v. United States*, 250 U.S. 616, 630–31 (1919).

127. See SCHAUER, *supra* note 10, at 27.

128. See Lidsky, *supra* note 20, at 894–95.

129. *Id.* (discussing how eliminating barriers to participation in the Marketplace of Ideas makes public discourse more democratic and inclusive).

130. *Id.* at 893–94 (“Ideally, the process of interacting in the marketplace of ideas . . . enables citizens to transcend their differences in order to forge consensus on issues of public concern . . .”).

131. *Id.* at 894.

132. *Id.* at 895.

133. See Balkin, *supra* note 14, at 7 (“Before the Internet, free speech theorists worried about the scarcity of bandwidth for broadcast media. . . . [O]nly a relatively few people could broadcast to a large number of people.”).

134. *Id.* at 7–10.

135. *Id.* at 9–10.

136. See Balkin, *supra* note 14, at 9–10; Lidsky, *supra* note 20, at 897–98.

Internet and social media may help contribute to the development of the body of informed citizens that the traditional Marketplace theory seeks.<sup>137</sup>

A critical component of virtually all social media websites is the ability for users to comment on the content generated by other users.<sup>138</sup> This commentary includes both positive feedback and criticism. This behavior embraces the Marketplace theory's belief that hearing contradictory or even false points of view has value in the search for truth.<sup>139</sup> Positive feedback and commentary may indicate that there may be some degree of truth to the opinion or statement. Over time and with increased exposure, the truth of the opinion or statement will be revealed and society can either accept or reject it.<sup>140</sup> Criticism or outright rejection of the opinion or statement is equally as valuable because the criticism may have merit. Likewise, the truth of the criticism itself can be evaluated over time, and, given increased exposure, the search for the truth will be advanced by acceptance or rejection of the criticism. Even clearly false commentary will have value in the search for truth by demonstrating the error of the false commentary's reasoning.<sup>141</sup> Granted, the social media user may have some control over whether he allows others to comment on his original post, but the principle remains that social media creates a forum in which freedom of speech in its purest form is available through criticism and commentary.

### III. BREAKDOWN OF THE MARKETPLACE: DISCONNECTS BETWEEN THE MARKETPLACE OF IDEAS AND THE USE OF SOCIAL MEDIA DURING EMERGENCIES AND PUBLIC HEALTH CRISES

The core Marketplace concepts generally embodied in social media are equally applicable to the operation of social media as a resource during an emergency or public health crisis. However, this intersection between social media and emergencies is where the pure Marketplace concept begins to break down and the false assumptions of the model exposed by Schauer begin to show. As discussed in Part I, two major false assumptions that Schauer finds critical to the Marketplace theory are: 1) that reason prevails amongst all members of society and 2) that open debate and discussion are

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137. See Lidsky, *supra* note 20, at 897.

138. See Douglass Dowty, *You've Got a friend at the PSB: Syracuse Police Department Introduces its Facebook Page*, POST-STANDARD, 12 (Feb. 17, 2011), [http://www.syracuse.com/news/index.ssf/2011/02/syracuse\\_police\\_accessible\\_to.html](http://www.syracuse.com/news/index.ssf/2011/02/syracuse_police_accessible_to.html) (noting social media as a method for the public to communicate with the police department and vice versa); *Emergency Management on Social Networks*, (May 14, 2009, 9:51 AM), <http://www.alachuacounty.us/Depts/Communications/Pages/Detail.aspx?itemID=838> (discussing the ability of users to ask questions, send messages, and obtain helpful information).

139. See Ingber, *supra* note 38 at 6; see also SCHAUER, *supra* note 10, at 17, 24–25.

140. See *Abrams v. United States*, 250 U.S. 616, 630–31 (1919).

141. See *supra* note 64 and accompanying text.

always beneficial because society will eventually be guided towards the truth.<sup>142</sup> When these assumptions are applied to the specific context of using social media as a resource during an emergency or public health crisis, three main disconnects between the Marketplace theory and its application to social media emerge: 1) time for vast quantities of information to filter through the system; 2) potential negative effects of false or counterproductive information; and 3) vetting the trustworthiness of sources.<sup>143</sup> It is important to note at the outset that the exploration of these disconnects largely occurs within the context of information and opinions posted by an individual user as opposed to a specialized group or governmental organization (such as the CDC or FEMA) using social media as a means to more rapidly and efficiently promulgate its message to the public.<sup>144</sup> The information generally sought by those accessing social media during an emergency or crisis is typically user-generated content rather than group or governmental content.<sup>145</sup> Social media use by a group or governmental organization during an emergency or crisis much more closely resembles the way in which a traditional mass media entity disseminates information; it acts as a gatekeeper to the content and quality of the information it chooses to make available.<sup>146</sup>

#### A. *Disconnect #1: Time for the Marketplace to Filter Vast Quantities of Information*

The availability of an extended period of time and the Marketplace's ability to correct itself over the long-run are luxuries that are simply not present during an emergency situation or public health crisis.<sup>147</sup> In order for the Marketplace to work properly, time is required to filter out the true

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142. See *supra* note 12 and accompanying text.

143. These three disconnects are generally applicable to the Marketplace theory, but their effect is exacerbated when applied to the specific context of social media and emergencies. See *supra* Part I.

