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AMERICAN STAR CHAMBER: ONLINE MISINFORMATION, GOVERNMENT INTERVENTION, AND THE INTELLECTUAL MATRIX OF THE FIRST AMENDMENT

Emily E. Burton *

“This is true Liberty, when free-born men, [h]aving to advise the public, may speak free What can be juster in a State than this?”¹ In his 1644 pamphlet *Areopagitica*, Milton traces the history of governance to the Athenian Areopagus and argues that censorship has never been in the best interest of any polity.² He continues, “When complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained, that wise men look for.”³

Freedom of speech is a bedrock principle of not only American law, but of American identity. As evident from Milton’s words, the ability to speak freely in the public sphere was an essential principle of the English Enlightenment, and that principle was adopted and carried forward by the American founders, who enshrined the citizens’ freedom of speech by giving it a preeminent place in the Bill of Rights. Freedom from proscribed speech and even freedom from a prescription of “what shall be orthodox in politics, nationalism, religion, or other matters of opinion” is the “fixed star in our constitutional constellation.”⁴ Throughout the twentieth century, the Supreme Court repeatedly upheld the

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¹ JOHN MILTON, *AREOPAGITICA* (1644), reprinted in JOHN MILTON: *AREOPAGITICA AND OTHER WRITINGS* 98, 98 (William Poole, ed., 2014) (quoting Euripides).

² *Id.* at 100–11.

³ *Id.* at 99.

⁴ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

breadth of the First Amendment, particularly in cases involving the promulgation of unpopular opinions and viewpoints,⁵ even confirming the protection of ideas that are deeply offensive and shocking.⁶

From John Milton and John Locke in the seventeenth century,⁷ philosopher John Stuart Mill in the eighteenth century,⁸ and Oliver Wendell Holmes and other justices in the twentieth century,⁹ the philosophy of free speech has never been predicated on the premise that all viewpoints are morally acceptable, informed, or correct. Some protected speech may be ignorant, offensive, and subversive. The First Amendment is based on the wisdom that underlies civil liberty¹⁰ and a recognition that “[r]estriction of free thought and free speech is the *most* dangerous of all subversions. It is the one un-American act that could most easily defeat us.”¹¹ Although some opinions and viewpoints are unpopular for a reason, the protection of speech is a necessary protection against a greater evil: government stifling of truth and dissent. In the words of constitutional scholar and president of Columbia Law School Lee C. Bollinger, “when the sovereignty resides in the citizenry, then there can be no place for the State to tell the people what they can and cannot say or hear.”¹²

Just as monarchs and clerical authorities struggled to respond to seditious and heretical writings enabled by the invention of the printing press, twenty-first century governments are experiencing a similar information revolution as a result of the digital age and a rising tide of what the United States has labeled online misinformation.¹³ Like the printing press, the Internet has enabled the

⁵ See generally, e.g., *West Virginia State Bd. of Educ.*, 319 U.S. at 642 (1943) (protecting the right of schoolchildren to refuse to salute the flag); see *Cohen v. California*, 403 U.S. 15, 16 (1971) (protecting the right of a young man to wear a jacket with an explicit anti-Vietnam War message into a courthouse); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (protecting the right to burn the American flag out of protest).

⁶ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 446–47, 449 (1969) (protecting the right of members of the KKK to advocate “revengeance”); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (protecting the right to intimidating, racially disparaging speech).

⁷ See *infra* Part I.

⁸ See generally JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in *ON LIBERTY AND OTHER WRITINGS* 5 (Stefan Collini, ed., Cambridge Univ. Press 2018).

⁹ Thomas Healy, *The Unlikely Birth of Free Speech*, N.Y. TIMES (Nov. 9, 2019), <https://www.nytimes.com/2019/11/09/opinion/free-speech-holmes-supreme-court.html>.

¹⁰ MILTON, *supra* note 1.

¹¹ William O. Douglas, *The One Un-American Act*, (Dec. 3, 1951), https://niemanreports.org/wp-content/uploads/2014/03/Spring-1953_150.pdf (emphasis added).

¹² *Id.*

¹³ See Kristina Hook & Ernesto Verdeja, *Social Media Misinformation and the Prevention of Political Instability and Mass Atrocities*, STIMSON (July 7, 2022), <https://www.stimson.org/2022/social-media-misinformation-and-the-prevention-of-political-instability-and-mass-atrocities/>; see also Richard Wike et al., *Social Media Seen as Mostly*

spread of information at an exponentially lower cost and an exponentially higher speed as it extends the ability to publish thoughts and opinions to an increasingly diverse array of individuals. Although this was largely celebrated during the first two decades of the twenty-first century,¹⁴ the 2020s have been defined by growing concern about the quality of information that is spreading on the Internet, and the potential political, social, and health ramifications of a decentralized, unvetted wildfire of divergent ideas.¹⁵ Concerns about online misinformation have been growing since the late 2010s, but these concerns were thrust into the spotlight of United States policy by the sudden onset of the novel COVID-19 pandemic in early 2020. This paper explores the question of whether the American notion of free speech can survive the digital age, and an even greater question—whether it should.

Part I discusses the genesis of the First Amendment and the centuries-long battle over speech that followed the invention of the printing press, a history that has been described as the “intellectual matrix” that underpins the Bill of Rights.¹⁶ Part II explores the scope and limitations of the First Amendment and outlines the constitutional and statutory landscape of online communication platforms. Part III describes contemporary federal efforts to categorize and combat online misinformation and demonstrates how government overreaction to misinformation can undermine civil society and institutional trust. Finally, Part IV argues that federal strategies to combat the spread of online misinformation during the early 2020s are inconsistent with the First Amendment and Enlightenment principles of free speech.

I. THE “INTELLECTUAL MATRIX” OF THE FIRST AMENDMENT

To understand the scope and purpose of the First Amendment, the legal history of American free speech is best traced to the invention of the printing press and the reactionary laws of England that characterized the subsequent three centuries. The Supreme Court frequently invokes this foundational era of history

Good for Democracy Across Many Nations, but U.S. Is a Major Outlier, PEW RSCH. CTR. (Dec. 6, 2022), <https://www.pewresearch.org/global/2022/12/06/social-media-seen-as-mostly-good-for-democracy-across-many-nations-but-u-s-is-a-major-outlier/>.

¹⁴ See, e.g., Heather Brown et al., *The Role of Social Media in the Arab Uprisings*, PEW RSCH. CTR. (Nov. 28, 2012), <https://www.pewresearch.org/journalism/2012/11/28/role-social-media-arab-uprisings/>.

¹⁵ See, e.g., Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RSCH. CTR. (Oct. 19, 2017), <https://www.pewresearch.org/internet/2017/10/19/the-future-of-truth-and-misinformation-online/>; Steven Vosloo, *Digital Misinformation / Disinformation and Children: 10 Things You Need to Know*, UNICEF (Aug. 24, 2021), <https://www.unicef.org/globalinsight/stories/digital-misinformation-disinformation-and-children>.

¹⁶ See *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

in its analysis of how the Bill of Rights is to be interpreted:

The story of that struggle has been fully chronicled in the pages of this Court's reports, and it would be a needless exercise in pedantry to review again the detailed history of the use of general warrants as instruments of oppression from the time of the Tudors, through the Star Chamber, the Long Parliament, the Restoration, and beyond. What is significant to note is that this history is largely a history of conflict between the Crown and the press.¹⁷

Referring to the special significance of the Star Chamber to the interpretation of the Bill of Rights, Justice Frankfurter observed that “[o]ur forefathers . . . had in mind a lot of history which has been largely forgotten to-day.”¹⁸ This forgotten history is directly relevant to the contemporary debate about online misinformation, and therefore, its review is no longer a needless exercise.

A. The English Star Chamber

During the sixteenth and seventeenth centuries, England grappled with political fallout from the invention of the printing press. In 1436, German goldsmith Johannes Gutenberg combined components from a wine press, calf-skin parchment, and a thick oil-based ink to create the first printing press.¹⁹ The new technology replaced a system of centralized libraries controlled by monarchies and clergy, wherein all literature had to be meticulously hand-copied.²⁰ Thus, much like the Internet, the printing press enabled information to spread at a lower cost and a higher speed. The ensuing print information age rapidly democratized knowledge, increased literacy rates, and is directly credited with widespread religious, political, and social upheaval across Europe and the world.²¹

The English Star Chamber was organized in 1487 by King Henry VII and was comprised of a small collection of advisors, bishops, or judges appointed by the monarch.²² The body derived its name from a design of stars painted on the ceiling of its Westminster Palace meeting room, a common medieval décor of

¹⁷ *Stanford v. Texas*, 379 U.S. 476, 482 (1965).

¹⁸ *Ullmann v. United States*, 350 U.S. 422, 427 (1956) (quoting C.J. Magruder).

¹⁹ Hellmut E. Lehmann-Haupt, *Johannes Gutenberg*, BRITANNICA, <https://www.britannica.com/biography/Johannes-Gutenberg> (Mar. 11, 2024).

²⁰ *Medieval Book Production and Monastic Life*, DARTMOUTH ANCIENT BOOKS LAB (May 24, 2016), <https://sites.dartmouth.edu/ancientbooks/2016/05/24/medieval-book-production-and-monastic-life/>.

²¹ Dave Roos, *7 Ways the Printing Press Changed the World*, HISTORY, <https://www.history.com/news/printing-press-renaissance> (Mar. 27, 2023).

²² Martin Gruberg, *Star Chamber*, FREE SPEECH CTR., <https://www.mtsu.edu/first-amendment/article/820/star-chamber> (Feb. 18, 2024).

the time period.²³ Considered to be an extension of the court of equity, the Chamber purportedly began as an attempt to avoid corruption and expedite the legal process.²⁴ However, the Star Chamber quickly became associated with forced confessions, arbitrary application of authority, and punishments such as steep fines, prison, whipping, pillory, and mutilation.²⁵ By the reign of Charles I, the Star Chamber was used as a political enforcement arm against political opposition, religious minorities, and any perceived breach of peace.²⁶ As a result, despite the Star Chamber's wide jurisdiction, the phrase has become notoriously associated with an unchecked, arbitrary exercise of bureaucratic authority and the witch hunt of unorthodox ideas and divisive speech.²⁷

As one scholar explains, "The Star Chamber was an administrative body whose main function was to keep public order in a troubled age. Abuses of speech and press were thought to be major sources of mischief."²⁸ In other words, the Star Chamber was tasked with identifying, patrolling, and punishing what was considered to be misinformation in the era following the advent of the printing press. It did so through multiple legal avenues. First, the Chamber exercised the existing parliamentary privilege against breaches of peace.²⁹ Second, it controlled the use of the printing press by attempting to maintain full monarchical control of all presses, eventually by awarding a print monopoly to the Stationers' Company,³⁰ and ultimately through the Licensure Act.³¹ Third, it created libel as a cause of action, for which truth was no defense, and was even considered to be an aggravating factor.³²

By 1641, the Star Chamber was unpopular and politically tied to Charles I and thus abolished by the Long Parliament following his ouster.³³ However, the functions the Star Chamber had performed regarding speech were still considered to be politically valuable, and Parliament retained the Licensure Act and a statutory system of censorship throughout the subsequent English Civil War and Restoration.³⁴ The Licensure Act was finally allowed to expire in

²³ *Legal History: England & Common Law Tradition: Star Chamber*, BODLEIAN LIBRS. AT UNIV. OF OXFORD, <https://libguides.bodleian.ox.ac.uk/law-histcom/starch> (Jan. 3, 2024).