144. See *Emergency Management on Social Networks*, (May 14, 2009, 9:51 AM), <http://www.alachuacounty.us/Depts/Communications/Pages/Detail.aspx?itemID=838>; David Hatch, *Social Media: Emergency Response's Next Frontier*, NATIONAL JOURNAL (May 5, 2011, 2:58 PM), <http://www.nationaljournal.com/tech/social-media-emergency-response-s-next-frontier-20110505>; J. Nicholas Hoover, *FEMA to Use Social Media for Emergency Response*, INFORMATION WEEK (Jan. 19, 2011, 4:00 PM), <http://www.informationweek.com/news/government/info-management/229000918>; *Pacific University Integrates Facebook, Twitter into E2Campus Emergency Notification System*, CAMPUS SAFETY MAGAZINE (Dec. 06, 2008), <http://www.campusafetymagazine.com/Channel/Emergency-Management/News/2008/12/06/Pacific-University-Integrates-Facebook-Twitter-into-e2Campus-Emergency-Notification-System.aspx>.

145. LINDSAY, *supra* note 25, at 3 ("However the main source of information disseminated and sought after is generally posted by citizens, rather than emergency management agencies or organizations").

146. See Balkin, *supra* note 14, at 7–10.

147. See *supra* note 43 and accompanying text.

information from the false.<sup>148</sup> The self-correction mechanism of the Marketplace can only be guaranteed to be effective after this extended duration.<sup>149</sup> However, if the purpose of social media use during an emergency or public health crisis is to rapidly provide useful and accurate information in order to save lives or mitigate damage,<sup>150</sup> it is an entirely impractical system if those in need of information cannot filter the information rapidly enough to make use of it during the limited duration of the emergency or crisis. In other words, arriving at the truth behind statements and opinions is all but useless if not done within the temporal restrictions of the emergency or crisis.

Even if the Marketplace is able, through social media, to filter information while the crisis or emergency is taking place, this does not necessarily mean that social media is the most efficient route to arrive at the truth of the information or opinions. It is entirely plausible that a single entity (such as the CDC or FEMA) with specialized knowledge and experience in emergency management and public health crises would be more efficient in promulgating information that would be both timely and useful in saving lives or mitigating damage. However, a situation in which a single entity or small group of entities is dictating the truth of information completely contradicts the Marketplace theory.<sup>151</sup>

Further compounding the time constraint problem is the proliferation of commentary and opinions that results when social media drastically lowers barriers to entry to the Marketplace.<sup>152</sup> More commentary and opinions lead to more information that the Marketplace has to process, and consequently a longer expected time for that processing to occur.<sup>153</sup> In a more traditional context, allowing the greatest number and most diverse array of opinions and information in the Marketplace ultimately benefits the search for truth.<sup>154</sup> However, in an emergency scenario, this over-abundance of information may actually be a barrier to arriving at the truth in an efficient and timely manner, due to the length of time it takes to sift through all of the information.<sup>155</sup> As Senator Scott Brown asked during a recent hearing of the Senate Homeland Security Subcommittee discussing disaster recovery, “Is

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148. See *supra* note 43 and accompanying text.

149. See SCHAUER, *supra* note 10, at 27.

150. See Daniel O'Brien et al., *Improving Information and Best Practices for Public Health Emergency Legal Preparedness*, 36 J.L. MED. & ETHICS 64, 64–65 (2008) (discussing the general need for “timely, accurate, and accessible information” for preparedness of all public health emergencies).

151. See *supra* Part I.A.

152. See Lidsky, *supra* note 20, at 894–95.

153. *Id.* at 902–03 (“[F]ostering a more participatory public discourse may come at a high cost. Speech from a ‘multitude of tongues’ may lead to truth, but it may also lead to the Tower of Babel.”).

154. See SCHAUER, *supra* note 10, at 16.

155. See Joseph Marks, *Social Media for Emergency Managers Can't Start When the Emergency Does*, NEXTGOV (Nov. 10, 2011), [http://www.nextgov.com/nextgov/ng\\_20111110\\_4195.php](http://www.nextgov.com/nextgov/ng_20111110_4195.php).

there a point where it's too much information? How do you draw that line?"<sup>156</sup> In a pure Marketplace, there is no saturation point at which there is too much information. Truth can be derived from any statement or opinion, whether accurate, contradictory to perceived opinion, or even false.<sup>157</sup> As opinions compete for audience attention in the Marketplace, an overabundance of information can ultimately lead to a point where varying statements or opinions begin to have a dilutive effect on each other.<sup>158</sup> While ordinarily this abundance of information would ultimately lead to the truth, an emergency or crisis situation simply does not provide the time for the Marketplace to properly function and provide the best answer at the time when it is most crucial.<sup>159</sup>

*B. Disconnect #2: Advancing False or Counterproductive Information on the Marketplace During an Emergency or Public Health Crisis*

The promulgation of false or counterproductive information may also prevent the advancement of truth through the Marketplace in an emergency or public health crisis. Under a traditional Marketplace theory, any and all information and opinions are encouraged, even if that information is false. Because, via the process of elimination, demonstration of the error of faulty reasoning will ultimately assist in arriving closer to the truth, the search for truth is advanced.<sup>160</sup> False information is not useful during an emergency or crisis, because the general public may not be acting with the rationality that the Marketplace theory requires in order to weed out the misinformation.<sup>161</sup> Furthermore, the urgency of the situation may result in reliance on misinformation, solely because the Marketplace cannot quickly identify the misinformation as false.<sup>162</sup>

The dissolution of the Marketplace's underlying assumption of rationality during an emergency or crisis is the Marketplace theorists' basis for rejecting the application of the Marketplace theory during emergencies.<sup>163</sup> These same concerns are amplified when applied to the dissemination of information through such a powerful tool as social media. When someone

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156. Hatch, *supra* note 144.