²⁴ Gruberg, *supra* note 22.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Mark P. Denbeaux, *The First Word of the First Amendment*, 80 Nw. U. L. REV. 1156, 1181 (1986).

²⁹ See generally David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 431–39 (1983).

³⁰ Michael Robertson, *The Worshipful Company of Stationers and Its Archives*, 5 LEARNED PUBLISHING 81 (1992).

³¹ Denbeaux, *supra* note 28, at 1188–89.

³² *Id.* at 1183–84.

³³ *Id.* at 1185.

³⁴ *Id.* at 1189.

1694.³⁵ After its expiration, abuses of speech and press were primarily moderated by the common law courts through the adjudication of slander and libel.³⁶

Justice Brennan highlighted the significance of the Star Chamber's licensure regime, remarking, "This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against [that] background of knowledge."³⁷ The Court concluded that the First, Fourth, and Fifth Amendments are closely related in purpose and should be interpreted against the background of the Star Chamber era's enforcement against speech and press.³⁸

B. Free Speech and the English Enlightenment

The political whiplash experienced by English subjects during the seventeenth century significantly impacted the generation that grew up against its volatile backdrop, including the English philosopher John Locke. Locke was ten years old when civil war broke out between supporters of Charles I and parliamentary forces in 1642 and was attending the Westminster School less than a mile away when Charles I was beheaded three years later.³⁹ At Westminster and later at Oxford, Locke was educated by both royalists and republicans, studied science and medicine, and discovered the words of early Enlightenment writers.⁴⁰ When the monarchy was restored in 1660, Locke witnessed the ensuing rapid social change, ideological intemperance, and political tension at Oxford.⁴¹ Inspired by what he saw, Locke began writing about the nature of government, civil stability, ideological toleration, and human nature, and he expounded on these themes for the remaining four decades of his life.⁴²

Locke's own life was characterized by rapid swings between political favor and disfavor, depending on which group held power. He spent much of his adult life as a political exile in France and then Holland, until he accompanied the Princess of Orange back across the English Channel in 1689 after the Glorious

³⁵ *Id.* at 1184.

³⁶ *Id.* at 1181.

³⁷ *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

³⁸ *Id.* at 238–39.

³⁹ Graham A.J. Rogers, *John Locke*, BRITANNICA, <https://www.britannica.com/biography/John-Locke> (Apr. 19, 2024).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

Revolution led to the ouster of James II.⁴³ Upon his return to England, Locke accomplished what Milton had failed to do fifty years earlier with *Areopagitica*: he successfully lobbied for the expiration of the Licensing Act.⁴⁴ His success in overturning the long-standing licensing regime—one of the few constants of the era—is largely credited to the fact that he made an economic argument rather than a free speech one: the Stationer’s Company kept book prices high and quality low.⁴⁵ Yet his underlying problem with licensure is evident by his criticism of the Act:

I know not why a man should not have liberty to print whatever he would speak . . . gagging a man, for fear he should talk heresy or sedition, has no other ground than such as will make chains necessary, for fear a man should use violence if his hands were free . . . must at last end in the imprisonment of all who you will suspect may be guilty of treason or misdemeanor.⁴⁶

Locke witnessed and experienced the effects of ideological whiplash within a system that used executive prerogative and parliamentary privilege to patrol, censor, and punish dissident political and religious beliefs on a large scale.⁴⁷ Consequently, the themes of individual rights, free exchange of ideas, and ideological toleration are found throughout his treatises on government.⁴⁸

C. The American Revolution and the Founding Generation

As one scholar has summarized, “The American mind of 1776 was saturated with John Locke.”⁴⁹ Locke’s “justification of revolt, based on his theory of natural rights, was the background from which the Declaration sprang. From this background came also . . . the Bill of Rights of the United States Constitution.”⁵⁰ The number of “Revolutionary contemporary references to, and citations of, the Lockian philosophy . . . is eloquent testament of the tremendous impact which one man can make.”⁵¹ George Washington is believed to have called him “the

⁴³ *Id.*

⁴⁴ 1695: Locke and the End of the Licensing Act, FREE SPEECH HISTORY, <https://www.freespeechhistory.com/timeline/1695-end-of-the-licensing-act/> (last visited Apr. 21, 2024).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See generally Denbeaux, *supra* note 28.

⁴⁸ See generally JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

⁴⁹ Kenneth D. Stern, *John Locke and the Declaration of Independence*, 15 CLEV. ST. L. REV. 186, 195 (1966) (quoting Miller, *op. citing supra* n.8, at pp. 491–92).

⁵⁰ *Id.* at 194–95.

⁵¹ *Id.* at 194.

greatest man who had ever lived.”⁵² Thomas Jefferson transferred much of Locke’s language directly into the Declaration of Independence, and the Founders considered injustices occurring in the colonies to be a continuation of the failures of English government and abuses of executive prerogative articulated by Locke during the preceding century, thereby justifying the institution of a new government.⁵³

Like John Locke, the pilgrims and settlers that established the British-American colonies were also members of the Star Chamber generation. Religious separatists who settled the northern colonies emigrated to escape from Star Chamber persecution of religious and political minorities.⁵⁴ As frustrations with the colonial system grew over time, the value of speech and press remained significant to their descendants. Over-taxation, remote governance, and the perceived and actual abuse of general warrants and writs of assistance as a means to search homes for seditious writings were considered to be violations of the colonists’ rights as British citizens.⁵⁵ Massachusetts lawyer and colonial activist James Otis decried writs of assistance as “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book; since they placed the liberty of every man in the hands of every petty officer.”⁵⁶ Justice Brennan highlighted the relationship between general warrants and free speech when he stated, “The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression. For the serious hazard of suppression of innocent expression inhered in the discretion confided in the officers authorized to exercise the power.”⁵⁷

Exercise of arbitrary executive authority outside the “assent to laws” as a means of stifling dissent is a recurring theme throughout the Declaration’s list of grievances.⁵⁸ Some of these grievances include making justice “dependent on his Will alone,” “erect[ing] a multitude of New Offices and send[ing] hither swarms of Officers to harass our People,” and subjecting the colonists “to a jurisdiction foreign to our constitution and unacknowledged by our laws.”⁵⁹ After the Revolution, lingering fear about the abuse of executive prerogative was

⁵² *Two Treatises of Government*, BRITANNICA (Oct. 9, 2023), <https://www.britannica.com/topic/Two-Treatises-of-Government>.

⁵³ See generally Stern, *supra* note 49.

⁵⁴ Daniel Baracskey, *Puritans*, FREE SPEECH CTR., <https://www.mtsu.edu/first-amendment/article/1372/puritans#:~:text=Many%20colonists%20came%20to%20America,were%20hostile%20to%20the%20Puritans> (Feb. 18, 2024).

⁵⁵ *Boyd v. United States*, 116 U.S. 616, 625–26 (1886).

⁵⁶ *Id.* at 625 (internal quotations omitted).

⁵⁷ *Marcus v. Search Warrants*, 367 U.S. 717, 729 (1961).

⁵⁸ See generally THE DECLARATION OF INDEPENDENCE (U.S. 1776).

⁵⁹ THE DECLARATION OF INDEPENDENCE para. 10, 11, 14 (U.S. 1776).

a central concern of the Constitutional Convention.⁶⁰ As a result, the Framers of the United States Constitution sought to limit abuses of executive authority and arbitrary laws by splitting sovereign prerogative into three separate federal branches, enumerating legislative authority, curtailing the jurisdiction of federal courts, and reserving state power through a system of federalism.⁶¹ Although some drafters believed these structural limitations were enough to protect citizens from the types of abuses experienced under British rule, including the fear of Star Chamber-like targeting of citizens, others disagreed.⁶² The Constitution was ratified only after the promise of a Bill of Rights, with the protection of the citizens' right to free speech as its preeminent guarantee.⁶³ The First Amendment was a clear rebuke of the British history of licensure and guaranteed that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁶⁴ The guarantees of the First Amendment transcend social and technological change and have been recognized as increasingly expansive as the United States has matured.⁶⁵

II. LIMITS ON THE SCOPE OF THE FIRST AMENDMENT

American jurisprudence has permitted limitations on the freedom of speech when those limits fall under categorical exceptions that were recognized at the founding era or when they fall within a content-neutral time, place, and manner restriction. In addition, corporate decisions to set speech guidelines on privately-owned social media platforms are not a form of state regulation and thus do not trigger a First Amendment analysis. As the federal government continues to

⁶⁰ See generally MICHAEL STOKES PAULSEN ET AL., *THE CONSTITUTION OF THE UNITED STATES* 37 (4th ed. 2021).

⁶¹ *Id.* at 37–38.

⁶² James Madison, *Amendments to the U.S. Constitution, [June 8] 1789*, FOUNDERS ONLINE (emphasis added), <https://founders.archives.gov/documents/Madison/01-12-02-0126> ("We ought not to disregard their inclination, but . . . conform to their wishes, and expressly declare the great rights of mankind secured under this constitution. . . . But perhaps there is a stronger motive than this for our going into consideration of the subject. *It is to provide those securities for liberty which are required by a part of the community.*") (last visited Apr. 24, 2024); PAULSEN ET AL., *supra* note 60, at 32, 813.

⁶³ U.S. CONST. BILL OF RIGHTS pmb1. ("The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution."); see also *The Bill of Rights*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights> (last visited Apr. 14, 2024).

⁶⁴ U.S. CONST. amend. I.

⁶⁵ See generally THE FREE SPEECH CENTURY (Lee C. Bollinger & Geoffrey R. Stone eds., Oxford University Press 2018).

establish its policy infrastructure for combatting misinformation,⁶⁶ inevitable future debate will likely revolve around whether novel characteristics of online communication necessitate the recognition of new categorical exceptions, whether certain online speech falls within already-recognized categorical exceptions, and whether the Maginot line between corporate and state content intervention has already dissolved.