157. See *supra* Part I.A, B.

158. See Balkin, *supra* note 14, at 7 ("My speech has always competed with yours; as the costs of distribution of speech are lowered, and more and more people can reach each other easily and cheaply, the competition for audience attention has grown ever more fervent.").

159. See *supra* note 43 and accompanying text.

160. See *supra* note 64 and accompanying text.

161. See SCHAUER, *supra* note 10, at 30.

162. See Harish Agarwal, *Use of Social Media in Crisis Management*, EXPRESS COMPUTER, <http://www.expresscomputeronline.com/20110930/techviews01.shtml> (last visited Mar. 8, 2012) (discussing the potential for information to be misconstrued and relied on during emergencies or crises).

163. See *supra* Part I.C.

shouts "Fire!" in a crowded theater,<sup>164</sup> the speech is constrained to those physically within earshot, whereas social media enables the shout to literally be heard around the globe.<sup>165</sup> Assuming that people are not necessarily thinking rationally<sup>166</sup> when caught in an emergency situation, the social media Marketplace does not rationally eliminate false and misleading statements or opinions and will not ensure arrival at the truth or advancement of the search for the truth.

If others are misled in an emergency or crisis situation, whether intentionally or not, such misinformation may directly lead to increased loss of life, health, or property.<sup>167</sup> When the Marketplace has not had time to process the misinformation and identify it as false, those who act on that false information may exacerbate the crisis. As Harish Agarwal notes in his article on the *Use of Social Media in Crisis Management*, "With the tendency to sensationalize news that is inherent in human nature, basic information may get disproportionately misconstrued as a result of which rumors are created, misleading people with regard to ongoing activities."<sup>168</sup> If there is a greater risk of proliferation of rumors based on misinformation during an emergency, the ability of social media to instantly promulgate that rumor to a worldwide audience is a significant hurdle to overcome, in order to arrive at the truth through the traditional Marketplace theory. Furthermore, the spread of false information may serve to increase panic and fear,<sup>169</sup> thus furthering the downward spiral of the potential loss of rationality during an emergency or crisis. At a minimum, the false information will compete with truthful information for the audience's time and attention.<sup>170</sup> Worse still, acceptance of the false information, even for a short time, will in effect work towards

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164. See Blocher, *supra* note 43; see also *supra* note 76 and accompanying text.

165. See Balkin, *supra* note 14, at 13 (discussing the global distribution of content via social media).

166. See Interview by David V. Johnson with Elaine Scarry, Walter M. Cabot Professor of Aesthetics & Gen. Theory of Value, Harvard Univ. (July 31, 2011), available at [http://www.bostonreview.net/BR36.4/elaine\\_scarry\\_thinking\\_in\\_an\\_emergency.php](http://www.bostonreview.net/BR36.4/elaine_scarry_thinking_in_an_emergency.php) (discussing the government's general position that in an emergency there is no time for rational deliberation); Patrick Tissington, *Thinking in an Emergency*, TIMES HIGHER EDUCATION (Apr. 14, 2011), <http://www.timeshighereducation.co.uk/story.asp?storyCode=415786&sectioncode=26> (discussing how politicians have taken debate out of decisions in times of crisis). *But see infra* Part IV (arguing that self-regulation of speakers during an emergency or crisis allows the Marketplace to survive without disturbing its underlying assumptions).

167. See LINDSAY, *supra* note 25, at 7.

168. See Agarwal, *supra* note 162.

169. See Thomas A. Glass & Monica Schoch-Spana, *Bioterrorism and the People: How to Vaccinate a City Against Panic*, 34 CLINICAL INFECTIOUS DISEASES 217, 220 (2002), available at <http://cid.oxfordjournals.org/content/34/2/217.full.pdf+html> ("The release of inaccurate, confusing or contradictory information by leaders and/or the media has the potential to increase levels of fear, panic and demoralization, as well as to discredit authorities.").

170. See Balkin, *supra* note 14, at 7.

discrediting information that is truthful and can create distrust between the public and the sources of that truthful information.<sup>171</sup>

A recent Congressional Research Service Report articulated many negative consequences of the use of social media in emergency situations and crises that result from the advancement of false or counterproductive information.<sup>172</sup> The Report observed documented instances of social media disseminating false or outdated information in an emergency or crisis.<sup>173</sup> There have been instances where the location of the hazard or threat was inaccurately reported or a request for help reposted after a victim had already been rescued.<sup>174</sup> The Report further noted that promulgation of this false or misleading information could complicate awareness of the emergency incident and slow down response efforts.<sup>175</sup> Furthermore, the Report hypothesized that social media could also be intentionally used as a malicious tool during an emergency situation to “confuse, disrupt, or otherwise thwart response efforts.”<sup>176</sup> In an emergency or crisis, there is often no time for the Marketplace to assess ideas, so we cannot assume that rationality will prevail;<sup>177</sup> the urgency of the situation may result in reliance on misinformation to the detriment of the pursuit of truth. These conditions lead to a situation where false or counterproductive information can produce detrimental results.

The popularity of social media has grown to the point where major news entities—such as *The New York Times* and *Reuters*—have created social media editor positions.<sup>178</sup> A social media editor monitors social media sites during breaking news events—like Hurricane Irene and the uprisings in the Middle East—to ask eyewitnesses what they are seeing in order to spread these eyewitness accounts to a larger audience.<sup>179</sup> However, the role of social media editors is expanding and now includes stopping the spread of misinformation to the public.<sup>180</sup> As a social media editor of *The New York Times* recently said, “I think there is a hunger out there for us to debunk

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171. See *supra* note 169 and accompanying text.

172. See LINDSAY, *supra* note 25, at 7.

173. *Id.* at 6.

174. *Id.*

175. *Id.* at 7.

176. *Id.*; see also Report: *Social Media Helpful in Emergencies but Open to Inaccuracy*, IHEALTHBEAT (Sept. 19, 2011), <http://www.ihealthbeat.org/articles/2011/9/19/report-social-media-helpful-in-emergencies-but-open-to-inaccuracy.aspx>.

177. See *supra* Part I.C.

178. See Steve Myers, *Social Media Editor Role Expands to Include Fighting Misinformation During Breaking News*, POYNTER (Sept. 2, 2011, 3:33 PM), <http://www.poynter.org/latest-news/making-sense-of-news/144848/social-media-editor-role-expands-to-include-fighting-misinformation-during-breaking-news/>; Jeff Sonderman, *How the New York Times Is Taking Twitter Reporting Faster and Deeper with @NYTLive*, POYNTER (Aug. 29, 2011, 4:47 PM), <http://www.poynter.org/latest-news/media-lab/social-media/144412/how-the-new-york-times-is-taking-twitter-reporting-faster-and-deeper-with-nytlive/>.

179. See Myers, *supra* note 178.

180. *Id.*



misinformation when it's out there."<sup>181</sup> During the May 2011 tornadoes in Tuscaloosa, Alabama, rumors proliferated that impeded rescue and recovery efforts.<sup>182</sup> The local newspaper, in an effort to combat these rumors, decided to create a blog specifically to address and either verify or debunk the rumors.<sup>183</sup> The effect of rumors and misinformation are accentuated when distributed through social media because of the speed and breadth of their distribution.<sup>184</sup> For example, in the late summer of 2011 when Hurricane Irene was heading toward New York City, a picture entitled "Hurricane Irene approaching North Carolina"<sup>185</sup> spread around the Internet and was viewed 270,000 times.<sup>186</sup> However, not only was the picture not taken in North Carolina—it was taken in Pensacola, Florida weeks before Irene—but it wasn't even a picture of Hurricane Irene.<sup>187</sup> Social media is a powerful tool, and the speed and breadth with which material can be distributed makes it difficult to separate fact from fiction.<sup>188</sup>

### C. Disconnect #3: Vetting out the Trustworthy from Untrustworthy Sources

A third disconnect between the Marketplace theory and social media use in the context of an emergency or crisis is the reality that the anonymity of the Internet and the lack of time and resources available prevent one from properly distinguishing trustworthy sources from the untrustworthy. Traditional mass media entities or governmental organizations act as gatekeepers to the content and quality of the information they promulgate,<sup>189</sup> and users likely have developed preconceived notions of the trustworthiness (or lack thereof) of each entity based on past experience with that entity. Unlike these traditional mass media entities, social media relies on the individual user to independently vet sources' trustworthiness. Further complicating this relationship is the fact that during an emergency or crisis, those who turn to social media for opinions and advice are likely to collect information from a host of sources which they have never previously relied on. Because of the

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181. *Id.*

182. See Jason Morton, *Rumors Hamper Rescue Efforts*, TUSCALOOSA NEWS (May 3, 2011, 3:30 AM), <http://www.tuscaloosaneews.com/article/20110503/NEWS/110509917>; Myers, *supra* note 178.

183. See *Storm Rumor Blog*, TUSCALOOSA NEWS, <http://stormrumors.blogs.tuscaloosaneews.com/?tc=ar> (last visited Mar. 28, 2012).

184. See Myers, *supra* note 178.

185. *Hurricane Irene Approaching North Carolina*, TWITPIC, <http://twitpic.com/6caimh> (last visited Mar. 28, 2012).

186. Nick Bilton, *Twitter Becomes a Playground During Hurricane Irene*, N.Y. TIMES (Aug. 28, 2011, 1:36 PM), <http://bits.blogs.nytimes.com/2011/08/28/twitter-becomes-adult-playground-during-hurricane-irene/?pagewanted=all>.

187. *Id.*

188. *Id.*

189. See Balkin, *supra* note 14, at 9.

anonymity of the Internet, they cannot necessarily verify their authenticity.<sup>190</sup>

Admittedly, the context is not exactly the same, but like social media users, news reporters that rely on social media posts must make determinations on the credibility and trustworthiness of a source.<sup>191</sup> Even news organizations have been fooled into reporting news stories based on a false social media source,<sup>192</sup> but there are a few factors that these reporters regularly consider in order to avoid such mistakes. One factor is the social history of the poster and whether the profile posting the information is brand new or has a history of activity.<sup>193</sup> The more developed the profile, the more likely the post is to be authentic.<sup>194</sup> Examining this factor alone is insufficient because a significant amount of social media misinformation arises from sources who are not liars, but are merely mistaken or themselves misinformed.<sup>195</sup> Another factor to consider is whether or not the person posting the information is in a position to know what she claims to know.<sup>196</sup> However, determination of this factor often requires an opportunity to question the poster as to exactly what she saw and what assumptions she is making.<sup>197</sup> During an emergency or crisis, it seems unlikely that a social media user will have time to individually question the poster and discover the context in which the post was made. One final factor for reporters to consider is whether any corroborating sources exist, either from other social media users or from official sources such as the police or the CDC.<sup>198</sup> Yet again, this process requires a social media user to invest time that may not be available during an emergency in order to determine the trustworthiness of the source.