A. Categorical Exceptions to the First Amendment

In *Chaplinsky v. New Hampshire*, the Supreme Court explained,

[I]t is well understood that the right of free speech is not absolute There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.⁶⁷

Legislative attempts to add to these categorical exceptions have been sternly rejected.⁶⁸ In an opinion striking down a federal law that criminalized the misrepresentation of military service, Justice Kennedy presciently remarked:

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out.⁶⁹

When the government seeks to ban or limit the expression of particular content, it must show that the content falls within one of these historically limited categories, rather than whether regulation of the content would be good policy.⁷⁰ Since the mid-twentieth century, this has been an increasingly high bar; although the *Chaplinsky* list of categorical exceptions remains good law, the

⁶⁶ See *infra* Part III.

⁶⁷ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

⁶⁸ *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (holding false claims of military honors are not categorically proscribable); *United States v. Stevens*, 559 U.S. 460, 482 (2010) (holding that visual depictions of animal cruelty are not categorically proscribable).

⁶⁹ *Alvarez*, 567 U.S. at 723.

⁷⁰ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 792 (2011).

scope of each exception has been significantly narrowed during the past century.⁷¹

1. *Obscenity*

There is no bright-line test for determining obscenity, lewdness, or profanity, and the Court has struggled to define them.⁷² The Court has outlined guiding principles for assessing obscenity,⁷³ but the Court has increasingly deferred to individual autonomy in both the consumption and promulgation of obscene material.⁷⁴ The Supreme Court has held that virtual child pornography—pornography that uses young adult actors or computer-generated images rather than actual children—is a constitutionally protected “visual depiction of an idea”⁷⁵ that cannot be criminalized because it “creates no victims.”⁷⁶ The Court has also held that violent videogames are constitutionally protected because “violence is not part of the obscenity that the Constitution permits to be regulated.”⁷⁷

2. *Libel*

In 1735, publisher John Peter Zenger was indicted for seditious libel following his publication of acerbic criticism of a colonial governor, and stacks

⁷¹ *Id.* at 793 (“[V]iolence is not part of the obscenity that the Constitution permits to be regulated.”); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *see New York Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964) (limiting the ability of public officials to sue for defamation); *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (“The mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such an action.”).

⁷² *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“[The Court is] faced with the task of trying to define what may be indefinable . . . I know it when I see it.”).

⁷³ David L. Hudson, Jr., *Obscenity and Pornography*, FREE SPEECH CTR., <https://www.mtsu.edu/first-amendment/article/1004/obscenity-and-pornography> (last visited Apr. 24, 2024).

⁷⁴ *See Ashcroft v. ACLU*, 535 U.S. 564, 590 (2002) (Breyer, J., concurring) (“To read the statute as adopting the community standards of every locality in the United States would provide the most puritan of communities with a heckler’s veto affecting the rest of the Nation.”).

⁷⁵ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246 (2002); *see also* Linda Greenhouse, ‘Virtual’ Child Pornography Ban Overturned, N.Y. TIMES (Apr. 17, 2002), <https://www.nytimes.com/2002/04/17/us/virtual-child-pornography-ban-overturned.html>.

⁷⁶ *Ashcroft v. Free Speech Coalition*, 535 U.S. at 250.

⁷⁷ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 793 (2011).

of his *New York Weekly Journal* were burned by the government.⁷⁸ After a contentious trial, his jury of fellow colonists ignored instructions from the bench and acquitted him on the grounds that the English common law of libel was unjust.⁷⁹ The case established the American principle that the suppression of truth cannot be justified by a motivation to preserve public order.⁸⁰ The principle that truthful information cannot be libelous became an early American common law principle that was later embedded into multiple state laws and eventually into constitutional jurisprudence.⁸¹

In *New York Times Co. v. Sullivan*, the Court found that minor factual errors in an article that criticized Alabama's police response to the civil rights movement were insufficient to support a claim of libel, because the majority of the article was accurate.⁸² The Court proceeded to overturn the Alabama libel law as "constitutionally deficient" in its "failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by a public official against critics of his official conduct."⁸³ The holding was then extended to protect the speech of individual citizens, because "the inherent worth of speech in terms of its capacity for informing the public does not depend upon its source."⁸⁴

As a result, American libel law has shifted from being founded on the inherited notion of British parliamentary privilege to a question of weighing free speech rights with a "person or business's right not to have . . . false statements destroy their good name."⁸⁵ Since its Star Chamber recognition as a right of action, libel has dramatically shifted from a peacekeeping tool against divisive speech to a private right of action against knowingly false statements intended to cause reputational harm to an individual or organization.

⁷⁸ John R. Vile, *John Peter Zenger*, FREE SPEECH CTR., <https://firstamendment.mtsu.edu/article/john-peter-zenger/> (Feb. 18, 2024).

⁷⁹ *Id.*

⁸⁰ *See Crown v. John Peter Zenger, 1735*, HIST. SOC'Y OF THE N.Y. COURTS, <https://history.nycourts.gov/case/crown-v-zenger/> (last visited Mar. 8, 2024); Vile, *supra* note 78.

⁸¹ *See Crown v. John Peter Zenger, supra* note 80; Vile, *supra* note 78.

⁸² *See New York Times Co. v. Sullivan*, 376 U.S. 254, 264–65 (1964).

⁸³ *Id.* at 264.

⁸⁴ *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.").

⁸⁵ *First Amendment Defense in Defamation and Libel Suits*, LUBIN AUSTERMUEHLE, <https://www.thebusinesslitigators.com/first-amendment-defense-in-defamation-and-libel-suits.html#:~:text=Since%20the%20founding%20of%20our,statements%20destroy%20their%20good%20name> (last visited Mar. 8, 2024).

3. *Fighting Words and Incitement*

The *Chaplinsky* Court upheld the defendant's conviction for derisive speech on the justification that certain utterances "are no essential part of any exposition of ideas and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."⁸⁶ The disruption of this order and morality was alternatively described in the opinion as a "breach of the peace."⁸⁷

As with obscenity law, since at least the mid-twentieth century, the Supreme Court has tipped the social value scale toward individual freedom and away from majoritarian or government doctrines of elusive-to-define objective morality. For example, the Supreme Court significantly narrowed the scope of the fighting words exception by holding that there is no "heckler's veto,"⁸⁸ meaning that it is impermissible for the government to restrict speech because of anticipated or actual negative reactions of those who disagree with the speech.⁸⁹ In 1949, the Court overturned a breach of peace conviction after a riot occurred, recognizing that speech actually fulfills "its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."⁹⁰ In 1969, the Court narrowed the breach of peace standard to one of incitement, holding that even direct advocacy of force is protected speech, except when "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁹¹

The Court declined to find that even the shocking facts of that case qualified as incitement, wherein members of the Ku Klux Klan invited a reporter to film and broadcast a rural Klan meeting, cross burning, and speeches that advocated "revengeance" against Jews and Blacks.⁹² Two decades later, the Court struck down a Minnesota law that outlawed cross burnings under the fighting words doctrine because "the regulation of fighting words may not be based on non-proscribable content."⁹³ The government cannot regulate fighting words "based

⁸⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁸⁷ *Id.* at 571–72.

⁸⁸ *See Brown v. Louisiana*, 383 U.S. 131, 133 (1966) (overturning Louisiana breach of peace conviction of five protesting men who refused to leave a racially segregated public library).

⁸⁹ *See generally* *Street v. New York*, 394 U.S. 576, 594 (1969) (overturning state ban on mutilation or contempt of flag); *Texas v. Johnson*, 491 U.S. 397, 401 (1989) (holding that flag burning is expressive conduct and its ban cannot be justified by breach of peace argument); *Cohen v. California*, 403 U.S. 15, 26 (1971) (overturning conviction of defendant for wearing explicit political jacket in courthouse cannot be justified by breach of peace or state *parens patriae* arguments).

⁹⁰ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

⁹¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁹² *Id.*

⁹³ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 377 (1992).

on hostility, or favoritism, towards a . . . message they contain.”⁹⁴ The proscription of fighting words is unacceptable if there is any “possibility that regulation of ideas is afoot.”⁹⁵

Each of the *Chaplinsky* categorical exceptions raises questions about how courts should extend or limit their application to the regulation of online speech.

B. Regulating Speech Outside the *Chaplinsky* Exceptions

1. *Strict Scrutiny and Compelling Government Interest*

Laws attempting to limit the content of expression outside recognized categorical exceptions are strictly scrutinized.⁹⁶ To pass strict scrutiny, the government must prove that the law serves a compelling government interest and that the law is narrowly tailored to serve that interest.⁹⁷ The law must be actually necessary to solve an actual problem, and ambiguous proof or marginal percentage point advances will not suffice to meet the burden.⁹⁸ Strict scrutiny is the highest burden for the government to meet, and thus content limitations on speech, especially prior restraints on speech, are “almost never permissible,”⁹⁹ even in cases where the content may be considered offensive or shocking.¹⁰⁰

The protection of other constitutional rights has been recognized as a compelling government interest that passes strict judicial scrutiny.¹⁰¹ In particular, the state has a compelling interest in protecting voters from “confusion and undue influence” and “ensuring that an individual’s right to vote is not undermined by fraud in the election process.”¹⁰² Accordingly, in *Burson v. Freeman*, the Supreme Court held that states can restrict campaigning within

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011).

⁹⁷ *Id.*

⁹⁸ *Id.* at 799 n.9.

⁹⁹ *Moonin v. Tice*, 868 F.3d 853, 858 n.1 (9th Cir. 2017) (“[Plaintiff] calls the prospective restriction at issue here a ‘prior restraint,’ a phrase that conjures up a long line of cases in which we have held that such restraints are almost never permissible.”); *Alexander v. United States*, 509 U.S. 544, 550 (1993) (“The term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.”) (internal emphasis and quotations omitted).

¹⁰⁰ *See, e.g., Nat’l Socialist Party of America v. Village of Skokie*, 432 U.S. 43, 43 (1977).

¹⁰¹ *Burson v. Freeman*, 504 U.S. 191, 198–99 (1992).

¹⁰² *Id.* at 199.