For all of these factors that reporters must consider when determining the trustworthiness of the source, it is important to recognize that reporters are trained to vet trustworthy from untrustworthy sources. It seems a safe assumption that the general public who relies on social media during an emergency 1) has not received the specialized training and knowledge a reporter receives and 2) is not vetting sources of information on a regular basis, or at least is not as experienced as a reporter is at doing so.

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190. Steiner, *supra* note 26.

191. See Jeff Sonderman, *How to Verify—and When to Publish—News Accounts Posted on Social Media*, POYNTER (July 08, 2011, 12:34 PM), <http://www.poynter.org/how-tos/news-gathering-storytelling/138495/how-to-verify-and-when-to-publish-news-accounts-posted-on-social-media/>.

192. See Myers, *supra* note 178 (discussing how journalists have been tricked by misinformation promulgated via social media).

193. See Sonderman, *supra* note 191.

194. *Id.*

195. *Id.* (“Much social media misinformation comes from sources who are mistaken, not outright liars.”).

196. *Id.*

197. *Id.*

198. *Id.*

A prime example of the disconnect due to unreliability is the reliance on and unreliability of Yahoo! Answers.<sup>199</sup> In a comparative study across reference sites, Yahoo! Answers is among the most frequently consulted reference sites, but it is also one of the most inaccurate.<sup>200</sup> Part of its inaccuracy is due to the limited ability to verify the information posted.<sup>201</sup> The inability to verify posts on Yahoo! Answers may be explained by the absence of a linked profile to the main Yahoo! parent site.<sup>202</sup> As described above, the more developed the profile, the more generally trustworthy the source and the information. By not linking profiles to the parent site, a Yahoo! Answers profile is likely less developed and less verifiable. As evidenced by the study's determination that Yahoo! Answers has the least accurate information,<sup>203</sup> profile verifiability plays a significant role in the ability to both verify correct information and discredit information that is false. Yahoo! Answers focuses more on quantity of answers rather than on quality.<sup>204</sup> In a traditional Marketplace model, where time is not constrained and over time the best ideas will surface,<sup>205</sup> this abundance of unverifiable information would not be as problematic. But when applied to an emergency or crisis, the disconnect of trustworthiness is amplified. Trust issues, which arise in the context of the use of social media during emergencies and crises,<sup>206</sup> were either not contemplated by the Marketplace theory or would normally be resolved through competition of ideas over time in the Marketplace. The trust issues inherent in anonymous online postings are further compounded by an overall heightened need for trust in the context of emergency management or situations involving the health of the individual seeking advice.<sup>207</sup>

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199. See Jacob Leibenluft, *A Librarian's Worst Nightmare: Yahoo! Answers, Where 120 Million Users Can Be Wrong*, SLATE (Dec. 7, 2007, 4:30 PM), [http://www.slate.com/articles/technology/technology/2007/12/a\\_librarians\\_worst\\_nightmare.single.html](http://www.slate.com/articles/technology/technology/2007/12/a_librarians_worst_nightmare.single.html).

200. See Pnina Fichman, *A Comparative Assessment of Answer Quality on Four Question Answering Sites*, 37 J. INFO. SCI. 476, 476–77, 482 (2011) (comparing the sites Askville, Yahoo! Answers, Wikipedia, and WikiAnswers).

201. *Id.* at 477.

202. *Id.* at 483.

203. *Id.* at 477, 482.

204. See Leibenluft, *supra* note 199.

205. See *supra* Part I.A.

206. See A. Geissbuhler et al., *Confluence of Disciplines in Disciplines in Health Informatics: An International Perspective*, 50 METHODS OF INFO. MED. 545, 548 (2011) (discussing peer review and crowd sourced peer voting as potential solutions to the issue of reliability of information on social media networks).

207. See Glass & Schoch-Spana, *supra* note 169, at 221; see also Brittany A. Hackworth & Michelle B. Kunz, *Health Care and Social Media: Building Relationships via Social Networks*, 6 ACAD. HEALTH CARE MGMT. J. 55, 55–56 (2010) (discussing the need for trust in a provider-patient relationship which involves the health and well-being of the patient).

#### IV. A MIDDLE GROUND?: SELF-REGULATION MAY SAVE THE MARKETPLACE OF IDEAS DURING EMERGENCIES AND PUBLIC HEALTH CRISES

A decentralized, open access Marketplace is preferred under our First Amendment right to freedom of speech and expression,<sup>208</sup> but there are clearly prohibitive disconnects between the Marketplace theory and social media use during an emergency or crisis.<sup>209</sup> Given the three disconnects discussed in Part III of this Note, Marketplace theorists' proposition that the Marketplace breaks down in such a situation may have some merit.<sup>210</sup> However, it is also possible that the Marketplace theory can overcome these disconnects by adapting to the unique context of emergencies by applying a theory—similar to Balkin's—of freedom of speech as a regulative ideal based on the idea of a democratic culture.<sup>211</sup> First, I will explain my theory that when utilized for emergency situations or crises, social media constitutes its own mini-marketplace (such as those articulated by Justices Rehnquist and Brennan),<sup>212</sup> and that in this context, social media is subject to its own unique regulatory scheme, in which there exists self-regulation of user-posted content. Second, I will examine select case studies, the principal being the 2007 shooting at Virginia Tech,<sup>213</sup> where social media was used as a resource during a crisis. These case studies demonstrate that self-regulation of posted content may help mitigate the extent of the disconnects we would typically expect to see with a Marketplace model in the context of an emergency.

##### *A. Dispelling the Disconnects: How an Adaptive Self-Regulatory Marketplace Can Help Mitigate the Effects of Marketplace Disconnects*

While it is clear that a traditional Marketplace model breaks down when applied to the unique context of the use of social media during emergencies and crises,<sup>214</sup> the possibility of an adaptive self-regulatory Marketplace may salvage the Marketplace theory in this context. The adaptive self-regulatory

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208. Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1620 (1995).

209. See *supra* Part III.

210. See *supra* Part I.C.

211. See *supra* Part I.D.

212. See *supra* Part I.E.

213. See Sarah Vieweg et al., *Collective Intelligence in Disaster: Examination of the Phenomenon in the Aftermath of the 2007 Virginia Tech Shooting*, in PROCEEDINGS OF THE 5TH INTERNATIONAL ISCRAM CONFERENCE (2008), available at <http://www.jeanettesutton.com/uploads/CollectiveIntelligenceISCRAM08.pdf>; see also Leysia Palen et al., *Crisis in a Networked World: Features of Computer-Mediated Communication in the April 16, 2007, Virginia Tech Event*, 27 SOC. SCI. COMPUTER REV. 467 (2009).

214. See *supra* Part III.

Marketplace theory first relies on the opinions of Justices Rehnquist and Brennan, which imply the existence of mini-marketplaces of ideas.<sup>215</sup> While neither justice may have conceived of social media as a mini-marketplace, it is consistent with their articulated theories that such a Marketplace could exist.<sup>216</sup> For this Note, I propose more specifically that social media used during an emergency or crisis operates as its own mini-marketplace. As such, social media in this context will have “its own dynamics, parameters, regulatory scheme, and audience.”<sup>217</sup>

This Note proposes that the appropriate regulatory scheme for social media used in this context is a self-regulatory scheme. As discussed in Part II, social media embraces many of the elements of a traditional Marketplace, because the Internet and social media encourage the competition of ideas, accept the public at large as the best provider of ideas, and champion contradictory points of view as valuable to the search for truth. However, as discussed in Part III of this Note, social media, when utilized in the context of an emergency or crisis, experiences some major disconnects from the traditional Marketplace theory. Thus, there is a need for an appropriate regulatory scheme in this context.

In order to preserve as many of the elements of the traditional Marketplace theory embodied by social media as possible, this Note proposes a self-regulatory scheme for social media used during an emergency or crisis. The theory assumes that most individuals will self-regulate the content they post. The assumption that users will self-regulate before they post does not seem much more realistic than the assumption of the traditional Marketplace theory that all participants are thinking rationally to arrive at the truth or best answer. However, the assumption that individuals will self-regulate is more likely to be true because this assumption will be made in the context of the mini-marketplace in which information on a particular crisis is to be discussed. Individuals providing and seeking information on that particular crisis are more likely to be both interested in and knowledgeable about the subject matter. Because the theory relies on an interested and engaged subset of the public at large, it also seems more likely that those individuals will self-regulate their own postings in order to engage in rational discussion and debate on a topic of interest and importance to them. This Note recognizes that self-regulation is not a perfect solution and it will not completely eliminate the disconnects discussed in Part III, but it may help mitigate their effects.

Self-regulation may help mitigate or eliminate the three disconnects that otherwise would materialize in the Marketplace: 1) lack of time, 2) false and

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215. See *supra* Part I.E.

216. See *supra* Part I.E. (according to Rehnquist and Brennan’s theory, these social media mini-marketplaces would permit unique regulatory structures, here self-regulation by the posters).

217. See Hopkins, *supra* note 16, at 48.

counterproductive information, and 3) distinguishing trustworthy from untrustworthy sources. In an emergency situation where time is of the essence, social media can be very useful because content can be posted and viewed almost instantaneously. Time becomes a troublesome issue when too much content is posted in a short period of time, rendering it too costly to sort and filter through in order to determine which is the best. Self-regulation of user-posted content can help mitigate the negative effects of lack of time. If, for example, social media users repost content they believe to be true and important during the emergency, the volume of content may actually help dispel the disconnect of time.<sup>218</sup> This is because an increase in the volume of content—pre-determined by the reposters to be of value—subsequently increases the likelihood that social media users looking for valuable information will more quickly and easily find the best information, due to the frequency at which it will appear on the social media website. This assumes that reposters will self-regulate their repostings by limiting content to that which they know or strongly suspect to be true and useful to others during the emergency. Reposting information the social media user perceives to be false or unreliable only adds unnecessary clutter to a situation where time to sift through the unnecessary information is not available.

Depending on the situation, this self-regulation of repostings to help mitigate the disconnect with time could take many forms. For one, citation to the original poster as the source of the reposted content will save time for the person reviewing information gathered from social media that views the repost. Depending on the gravity of the situation, perhaps it would be appropriate for the second poster to only repost content that she herself is able to verify, thus eliminating the need to vet the original source. Assuming a self-regulatory scheme appropriate for the situation, the more frequent the reposting by social media users, the more likely it will be that those users looking for the information will find it in a timely fashion. The disconnect of time in regards to emergency situations can never be eliminated, regardless of the degree of regulation imposed, but instant access to social media postings that have been self-regulated, preselected, and prescreened by the reposters may help mitigate this disconnect with the Marketplace.