100 feet of a polling place to prevent voter intimidation or interference.¹⁰³ In 2018, the Court declined to extend *Burson* and struck down a Minnesota law that prohibited voters from wearing political clothing or items while voting.¹⁰⁴ In March 2023, a New York jury found that a Twitter user with 58,000 followers had undermined others' constitutional rights during the 2016 presidential election when he circulated messages and images on Twitter that instructed Hillary Clinton supporters to vote from home by texting "Hillary" to 59925.¹⁰⁵ Although voting by text was not a valid voting method, the posts mimicked the style of official advertisements and at least 4,900 unique phone numbers texted "Hillary" to the listed number.¹⁰⁶ A jury ultimately found that the user's actions qualified as a fraudulent interference with voting rights.¹⁰⁷

Although the court recognized that the First Amendment protects even false statements, the trial judge relied on an *Alvarez* concurrence to conclude that strict scrutiny did not apply because the defendant's meme was not merely political speech, but speech that targeted election infrastructure.¹⁰⁸ The court's denial of the user's First Amendment defense raises questions about what level of scrutiny applies to the prosecution of election memes—whether they present a compelling or a significant and narrowly tailored government interest, whether they fall under an existing categorical exception of fraud, or whether they *should* fall under a new categorical exception of election interference. These outstanding questions are becoming even more relevant as artificial intelligence and other tools make it easy to mimic legitimate advertisements and educational materials.¹⁰⁹

¹⁰³ *Id.* at 191.

¹⁰⁴ *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1891–92 (2018).

¹⁰⁵ Amy B. Wang & Shayna Jacobs, *Trump Supporter Found Guilty in 2016 Twitter Scheme to Undermine Hillary Clinton*, WASH. POST (Mar. 31, 2023, 5:46 PM), <https://www.washingtonpost.com/politics/2023/03/31/trump-douglass-mackey-guilty-verdict/>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*; see also James Fanelli, *Far-Right Twitter Influencer Found Guilty of Spreading Misinformation to Voters*, WALL ST. J. (Mar. 31, 2023, 7:02 PM), <https://www.wsj.com/articles/far-right-twitter-influencer-found-guilty-of-spreading-misinformation-to-voters-833abb5>.

¹⁰⁸ Comment, *First Amendment – Social Media – Eastern District of New York Convicts Internet Meme Creator for Publishing False Voting Information*. – *United States v. Mackey*, No. 21-CR-80, 2023 U.S. Dist. LEXIS 40796 (E.D.N.Y. Mar. 10, 2023), 137 HARV. L. REV. 1509, 1512 (2024); see also *United States v. Mackey*, No. 21-CR-80, 2023 U.S. Dist. LEXIS 40796 (E.D.N.Y. Mar. 10, 2023).

¹⁰⁹ See generally Amber Herrle, *Regulating Fact from Fiction: Disinformation in Political Advertising*, BROOKINGS (Dec. 20, 2019), <https://www.brookings.edu/blog/fixgov/2019/12/20/regulating-fact-from-fiction-disinformation-in-political-advertising/>.

2. *Intermediate Scrutiny & Neutral Time, Place, and Manner Restrictions*

Although the freedom of speech is an expansive individual right, “the First Amendment does not guarantee the right to communicate one’s views at all times and places or in any manner that may be desired.”¹¹⁰ In *Clark v. Community for Creative Non-Violence*, the Supreme Court held that the government can restrict the time, place, and manner of speech and protest when the restrictions are content neutral, justified without reference to content of speech, narrowly tailored to a significant government interest, and when there are significant alternative channels for the speakers’ message to be shared.¹¹¹ To determine content neutrality, a court must inquire “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”¹¹² A time, place, and manner (“TPM”) restriction on speech can only be considered content neutral if it is “justified without reference to the content of the regulated speech.”¹¹³

The case law applying TPM restrictions to Internet speech is still a shallow pool. However, the Illinois Supreme Court has recently recognized a state revenge porn statute as a permissible TPM restriction.¹¹⁴ After declining to recognize the dissemination of nonconsensual illicit images as a categorical exception to the First Amendment, the court then determined that the statute was justified without reference to content and applied intermediate scrutiny using the *Clark* test.¹¹⁵ After reviewing the statutory language and the pervasiveness of electronically distributed revenge porn, the court determined that the government had a substantial interest in protecting plaintiffs from the dissemination of their private sexual images, that the statute was narrowly tailored to that interest, and that the defendant had alternative means of venting her frustration, ultimately concluding that the statute was permissible as a TPM restriction.¹¹⁶

The Illinois court’s holding that the pervasiveness of online distribution can

¹¹⁰ *Heffron v. Int’l Soc’y for Krishna Consciousness*, 425 U.S. 640, 647 (1981).

¹¹¹ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296–99 (1984); *see also* *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹¹² *Rock Against Racism*, 491 U.S. at 791.

¹¹³ *Id.* (internal emphasis and quotation marks omitted).

¹¹⁴ *People v. Austin*, 2019 IL 123910, ¶ 43.

¹¹⁵ *Id.* at ¶ 46 (“Determining whether a particular regulation is content based or content neutral is not always a simple task. We recognize that section 11-23.5(b) on its face targets the dissemination of a specific category of speech—sexual images. However, the statute is content neutral. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.”) (internal citations and quotations omitted).

¹¹⁶ *Id.* at ¶¶ 33, 61, 70–71, 74.

justify a TPM restriction on speech raises the specter of whether state or federal statutes could constitutionally curtail the dissemination of other online content—and the specter of whether TPM restrictions on revenge porn, election misinformation, or posts that undermine public safety are actually new categorical restrictions in disguise. TPM restrictions justified by the pervasiveness of online distribution also raise the question of whether meaningful channels remain when online speech is silenced in an increasingly digital public square.

C. Online Speech Raises Some Novel Implications for Free Speech Philosophy

Following the invention of the World Wide Web in 1989,¹¹⁷ search engines in the mid-1990s, and Wi-Fi in 1999,¹¹⁸ the twenty-first century dawned just in time to become forever associated with the beginning of a technological revolution akin to the spread of Gutenberg’s printing press 500 years before. Following the introduction of the first smart phone in 2007,¹¹⁹ the digital information revolution became “almost a feature of human anatomy.”¹²⁰

At the same time that companies like Microsoft, IBM, and Apple were driving rapid evolution of devices, companies like AOL, Google, Myspace, and Facebook were driving the rapid evolution of online information and social networking platforms.¹²¹ The popularity of these communication platforms combined with continuous improvements to phone hardware and processing speeds allows information to be exchanged cheaper, faster, and further than any time in history. In the district court opinion *ACLU v. Reno*, which was later affirmed by the Supreme Court, Judge Stewart Dalzell observed that the Internet is “the most participatory form of mass speech yet developed” and “a far more speech-enhancing medium than print.”¹²²

As of 2021, more than 85 percent of Americans report that they use the Internet daily, and 31 percent of adults in the United States report that they are on the Internet “almost constantly.”¹²³ Broken down demographically, the

¹¹⁷ Timothy Williamson, *History of Computers: A Brief Timeline*, LIVESCIENCE, <https://www.livescience.com/20718-computer-history.html> (Dec. 22, 2023).

¹¹⁸ *Id.*

¹¹⁹ *The Evolution of Social Media: How Did It Begin, and Where Could It Go Next*, MARYVILLE UNIV. (May 28, 2020), <https://online.maryville.edu/blog/evolution-social-media/>.

¹²⁰ *Carpenter v. United States*, 138 S. Ct. 2206, 2218 (2018) (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)) (internal quotations omitted).

¹²¹ MARYVILLE UNIV., *supra* note 119.

¹²² *ACLU v. Reno*, 929 F. Supp. 824, 882–83 (1996) (Dalzell, J., supporting opinion) (affirmed in judgment).

¹²³ Andrew Perrin & Sara Atske, *About Three-in-Ten U.S. Adults Say They Are ‘Almost Constantly’ Online*, PEW RSCH. CTR (Mar. 26, 2021), <https://www.pewresearch.org/fact->

numbers are even more striking, with 42 percent of U.S. adults between the ages of 30–49 reporting being online “almost constantly” and 48 percent of U.S. adults between the ages of 18–29 reporting almost constant connection.¹²⁴ In addition, 72 percent of U.S. adults report using at least one social media platform, compared to just 5 percent in 2005.¹²⁵ As of February 2021, YouTube and Facebook are the most popular social media platforms, followed by Instagram, Pinterest, LinkedIn, Snapchat, Twitter,¹²⁶ and TikTok, in that order.¹²⁷

1. *Social Media Terms of Service and Content Policies Lie Outside the First Amendment*

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”¹²⁸ Accordingly, the First Amendment does not prevent a social media company from abridging speech or monitoring content on its own platform. In the United States, social media companies are private corporations, which share many of the same rights as individual Americans.¹²⁹ Consequently, Alphabet (the parent company of Google), Twitter, and Meta (the parent company of both Facebook and Instagram) are *protected* by the First Amendment, not constrained by it.¹³⁰ Twitter, Facebook, and Instagram have the right to promote, denounce, or ban certain beliefs and political assertions. Corporations have the right to make political contributions and pick sides in politics.¹³¹ Social media companies can therefore establish their own terms of

tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/.

¹²⁴ *Id.*

¹²⁵ *Social Media Fact Sheet*, PEW RSCH. CTR. (Jan. 11, 2022), <https://www.pewresearch.org/internet/fact-sheet/social-media/>.

¹²⁶ Twitter was recently rebranded to X. See Saira Mueller, *Why Is X Still Called Twitter*, CNN (Feb. 23, 2024, 4:00 PM), <https://www.cnn.com/2024/02/23/tech/twitter-x-rebrand-ccc/index.html>.

¹²⁷ *Social Media Fact Sheet*, *supra* note 125.

¹²⁸ U.S. CONST. amend. I (emphasis added).

¹²⁹ See *Santa Clara v. Southern Pac. R. Co.*, 118 U.S. 394, 400–01 (1886); See *First Nat’l. Bank of Bos. v. Bellotti*, 435 U.S. 765, 771 (1978); *Citizens United v. Federal Election Com’n*, 558 U.S. 310, 466 (2010); see also Ciara Torres-Spelliscy, *The History of Corporate Personhood*, BRENNAN CTR. (Apr. 8, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/history-corporate-personhood>.

¹³⁰ Jonathan Stempel, *Google Defeats Conservative Nonprofit’s YouTube Censorship Appeal*, REUTERS (Feb. 26, 2020, 10:21 PM), <https://www.reuters.com/article/us-google-lawsuit-censorship/google-defeats-conservative-nonprofits-youtube-censorship-appeal-idUSKCN20K33L>.

¹³¹ *Citizens United*, 558 U.S. at 364, 370–71; see also Ari Levy, *The Most Liberal and Conservative Tech Companies, Ranked by Employees’ Political Donations*, CNBC, <https://www.cnbc.com/2020/07/02/most-liberal-tech-companies-ranked-by-employee->

use for their platforms, and they can withdraw service to individuals based on those terms.¹³²

In addition, Section 230 of the Communications Decency Act of 1996 (“CDA”) provides a significant level of statutory protection regarding content decisions by social media companies.¹³³ The statute forecloses a wide scope of liability, including protection for social media “from lawsuits based on their decisions to transmit or take down user-generated content.”¹³⁴ Section 230 protects websites from liability for the content posted by individual users of the platform.¹³⁵ The statute’s Good Samaritan Clause also protects social media companies from liability arising from “good faith efforts” to patrol third party content.¹³⁶ The effect of Section 230 on the way that consumers use the Internet is so significant that it has been called “the twenty-six words that created the internet.”¹³⁷ As summarized by the Electronic Frontier Foundation,

CDA 230 creates a broad protection that has allowed innovation and free speech online to flourish Given the sheer size of user-generated websites . . . it would be infeasible for online intermediaries to prevent objectionable content from cropping up on their site. Rather than face potential liability for their users’ actions, most would likely not host any user content at all or would need to protect themselves by being actively engaged in censoring what we say, what we see, and what we do online. In short, CDA 230 is perhaps the most influential law to protect the kind of innovation that has allowed the Internet to thrive since 1996.¹³⁸

The Brookings Institution argues that, while it may be an overstatement to claim that Section 230 created the Internet, the statute did allow “for the creation

donations.html (July 2, 2020, 12:05 PM).

¹³² See, e.g., *X Terms of Service*, X CORP. (Sept. 29, 2023), <https://twitter.com/en/tos>.

¹³³ See CONG. RES. SERV., R46751, SECTION 230: AN OVERVIEW (2024), <https://sgp.fas.org/crs/misc/R46751.pdf>.

¹³⁴ *Id.*

¹³⁵ Communications Decency Act of 1996, 42 U.S.C. § 230(c)(1); see, e.g., *Zeran v. America Online, Inc.*, 129 F.3d 327, 327–28, (4th Cir. 1997) (one of the first suits that arose under Section 230, holding that AOL was not liable for anonymous posts that falsely associated a plaintiff with offensive t-shirts supportive of the Oklahoma City Bombing, despite the fact that AOL had failed to take action after multiple attempts by the plaintiff to get the post removed by AOL); see also *Fair Hous. Council of San Fernando Valley v. Roommates.com, L.L.C.*, 521 F.3d 1157, 1175 (9th Cir. 2008); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 402 (6th Cir. 2014); *Marshall’s Locksmith Serv., Inc. v. Google, LLC*, 925 F.3d 1263, 1265 (D.C. Cir. 2019).

¹³⁶ 42 U.S.C. § 230(c)(2)(A)–(B).

¹³⁷ Tom Wheeler, *The Supreme Court Takes Up Section 230*, BROOKINGS (Jan. 31, 2023), <https://www.brookings.edu/blog/techtank/2023/01/31/the-supreme-court-takes-up-section-230/> (quoting Jeff Kosseff).

¹³⁸ *Section 230*, ELEC. FRONTIER FOUND., <https://www EFF.ORG/issues/cda230> (last visited Apr. 20, 2024).

of the economic model of social media platforms.”¹³⁹ Brookings explains, “What the statute ‘created’ was the protected monetization of users’ personal information through the application of software algorithms to target both advertisements and information and to sell access to those targets.”¹⁴⁰

2. *Consuming the Consumer: The Marketplace of Data Versus the Marketplace of Ideas*

In 1973, artist Richard Serra observed, “It is the consumer who is consumed. *You* are the product of [television].”¹⁴¹ In other words, “[i]f something is free, you’re the product.”¹⁴² Consumers use the majority of search engines, social media platforms, and individual websites without a paywall, which means that individual users trade and consume information primarily for free. Most websites earn their revenue when advertisers pay to place ads where users will see them and when advertisers and other entities pay for access to information about users.¹⁴³ Advertisers and other entities then use that information to gain market insight and to maximize returns on marketing investment.¹⁴⁴

In 2022, this global data market had an estimated worth of \$190.1 billion, and the market is expected to continue its rapid growth as a result of increased data collection through cloud computing, Bluetooth devices, and the Internet of Things.¹⁴⁵ The size of the Internet and its associated data industry is almost beyond comprehension. Out of 8 billion people on earth, 4.9 billion use social media and each of these users has an average of 6.6 social media platforms.¹⁴⁶ Every second, the world sends approximately 3.4 million emails; 741,000 WhatsApp messages; 68,500 Google searches; 55,000 Facebook posts; and 5,700 Tweets.¹⁴⁷ In addition, the world is Instagramming, SnapChatting,

¹³⁹ Wheeler, *supra* note 137.

¹⁴⁰ *Id.*

¹⁴¹ *Television Delivers People* (Richard Serra & Carlota F. Schoolman 1973), <https://www.youtube.com/watch?v=LvZYwaQlJsg> (emphasis added).

¹⁴² Soumik Roy, *Facebook: If Something Is Free, ‘You’ Are the Product*, TECHHQ (Apr. 9, 2018), <https://techhq.com/2018/04/facebook-if-something-is-free-you-are-the-product/>.

¹⁴³ See Greg McFarlane, *How Facebook (Meta), X Corp (Twitter), Social Media Make Money From You*, INVESTOPEDIA, <https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx> (Dec. 2, 2022).

¹⁴⁴ *Id.*

¹⁴⁵ See *Big Data Market*, MKTS & MKTS, <https://www.marketsandmarkets.com/Market-Reports/big-data-market-1068.html> (last visited Apr. 12, 2024).

¹⁴⁶ Rohit Shewale, *Social Media Users and Statistics in 2024*, DEMANDSAGE (Jan. 9, 2024), <https://www.demandsage.com/social-media-users/>.

¹⁴⁷ *Mind Boggling Stats for 1 Second of Internet Activity*, ZETTASPHERE, <https://www.zettasphere.com/mind-boggling-stats-for-1-second-of-internet-activity/> (last

TikToking, and texting, while billions of individuals are passively scrolling.¹⁴⁸

Even prior to the Internet, it would have been impossible for an individual to read every book or newspaper in the world, but the number of posts and messages distributed through digital means compounds the issue exponentially. Further, the monetized advertising model means that social media companies use algorithms to automatically tailor the information consumed by individual users.¹⁴⁹ Advertisers pay for the ability to prioritize content, and that prioritized content will differ from person to person.¹⁵⁰ In addition, social media companies use algorithms to promote individual engagement, meaning that a user will automatically see the content that is most likely to cause an emotional reaction,¹⁵¹ thereby keeping a user's eyes on the app or web page longer, as this is valuable time that can be sold to a third party.¹⁵²

The significant result of this relatively new data economy is that, rather than being exposed to a broad marketplace of diverse ideas, passive online information consumers will be continually exposed to the ideas they already like, a phenomenon that has been labeled the “echo chamber.”¹⁵³ Section 230 protects social media companies from liability for posts that are false, defamatory, and offensive, and algorithms may actually push users toward this sort of socially undesirable content because it increases engagement. As a result, viral information on social media is often sensational, incorrect, or commercially sponsored—and often all three. Some have raised concerns that this algorithmic siloing of information is quietly obliterating the traditional concept of a marketplace of ideas.¹⁵⁴

As articulated by nineteenth-century philosopher John Stuart Mill, the protection of free speech allows individuals to metaphorically shop for ideas as

visited Apr. 12, 2024).

¹⁴⁸ *Id.*

¹⁴⁹ See Forbes, *Why Algorithms Shape What We See Online*, YOUTUBE (Oct. 12, 2020), https://www.youtube.com/watch?v=mTW_xydfses; see also The Today Show, *How Algorithms Shape What You See on Social Media*, YOUTUBE (Jan. 18, 2024), https://www.youtube.com/watch?v=KWt_IL3JViy.

¹⁵⁰ See generally THE SOCIAL DILEMMA (Netflix 2020); see also THE SOCIAL DILEMMA, <https://www.thesocialdilemma.com/> (last visited Apr. 12, 2024).

¹⁵¹ See Julianne Gabor, *The TikTok Algorithm Is Good, But Is It Too Good? Exploring the Responsibility of Artificial Intelligence Systems Reinforcing Harmful Ideas on Users*, 32 CATH. U. J. L. & TECH 109, 112–15 (2023).

¹⁵² Shankar Vedantam, *How Outrage Is Hijacking Our Culture and Our Minds*, NPR (Oct. 9, 2019, 5:03 AM), <https://www.npr.org/2019/10/09/768489375/how-outrage-is-hijacking-our-culture-and-our-minds>.

¹⁵³ Matteo Cinelli, et al., *The Echo Chamber Effect on Social Media*, PNAS (Feb. 23, 2021), <https://www.pnas.org/doi/10.1073/pnas.2023301118>.

¹⁵⁴ Connor B. Flannery, § 230 and Tinfoil Hats: What Conspiracy Theories Teach Us About the Marketplace of Ideas and Online Speech, 31 CATH. U. J. LAW & TECH. 3, 16 (2023).

rational consumers in a society full of good and bad ideas.¹⁵⁵ The marketplace of ideas was cited into First Amendment jurisprudence by Oliver Wendell Holmes¹⁵⁶ and has been adopted as a principle of American free speech,¹⁵⁷ but the underlying principle has Enlightenment roots. More than 200 years before Mill wrote *On Liberty*,¹⁵⁸ and 130 years before Adam Smith's invisible hand explanation of the free market,¹⁵⁹ John Milton defended free speech on similar grounds in *Areopagitica*: government censorship of unsanctioned ideas will never produce the kind of progress, education, and individual virtue that can be achieved through the free exchange of both good and bad ideas.¹⁶⁰ Thus, regulating the free exchange of ideas will create a less informed population and undermine political stability in the long run.

Ironically, the fact that social media is a *literal* data marketplace may undermine the Internet's qualification as the type of marketplace of ideas discussed by Mill, because "[online] ideas are valued only by engagement, the only metric that matters to the interactive computer services . . . that make their money based on internet traffic. Speech is no longer weighed for its epistemic value, legitimacy, or intellectual humility and openness to correction."¹⁶¹ Algorithmic direction of what users see undermines the ability of citizens to form opinions based on exposure to multiple ideas. If the echo chamber effect really does unravel the theoretical and historical underpinnings of the First Amendment, it provokes questions about whether the Internet merits new categorical exceptions, presents a compelling government interest in the regulation of some online speech, or is permissibly subject to TPM restrictions.

In his *Brown v. Entertainment Merchants* concurrence, Justice Alito addressed the importance of aligning Constitutional interpretation with the practical reality of evolving technology. He cautioned,

In considering the application of unchanging constitutional principles to new and rapidly evolving technology, this Court should proceed with caution. We should make every effort to understand the

¹⁵⁵ Jill Gordon, *John Stuart Mill and the "Marketplace of Ideas,"* 23 SOC. THEORY & PRAC. 235, 235 (1997).