Self-regulation may also help mitigate the disconnects of false or counterproductive information and the vetting of the trustworthiness of sources.

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218. See Katie Starbird & Leysia Palen, *Pass it on?: Retweeting in Mass Emergency*, in PROCEEDINGS OF THE 7TH ANNUAL ISCRAM CONFERENCE 9 (2010), available at [fsb.cvm.msu.edu/documents/starbirdpalenisgramretweet.pdf](http://fsb.cvm.msu.edu/documents/starbirdpalenisgramretweet.pdf). Reposting content is a process used on social networking sites in order to share another social media user's content via posting the copied information to your account so that everyone in your social network can also view the content. Thus, the message's range is expanded because it reaches both the original poster's social media network, as well as everyone else in the second poster's social media network. Tweets are short posts of under 140 characters on the website Twitter and retweeting is the process of reposting another user's tweets to share with all of the second tweeter's friends. *Id.*

If social media follows Rehnquist and Brennan's mini-marketplace,<sup>219</sup> access to such a marketplace "is likely to be easier, the audience is likely to have more common ground, and there is greater likelihood of some resulting resolution."<sup>220</sup> While it is beyond the scope of this Note to study the posting mentality of social media users, it seems likely that the common mentality shared by the audience in this mini-marketplace would lead posters to recognize the gravity of the situation during a particular emergency. Therefore, based on the seriousness of the situation, the users would seemingly be more inclined to self-regulate their posts and refrain from intentionally posting false or counterproductive information that did not come from respectable authority. Self-regulation cannot eliminate the possibility of the spread of—and reliance on—false or counterproductive information, but the combination of self-regulation with the application of the mini-marketplace theory has the potential to mitigate the disconnect. As explained above with regards to the time disconnect, verification of posts or reposts perceived to be truthful and useful will also help mitigate the possibility that misinformation will be relied on too heavily and for too long. While there isn't time to properly vet the trustworthy from untrustworthy sources, self-regulating social media posters who cite the source of their information or who repost information from other posters that is perceived to be useful can also help mitigate the extent of the disconnect. While certainly not a perfect solution to the elimination of the disconnects between the Marketplace and social media, self-regulation offers the potential to mitigate some of the negative consequences of these disconnects during emergencies or crises.

### B. Case Studies: Examples of Self-Regulation in the Social Media Emergency Marketplace

Having established a theory by which the Marketplace can potentially be salvaged from the various underlying disconnects that threaten it, this Note will now look at some select case studies of social media's use during an emergency or crisis. The first and primary case study this Note will analyze is the shooting at Virginia Polytechnic Institute and State University (Virginia Tech) on April 16, 2007.<sup>221</sup> It should be noted at the outset that the use of social media in this study took place after the actual shooting occurred,<sup>222</sup> in Facebook groups dedicated to determining the identity of the

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219. See *supra* Part I.E.

220. See Hopkins, *supra* note 16, at 48.

221. See Maria Newman & Christine Hauser, *Panel on Virginia Tech Shooting Issues Report*, N.Y. TIMES (Aug. 22, 2007), <http://www.nytimes.com/2007/08/22/us/22end-virginia.html> (describing the events of the 2007 Virginia Tech shooting in which 32 people—not including the gunman, student Seung-Hui Cho, who committed suicide—were shot and killed in two separate shootings: one in a dorm room around 7:00 AM and the second in a classroom from 9:30–9:50 AM).

222. Vieweg et al., *supra* note 213, at 2, 4. If we define the actual emergency as constrained to the time between when the shootings began and when they ended, then these social

victims of the shooting.<sup>223</sup> Numerous Facebook groups were able to collectively identify thirty-two victims, hours before the University released the official list.<sup>224</sup> However, no Facebook group's list contained an exhaustive list of all of the victims.<sup>225</sup>

Participation in these Facebook groups fits the description of the mini-marketplaces articulated by Rehnquist and Brennan.<sup>226</sup> While participation in these specific Facebook groups was open to the public, in reality, social media users self-selected whether to participate in the groups based on their interest level in the topic, and thus, participation was not universal. As a result, the audience involved in the Virginia Tech postings appeared to be genuinely interested and knowledgeable about the events of the shooting.

A mini-marketplace will have its own regulatory scheme that allows the Marketplace theory to adapt to the unique circumstances of the crisis without disturbing its underlying assumptions. For this particular crisis, self-regulation is the regulatory scheme employed. Posters who contributed to the verification of victims' identities self-regulated by refraining from posting names of the victims until they had a reliable source—this helped maintain order in the Facebook groups.<sup>227</sup> In many instances where a poster listed the name of an individual believed to be deceased, the poster provided the relationship to the deceased or described the individual circumstances which positioned the poster with access to privileged information. Examples include writing that the deceased was an Air Force buddy or fellow sorority sister, or noting that the poster had just finished speaking with the deceased's girlfriend.<sup>228</sup> When individuals did not post their source or position to obtain the privileged information, the poster would often be asked by others on the message board to provide sources for this knowledge.<sup>229</sup> There are also documented instances where a poster placed a question mark by the name of a suspected deceased, indicating that there was no confirmation that

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media postings technically did not take place in the context of an emergency. It is also possible that these results were unique because of the short duration of the emergency and the relatively localized places, points in time, and people involved in the emergency situation. The use of social media during a large-scale natural disaster or act of terrorism might not have the coherence and efficacy experienced during the Virginia Tech incident.

223. *Id.* at 2.