¹⁵⁶ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁵⁷ *See* *United States v. Alvarez*, 567 U.S. 709, 718 (2012).

¹⁵⁸ *See generally* JOHN STUART MILL, *ON LIBERTY* xxii (1859).

¹⁵⁹ *See generally* ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (1776).

¹⁶⁰ MILTON, *supra* note 1, at 111 ("[W]hat wisdom can there be to choose, what continence to forbear without the knowledge of evil . . . I cannot praise a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race, where that immortal garland is to be run for, not without dust and heat . . . [T]hat which purifies us is trial, and trial is by what is contrary.").

¹⁶¹ Flannery, *supra* note 154, at 28.

new technology. We should take into account the possibility that developing technology may have important societal implications that will become apparent only with time. We should not jump to the conclusion that new technology is fundamentally the same as some older thing with which we are familiar.¹⁶²

However, categorizing online speech as a technologically and philosophically distinct medium for speech poses a direct threat to individual rights, precisely *because* of how much of our speech now occurs online.

Social media platforms have become a primary source of information and news, particularly for younger demographics: 71 percent of Gen Z and Millennial Americans report getting their daily news from social media platforms, and 91 percent of the same demographic get their news from social media platforms at least weekly, with Facebook, YouTube, and Instagram representing the most popular sources of social media news overall.¹⁶³ Additionally, 43 percent of Gen Z and Millennial Americans share this news through texting, talking, emailing, commenting, or sharing at least once a day.¹⁶⁴ In 2020, 99 percent of United States Senators and 98 percent of United States House Representatives posted on official Twitter accounts, and 100 percent of members of both the Senate and the House posted on Facebook.¹⁶⁵ Government intervention in the exchange of online ideas would be a significant intrusion into Americans' right to speak and listen freely.

The next section of this paper will discuss contemporary policy approaches to addressing the spread of misinformation, including two case studies that demonstrate how overreaction to misinformation undermines civil society and trust in government.

III. THE WAR ON MISINFORMATION

The 2010s dawned with an almost giddy optimism about the free spread of information online.¹⁶⁶ In the immediate aftermath of the 2011 Arab Spring protests, social media seemed like the greatest information triumph of liberalism over despotism since Radio Free Europe. The West was smitten with social

¹⁶² *Brown v. Ent. Merchants Ass'n*, 564 U.S. at 806 (Alito, J., concurring).

¹⁶³ Media Insight Project, *The News Consumption Habits of 16-to-40-Year-Olds*, AM. PRESS INST. (Aug. 31, 2022), <https://www.americanpressinstitute.org/publications/reports/survey-research/the-news-consumption-habits-of-16-to-40-year-olds/>.

¹⁶⁴ *Id.*

¹⁶⁵ Stacy Jo Dixon, *Percentage of U.S. Congress Members Who Posted on Social Media Accounts in 2020*, STATISTA (June 21, 2022), <https://www.statista.com/statistics/958794/congress-members-posted-official-social-media-accounts-usa/>.

¹⁶⁶ See, e.g., Brown et al., *supra* note 14.

media and its democratic possibilities.¹⁶⁷ By the mid-2010s, these rose-colored glasses had already fallen off when #AllEyesOnISIS announced and celebrated the brutal ISIS invasion of northern Iraq in a global Twitter propaganda campaign reminiscent of a movie studio media blitz.¹⁶⁸

In 2016, *The Atlantic* claimed, “The self-styled Islamic State owes its existence to what the internet has become with the rise of social media—a vast chamber of online sharing and conversation and argumentation and indoctrination, echoing with billions of voices.”¹⁶⁹ Targeted youth recruitment and social media propaganda campaigns by terrorist groups became a serious concern,¹⁷⁰ and Twitter had a grim reputation as a repository for terrorist propaganda, including photos and videos of beheadings and political executions.¹⁷¹

The 2016 presidential election raised concerns about whether the election had been stolen by Russian bots and social media disinformation campaigns.¹⁷² Although a subsequent Special Counsel investigation confirmed that Russian state-sponsored entities attempted to “provoke and amplify political and social discord in the United States” through social media “information warfare” in

¹⁶⁷ See, e.g., Lenie Brouwer & Edien Bartels, *Arab Spring in Morocco: Social Media and the 20 February Movement*, 27 AFRICA FOCUS 9, 9 (2014) (“This article explores how protesters challenge the dominant institutions and norms in society through their struggle and how they try to create new meanings for these institutions, not only by protesting but also by using social media. We argue that using new social media is not only a vehicle for the mobilisation of activists, but also represents a form of new meaning-making for them: they participate, not only in a local sense, but also globally. Their online activities intersect and influence offline practices and vice versa, creating a continuous interaction which exerts an influence on both worlds. It is precisely this interconnectedness of offline and online worlds that is the decisive force in these movements and creates new meaning-making.”).

¹⁶⁸ Emerson T. Brooking & P.W. Singer, *War Goes Viral*, ATL. (Nov. 2016), <https://www.theatlantic.com/magazine/archive/2016/11/war-goes-viral/501125/>.

¹⁶⁹ *Id.*

¹⁷⁰ See Makenzi Taylor, *ISIS Recruitment of Youth via Social Media*, N.Y. UNIV. (Feb. 2, 2020), https://wp.nyu.edu/schoolofprofessionalstudies-ga_review/isis-recruitment-of-youth-via-social-media/; see also Gabriel Weimann, *Terror on Facebook, Twitter, and Youtube*, 16 BROWN J. WORLD AFFS. 45, 45–46 (2010).

¹⁷¹ See Mike Isaac, *Twitter Steps Up Efforts to Thwart Terrorists’ Tweets*, N.Y. TIMES (Feb. 5, 2016), <https://www.nytimes.com/2016/02/06/technology/twitter-account-suspensions-terrorism.html> (“Twitter appears to be heavily used by ISIS—so much so that some Twitter accounts linked to the group half-jokingly put the location on their profile as “Wilayat Twitter,” or “the province of Twitter.”); Charlie Warzel, *Twitter Says This ISIS Beheading Photo Doesn’t Qualify as Abuse*, BUZZFEED (Sept. 29, 2016, 11:54 AM), <https://www.buzzfeednews.com/article/charliewarzel/twitter-says-this-isis-beheading-photo-doesnt-qualify-as-abu>.

¹⁷² See generally ROBERT S. MUELLER, III, U.S. DEP’T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 14 (2019).

2016,¹⁷³ multiple empirical studies have concluded that “there were no measurable changes in attitudes, polarization, or voting behavior among those exposed to this foreign influence.”¹⁷⁴ In an ironic twist, Russian disinformation was undermined by the same echo chamber effect it had hoped to exploit. Regardless, policy concerns about the effects of online extremism and concerted foreign disinformation efforts are valid and based on legitimate contemporary issues.

In response to these issues, Congress passed the Cybersecurity and Infrastructure Security Agency Act and created the Cybersecurity & Infrastructure Security Agency (“CISA”) in 2018, which serves as a section of the Department of Homeland Security (“DHS”) dedicated to the protection of national cyber infrastructure.¹⁷⁵ DHS then created the Countering Foreign Influence Task Force in 2018 to directly address the threat of election disinformation and a separate entity called the Foreign Influence and Interference Branch in 2019.¹⁷⁶

Critics allege that internal documents obtained through Freedom of Information Act (“FOIA”) requests suggest that what began as an effort to combat foreign disinformation almost immediately broadened to a more general, expansive federal effort to police the promulgation of online misinformation—including information shared or posted domestically by American citizens.¹⁷⁷ In other words, executive agencies have been accused of surreptitiously regulating the speech of American citizens on a very large scale.

A. From “Cybersecurity to Cybercensorship”

DHS was established by the Homeland Security Act of 2002 in response to the September 11 terrorist attacks.¹⁷⁸ The Act consolidated twenty-two agencies

¹⁷³ *Id.* at 4.

¹⁷⁴ *Exposure to Russian Twitter Campaigns in 2016 Presidential Race Highly Concentrated, Largely Limited to Strongly Partisan Republicans*, N.Y.U. (Jan. 9, 2023), <https://www.nyu.edu/about/news-publications/news/2023/january/exposure-to-russian-twitter-campaigns-in-2016-presidential-race-.html>; *see also Russia ‘Meddled in All Big Social Media’ Around US Election*, BBC (Dec. 17, 2018), <https://www.bbc.com/news/technology-46590890>.

¹⁷⁵ *DHS at 20: Celebrating a Legacy of Service*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/dhs20> (last visited Apr. 11, 2024).

¹⁷⁶ *See* U.S. DEP’T OF HOMELAND SEC. OFF. OF INSPECTOR GEN., *DHS NEEDS A UNIFIED STRATEGY TO COUNTER DISINFORMATION CAMPAIGNS* 5–6 (2022).

¹⁷⁷ Ken Klippenstein & Lee Fang, *Truth Cops: Leaked Documents Outline DHS’s Plans to Police Disinformation*, THE INTERCEPT (Oct. 31, 2022, 5:00 AM), <https://theintercept.com/2022/10/31/social-media-disinformation-dhs/>.

¹⁷⁸ *DHS at 20: Celebrating a Legacy of Service*, *supra* note 175.

into one cabinet department with a mission to safeguard the American people.¹⁷⁹ The DHS mission includes a broad array of efforts, including counterterrorism, law enforcement, border patrol, maritime security, immigration, transportation, emergency response, and cybersecurity.¹⁸⁰ The department collaborates with over 4,800 intergovernmental and private sector partners,¹⁸¹ including the major social media platforms.¹⁸² As resources have shifted away from the War on Terror, DHS has reportedly shifted its attention from monitoring foreign terrorism toward monitoring online misinformation on these platforms.¹⁸³

Critical observers argue that around 2017, DHS expanded from “cybersecurity to cybercensorship” by characterizing the promulgation of online misinformation as a cyberattack on United States critical infrastructure.¹⁸⁴ In his final act at the end of President Obama’s second term, outgoing DHS Secretary Jeh Johnson categorized elections as critical infrastructure, which laid the legal framework to declare the dissemination of misinformation about public issues to be an attack against critical government infrastructure.¹⁸⁵

Around the same time, at the end of 2017, an American tech company called New Knowledge claimed to have delivered the decisive margin for Democrats in the 2017 Alabama Senate race by “orchestrat[ing] a ‘false flag’ operation that planted the idea that the [Republican Senate candidate Roy] Moore campaign was amplified on social media by a Russian botnet.”¹⁸⁶ The false impression that Russian bots were manipulating the election was manufactured with the intent to “radicalize Democrats, suppress unpersuadable Republicans . . . and faction moderate Republicans by advocating for write-in candidates.”¹⁸⁷ The funding and implementation of the effort, called Project Birmingham, has been

¹⁷⁹ *See id.*

¹⁸⁰ *Id.*

¹⁸¹ *Today, DHS Will . . .*, U.S. DEP’T OF HOMELAND SEC., <https://www.dhs.gov/todayDHSwill> (Nov. 3, 2023).

¹⁸² *See* Klippenstein & Fang, *supra* note 177.

¹⁸³ *Id.*

¹⁸⁴ *The Censorship Industrial Complex: U.S. Government Support for Domestic Censorship and Disinformation Campaigns: Hearing Before the H. Select Comm. on the Weaponization of the Fed. Gov’t*, 118th Cong. 34 (2023) (statement of Michael Shellenberger) [hereinafter Shellenberger].

¹⁸⁵ *Id.*

¹⁸⁶ Scott Shane & Alan Blinder, *Secret Experiment in Alabama Senate Race Imitated Russian Tactics*, N.Y. TIMES (Dec. 19, 2018), <https://www.nytimes.com/2018/12/19/us/alabama-senate-roy-jones-russia.html>.

¹⁸⁷ Craig Timberg et al., *Secret Campaign to Use Russian-Inspired Tactics in 2017 Ala. Elections Stirs Anxiety for Democrats*, WASH. POST (Jan. 6, 2019, 2:25 PM), https://www.washingtonpost.com/business/technology/secret-campaign-to-use-russian-inspired-tactics-in-2017-alabama-election-stirs-anxiety-for-democrats/2019/01/06/58803f26-0400-11e9-8186-4ec26a485713_story.html.

associated with several former members of the Obama administration who had transitioned to private technology firms.¹⁸⁸ The event highlighted the concern that “threats to honest, transparent political discourse in the age of social media are as likely to be domestic as foreign.”¹⁸⁹

Policy researcher Renee DiResta, who had worked on the early phase of Project Birmingham, later became the principal researcher for the Senate Intelligence Committee investigation of Russian influence operations.¹⁹⁰ In 2018 testimony to the U.S. Senate, DiResta stated that “disinformation, misinformation, and social media hoaxes have evolved from a nuisance into high-stakes information war.”¹⁹¹ DiResta claimed that America is

in the midst of an arms race, in which responsibility for the integrity of public discourse is largely in the hands of private social platforms . . . it is critical to acknowledge that computational propaganda and disinformation is not about arbitrating truth, nor is it a question of free speech. Information Warfare is a cybersecurity issue, it is an ongoing national security issue, and it must be addressed through a collaboration between governments responsible for the safety of their citizens and private industry responsible for the integrity of their products and platforms.¹⁹²

DiResta recommended government intervention against “witting or unwitting U.S. Persons” whom foreign propagandists may use to launder disinformation.¹⁹³ She also recommended “immediate government action” to intervene in privately-owned social media efforts to patrol misinformation.¹⁹⁴

The final years of the 2010s were characterized by policy discussions like this that blurred the line between threats to cybersecurity infrastructure and instances of political propaganda, the line between foreign actors and American citizens, and the line between Big Tech private terms of use and government intervention. Then, the 2020s began with a global pandemic and a historically divisive election.

B. Defining Terms: Misinformation, Disinformation, and Malinformation

CISA divides misinformation into three categories: misinformation,

¹⁸⁸ *See id.*

¹⁸⁹ *Id.*

¹⁹⁰ Shellenberger, *supra* note 184, at 34–37.

¹⁹¹ *Open Hearing on Foreign Influence Operations’ Use of Social Media Platforms (Third Party Expert Witnesses): Hearing Before the Select Committee on Intelligence of the United States Senate*, 115th Cong. 19 (2018) (statement of Renee DiResta, Director of Research, New Knowledge).

¹⁹² *Id.*

¹⁹³ *Id.* at 23.

¹⁹⁴ *Id.*

disinformation, and malinformation. Misinformation is “false, but not created or shared with the intention of causing harm.”¹⁹⁵ Disinformation is “deliberately created to mislead, harm, or manipulate a person, social group, organization, or country.”¹⁹⁶ Malinformation is “based on fact, but used out of context to mislead, harm, or manipulate.”¹⁹⁷ According to a draft of its Quadrennial Homeland Security Review released in 2022, DHS misinformation priorities included combatting “inaccurate information” on multiple topics, including the origins of COVID-19, efficacy of COVID-19 vaccines, racial justice, the 2021 U.S. withdrawal from Afghanistan, and U.S. support to Ukraine.¹⁹⁸

This expansive list has raised eyebrows and led to concerns about how disinformation is defined by the government, because “the inherently subjective nature of what constitutes disinformation provides a broad opening . . . to make politically motivated determinations about what constitutes dangerous speech.”¹⁹⁹ *Reuters* has identified serious risks in current government efforts to combat misinformation, including a “lack of conceptual clarity and substantial agreement on what exactly constitutes disinformation.”²⁰⁰ Other concerns raised by the report include peer-reviewed empirical research suggesting that fake news makes up a “very small part of people’s overall media use” and that public discourse about misinformation often focuses on broader issues like politics and poor-quality journalism rather than “demonstrably false information spread to harm.”²⁰¹

In March 2023 testimony to the Republican-led House Subcommittee on Government Weaponization, journalist Michael Shellenberger claimed, “What today’s censors call ‘disinformation’ is more often than not just ‘being wrong’ on the internet.”²⁰² The lack of agreement about what topics can qualify as misinformation combined with public perception that there is a close relationship between government and social media companies has led to First Amendment concerns and an erosion of trust in the government.

¹⁹⁵ *Foreign Influence Operations and Disinformation*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/topics/election-security/foreign-influence-operations-and-disinformation> (last visited Apr. 12, 2024) [hereinafter *Foreign Influence Operations and Disinformation*].

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Klippenstein & Fang, *supra* note 177.

¹⁹⁹ *Id.*

²⁰⁰ Rasmus Kleis Nielsen, *How to Respond to Disinformation While Protecting Free Speech*, REUTERS INST. (Feb. 19, 2021), <https://reutersinstitute.politics.ox.ac.uk/news/how-respond-disinformation-while-protecting-free-speech>.

²⁰¹ *Id.*

²⁰² Shellenberger, *supra* note 184, at 33

C. Case Study 1: Misinformation, Uncertainty, and Policy Disagreement During COVID-19

In December 2019, citizens in China’s Hubei Province began to experience symptoms of an “atypical pneumonia-like illness that [did] not respond well to standard treatments,” reminiscent of the 2003 SARS outbreak.²⁰³ According to the Chinese Communist Party (“CCP”), the first known COVID-19 case was traced to a potential bat or other animal exposure in the Huanan Seafood Market.²⁰⁴ Initially, China denied human-to-human transmissibility, accused Wuhan healthcare workers of spreading hoaxes, and ordered the destruction of viral samples.²⁰⁵ By December 31, 2019, Chinese censors had banned the phrases “Wuhan unknown pneumonia” and “unknown SARS” from Chinese social media discussions and online searches.²⁰⁶ When China did begin to publicly acknowledge transmissibility of the virus after Lunar New Year 2020, the virus had already spread internationally.²⁰⁷

As the virus spread around the world in early 2020, so did theories about its origin: the CCP accused U.S. Army soldiers of introducing the virus to Wuhan;²⁰⁸ others accused China of intentionally releasing a biological weapon or negligently leaking the virus from the Wuhan Institute of Virology.²⁰⁹ Experts were divided about the CCP’s claim of bat-to-human transmission.²¹⁰ On January 30, 2020, the World Health Organization (“WHO”) declared a global health emergency, and by February 1, the outbreak had become both a public health and a diplomatic concern for the United States.²¹¹ As a result of the CCP’s

²⁰³ *CDC Museum COVID-19 Timeline*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/museum/timeline/covid19.html> (last visited Apr. 10, 2024).

²⁰⁴ *See Coronavirus Timeline: Tracking the Chinese Communist Party’s Response*, HUDSON INST., <https://www.hudson.org/national-security-defense/coronavirus-timeline> (May 26, 2020).

²⁰⁵ *See id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Ben Westcott & Steven Jiang, *Chinese Diplomat Promotes Conspiracy Theory That US Military Brought Coronavirus to Wuhan*, CNN, <https://www.cnn.com/2020/03/13/asia/china-coronavirus-us-lijian-zhao-intl-hnk/index.html> (Mar. 13, 2020, 10:53 PM).

²⁰⁹ Robert Kuznia & Drew Griffin, *How Did Coronavirus Break Out? Theories Abound as Researchers Race to Solve Genetic Detective Story*, CNN, <https://www.cnn.com/2020/04/06/us/coronavirus-scientists-debate-origin-theories-invs/index.html> (Apr. 6, 2020, 5:34 PM).

²¹⁰ *Id.*

²¹¹ *See HUDSON INST., supra note 204.* (“Responding to the prior day’s announcement that the United States would suspend entry of foreign nationals who had visited China, Chinese officials criticize[d] the move as ‘neither based in fact nor helpful’ and ‘certainly not a gesture of goodwill.’”); *see also* Yuliya Talmazan, *China Criticizes U.S. Border Closure as Coronavirus Death Toll Rises*, NBC NEWS (Feb. 1, 2020, 9:01 AM), <https://www.nbcnews.com/news/world/china-criticizes-u-s-border-closure-coronavirus->

lack of transparency, mixed messaging from WHO,²¹² and contradictory responses by United States policymakers,²¹³ the COVID-19 pandemic was defined by public uncertainty and official mixed-messaging from its beginning.

As both the virus itself and fear of the virus spread through the United States, Americans were eager for guidance about how to protect themselves and how to mitigate the transmission of COVID-19 in the community. As a result, the onset of the pandemic was accompanied by an “infodemic” of conflicting information.²¹⁴ In spring 2020, there were no vaccines, no identified treatments, and no publicly available diagnostic tests. One article describes the time period as one of “panic buying of sanitizers and panic selling of stocks.”²¹⁵ Social media was rife with unverified health claims about groceries,²¹⁶ 5G signals,²¹⁷ cleaning products,²¹⁸ and the anti-malarial drug hydroxychloroquine.²¹⁹ The infodemic

death-toll-rises-n1128161.

²¹² HUDSON INST., *supra* note 204.