224. *Id.* at 2, 4. Virginia Tech confirmed that thirty-two were dead at 2:13 PM on the 16th, but they did not release any names at that time. Documented Facebook postings in Facebook groups dedicated to determining who was confirmed dead began around 9:30 PM on the 16th and continued until the University released the names of the deceased on the 17th at 9:17 PM.

225. *Id.*

226. *See supra* Part I.E.

227. *See* Vieweg et al., *supra* note 213, at 3 (“Participants in the list-building activities self-policed, and they knew that adding a name to the list was a serious statement. Accuracy, verification, and gravitas ruled the interaction on these focal point sites.”).

228. *Id.* at 5.

229. *Id.*



this individual was among the casualties.<sup>230</sup> Additionally, there are documented instances of a poster deleting the name of a suspected victim when that victim's death could not be confirmed.<sup>231</sup> A number of posters also compiled and updated lists of names that were confirmed or strongly believed to be true.<sup>232</sup> This list-building and compilation of posts enabled new participants in the discussion to be updated quickly without having to spend a significant amount of time re-reading older posts.

These displays of self-regulation may explain why many of the disconnects between traditional Marketplace theory and its application to social media use during an emergency or crisis did not manifest in this situation. Regarding the time constraint, the list of names compiled on the Facebook groups was more timely and more accurate than the information being reported by traditional news media sources.<sup>233</sup> In addition, the compilation of posts and list-building provided a very efficient and reliable method to update information seekers on the current state of the crisis. Even still, the inability of a single Facebook group to develop an exhaustive list of the names of all thirty-two victims is evidence of the Marketplace's inability to completely self-correct in a short period of time.

However, the second disconnect concerning the promulgation of false or misleading information did not manifest here. In one recorded instance when a victim could not be verified at the time, the post was quickly deleted and the victim was not added to the running list of names.<sup>234</sup> As posited in Part IV.A of this Note, it seems likely that the social media posters recognized the gravity of the situation and quickly corrected any known errors in order to limit the spread of misinformation. Likewise, the problems related to the vetting of sources did not manifest, because the individuals posting the names of the victims would almost always cite the source from which they discovered the identity of the victim.<sup>235</sup> Here, too, it seems likely that the posters recognized the gravity of the situation and the need to have some reliable authority before posting the victim's name. Posters' self-regulation combined with citation to reliable sources greatly advanced the ability of social media users to quickly and effectively vet the trustworthiness of the posts. The result of such self-regulation is that social media has demonstrated its ability to outpace traditional news media sources both in accuracy and timeliness during an emergency using a Marketplace model, even given the expected disconnects. By recognizing the discussion of the crisis as a mini-marketplace subject to its own self-regulatory scheme, and given the self-selection of the audience to those genuinely interested participants, the

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230. *Id.* at 8.

231. *Id.* at 7.

232. *Id.* at 8.

233. *Id.* at 9.

234. *Id.* at 7.

235. *Id.* at 6–7.

Marketplace theory is able to slightly adapt and flourish in the context of social media.

The second case study this Note will examine involves the use of Twitter during concurring natural disasters in the spring of 2009—the Red River that flooded the Red River Valley and the grassfires that swept across the Oklahoma plains.<sup>236</sup> This case study looked particularly at a number of retweets or repostings in connection with either of these two disasters.<sup>237</sup> The study found that during the time period of the emergency, retweets from locals were more likely to be about the emergency than original tweets.<sup>238</sup> Thus, the authors of the study concluded that the examination of retweets during emergencies is an effective way to gauge what information and opinions individuals at the site of the emergency deem to be most important, useful, and recommended.<sup>239</sup>

This observation regarding retweets supports this Note's hypothesis that self-regulation of postings has the potential to mitigate the typical disconnects we would expect to see in the Marketplace. By retweeting information deemed important and useful, Twitter users during these two concurrent emergencies demonstrated the ability to self-regulate their postings. In doing so, the posters helped mitigate the disconnect of time by pointing users looking for information to the tweets deemed most useful—those that had been retweeted the most. Likewise, retweeting helped mitigate the third disconnect of vetting sources by attributing authorship of the original tweet to the original source in the retweet.<sup>240</sup> The study of twitter messages relating to the Red River flooding and Oklahoma Plains grassfires is another example demonstrating the possibility that self-regulation of user posting can be used to mitigate the disconnects one would expect to find in the Marketplace.

## CONCLUSION

The Marketplace of Ideas theory, based on unregulated freedom of speech that encourages as many diverse viewpoints as possible, may be most purely manifested through social media. Social media has significantly lowered the barriers to entry into the Marketplace. However, it is clear that the underlying assumptions of the Marketplace theory are exposed when applied to emergency situations, and the Marketplace is in danger of collapsing under these circumstances. The possibility of regulation, as opposed to suppression, allows the Marketplace theory to survive and adapt to the

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236. See Starbird & Paylen, *supra* note 218, at 3.

237. See Starbird & Paylen, *supra* note 218 and accompanying text.

238. *Id.* at 5.

239. *Id.* at 9.

240. *Id.* at 5 (“Our research suggests that retweets act as an informal recommendation system for both the information and the original author.”).

unique environment of an emergency. As exemplified best by the Virginia Tech case study, the Marketplace theory may effectively apply to the use of social media during an emergency or public health crisis. However, it is equally likely that this application of the Marketplace theory was only possible due to the regulatory measures that social media users self-imposed. There is no guarantee that the disconnects between the Marketplace and social media used during an emergency or crisis can be completely resolved, but an adaptive, self-regulating Marketplace has proven that it can survive.