²¹³ See, e.g., Allison Aubrey, *Trump Declares Coronavirus a Public Health Emergency and Restricts Travel from China*, NPR (Jan. 31, 2020, 4:42 PM), <https://www.npr.org/sections/health-shots/2020/01/31/801686524/trump-declares-coronavirus-a-public-health-emergency-and-restricts-travel-from-c>; Nancy Pelosi Visits San Francisco’s Chinatown Amid Coronavirus Concerns, NBC BAY AREA, <https://www.nbcbayarea.com/news/local/nancy-pelosi-visits-san-franciscos-chinatown/2240247/> (Feb. 25, 2020, 7:05 AM) (“That’s what we’re trying to do today is say everything is fine here. . . . Come because precautions have been taken. The city is on top of the situation.”); Press Release, Office of Governor Gavin Newsom, Governor Gavin Newsom Issues Stay at Home Order (Mar. 19, 2020) (on file with author) (ordering the complete shutdown of California pursuant to March 4, 2020 state of emergency declaration).

²¹⁴ WHO, NOVEL CORONAVIRUS (2019-nCoV) SITUATION REPORT 13 (2020) (“The 2019-nCoV outbreak and response has been accompanied by a massive ‘infodemic’—an overabundance of information—some accurate and some not—that makes it hard for people to find trustworthy sources and reliable guidance when they need it.”).

²¹⁵ Jon LaPook, *Coronavirus: How U.S. Hospitals Are Preparing for COVID-19, and What Leading Health Officials Say About the Virus*, CBS 60 MINUTES (Mar. 8, 2020, 7:12 PM), <https://www.cbsnews.com/news/coronavirus-containment-dr-jon-lapook-60-minutes-2020-03-08/>.

²¹⁶ See, e.g., Elizabeth Dohms-Harter, *You Don’t Need to Leave Your Groceries in the Garage for 3 Days*, WIS. PUB. RADIO (Apr. 1, 2020), <https://www.wpr.org/you-dont-need-leave-your-groceries-garage-3-days>.

²¹⁷ Gina Mantica, *5G Doesn’t Cause COVID-19, but the Rumor It Does Spread Like a Virus*, BOS. UNIV. (Jan. 4, 2021), <https://www.bu.edu/hic/2021/01/04/5g-doesnt-cause-covid-19-but-the-rumor-it-does-spread-like-a-virus/>.

²¹⁸ Katie Rogers et al., *Trump’s Suggestion That Disinfectants Could Be Used to Treat Coronavirus Prompts Aggressive Pushback*, N.Y. TIMES (Apr. 24, 2020), <https://www.nytimes.com/2020/04/24/us/politics/trump-inject-disinfectant-bleach-coronavirus.html>.

²¹⁹ Tim K. Mackey et al., *Application of Unsupervised Machine Learning to Identify and Characterize Hydroxychloroquine Misinformation on Twitter*, 3 LANCET DIGIT. HEALTH e72, e72 (2021); see also Theresa Waldrop et al., *Fearing Coronavirus, Arizona Man Dies After Taking a Form of Chloroquine Used to Treat Aquariums*, CNN,

was compounded by government lockdown policies; as officials closed down public spaces, public discourse necessarily occurred almost exclusively over social media platforms.

In response to public concern about the virus, director of the National Institute of Allergy and Infectious Diseases (“NIAID”) Dr. Anthony Fauci dismissed the notion that masks would protect individuals from contracting COVID-19. In a *60 Minutes* interview on March 8, 2020, Fauci was asked to address online misinformation about face masks and responded,

Right now, in the United States people should not be walking around with masks. There’s no reason for people to be walking around with a mask. When you’re in the middle of an outbreak, wearing a mask might make people feel a little bit better, and it might even block a droplet, but it’s not providing the perfect protection people think that it is, and often, there are unintended consequences: people keep fiddling with the mask and keep touching their face When you look at the films of foreign countries and you see 85 percent of the people wearing masks, that’s fine. I’m not against it. If you want to do it, that’s fine. . . . But it could lead to a shortage of masks for the people who really need it.²²⁰

When interviewer Dr. Jon LaPook asked, “You’re sure of this? Because people are listening really closely to this,” Fauci reiterated his confidence that there was no need for the public to mask against coronavirus.²²¹ On April 3, public health authorities reversed this position and advised all people to wear face coverings in public, citing concerns of asymptomatic or pre-symptomatic transmission.²²²

By the summer of 2020, stringent masking requirements were ubiquitous in

<https://www.cnn.com/2020/03/23/health/arizona-coronavirus-chloroquine-death/index.html> (Mar. 25, 2020, 12:50 PM); *but see* Alana Goodman, *Police Investigating Death of Arizona Man from Chloroquine Phosphate*, WASH. FREE BEACON, <https://freebeacon.com/coronavirus/police-investigating-death-of-arizona-man-from-chloroquine-phosphate/> (Apr. 29, 2020, 11:17 AM) (debunking a connection to public statements about hydroxychloroquine and detailing a subsequent homicide investigation into the man’s wife).

²²⁰ 60 MINUTES, *March 2020: Dr. Anthony Fauci Talks with Dr. Jon LaPook About Covid-19*, YOUTUBE (Mar. 8, 2020), https://www.youtube.com/watch?v=PRA6t_e7dgl; *see also* Britt McCandless Farmer, *March 2020: Dr. Anthony Talks with Dr. Jon LaPook About COVID-19*, CBS News (Mar. 8, 2020, 7:02 PM), <https://www.cbsnews.com/news/preventing-coronavirus-facemask-60-minutes-2020-03-08/>.

²²¹ Farmer, *supra* note 220; *see also* Darragh Roche, *Fauci Said Masks ‘Not Really Effective in Keeping Out Virus,’ Email Reveals*, NEWSWEEK (June 2, 2021, 4:59 AM), <https://www.newsweek.com/fauci-said-masks-not-really-effective-keeping-out-virus-email-reveals-1596703> (“The typical mask you buy in the drug store is not really effective in keeping out virus, which is small enough to pass through material.”).

²²² Saranac Hale Spencer, *Outdated Fauci Video on Face Masks Shared Out of Context*, FACTCHECK.ORG (May 19, 2020), <https://www.factcheck.org/2020/05/outdated-fauci-video-on-face-masks-shared-out-of-context/>.

multiple high-population states.²²³ California Governor Gavin Newsom stated, “Science shows that face coverings and masks work. . . . Simply put, we are seeing too many people with faces uncovered.”²²⁴ Despite his prior comments on the ineffectiveness of store-bought surgical masks at protecting individuals from the airborne coronavirus, in May 2020, Fauci stated that he wears a mask “because I want to make it be a *symbol* for people to see that that’s the kind of thing you should be doing.”²²⁵ He characterized the symbol of wearing a mask as a form of “respect for another person. . . . You wear a mask, they wear a mask, you protect each other.”²²⁶ In June 2020, Fauci claimed that he had intentionally misdirected the American people from the benefit of masking to prevent a run on personal protective equipment needed by the healthcare industry.²²⁷

At the same time, social media companies began to leverage their information business model to assist policymakers²²⁸ in attempts to address the COVID-19 infodemic. As discussed in Part II, the social media business model is driven by the ability to manipulate what people see online. According to Facebook, “the average [social media] user sees only 10 [percent] of their News Feed and the platforms determine what users see by reordering how stories appear.”²²⁹ As a

²²³ See *California Public Health Officials Release Guidance Requiring Californians to Wear Face Coverings in Most Settings Outside the Home*, CAL. DEP’T OF PUB. HEALTH (June 18, 2020), <https://www.cdph.ca.gov/Programs/OPA/Pages/NR20-128.aspx>; see also, e.g., *Mayor’s Order 2020-080: Wearing Masks in the District of Columbia to Prevent the Spread of COVID-19*, GOV’T OF THE D.C. (July 22, 2020), [https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-issues-executive-order-requiring-all-people-new](https://coronavirus.dc.gov/maskorder#:~:text=of%20this%20Order%3A-,1.,person%20is%20wearing%20a%20mask; see also, e.g., Amid Ongoing COVID-19 Pandemic, Governor Cuomo Issues Executive Order Requiring All People in New York to Wear Masks or Face Coverings in Public</i>, GOVERNOR OF NEW YORK (Apr. 15, 2020), <a href=).

²²⁴ Dennis Romero, *California Mandates Masks for Most Public Activity as Coronavirus Numbers Surge*, NBC NEWS (June 18, 2020), <https://www.nbcnews.com/news/us-news/california-mandates-masks-most-public-activity-coronavirus-numbers-surge-n1231487>.

²²⁵ Quint Forgy, *Fauci Says He Wears Mask as ‘Symbol’ of Good Behavior*, POLITICO (May 27, 2020, 10:49 AM), <https://www.politico.com/news/2020/05/27/fauci-wears-mask-as-symbol-of-good-behavior-283847>.

²²⁶ *Id.*

²²⁷ See Kerrington Powell & Vinay Prasad, *The Noble Lies of COVID-19*, SLATE (July 28, 2021), <https://slate.com/technology/2021/07/noble-lies-covid-fauci-cdc-masks.html>; see also Katherine Ross, *Why Weren’t We Wearing Masks from the Beginning? Dr. Fauci Explains*, THE STREET (June 12, 2020, 3:07 PM), <https://www.thestreet.com/video/dr-fauci-masks-changing-directive-coronavirus>.

²²⁸ See *WFAB Staff, Louisiana, Missouri Release Full Fauci Deposition Transcript* (Dec. 5, 2022, 3:28 PM), <https://www.wfab.com/2022/12/05/louisiana-missouri-release-full-fauci-deposition-transcript/>.

²²⁹ Bhaskar Chakravorti, *Social Media Companies Are Taking Steps to Tamp Down Coronavirus Misinformation – But They Can Do More*, CONVERSATION (Mar. 30, 2020),

result, “demoting and elevating posts [can] be as essential as blocking them outright.”²³⁰

In the spring of 2020, social media companies began to address purported COVID-19 misinformation through a system of blocking, demoting, elevating, and labeling.²³¹ Blocking removes content and individuals from the marketplace of ideas.²³² Demotion and elevation do not remove content or individuals from the platform, but within a competitive information ecosystem where users see only a fraction of their news feeds, demotion or non-elevation can be the functional equivalent of blocking.²³³ As a result, the phenomenon has been called “shadowbanning”—a form of censorship that may not be easily identifiable.²³⁴ Labeling attaches a visible misinformation disclaimer to content.²³⁵ In an attempt to assuage concerns about an infodemic, Facebook and other social media companies began to rely on third-party fact-checkers and health authorities to flag problematic content.²³⁶ The companies would then remove posts, block and restrict hashtags, or demote information that was not aligned with official health policies.²³⁷

In spring 2020, for example, when policymakers assured the public that masks were unnecessary, Facebook banned ads and commercial listings for medical face masks, characterizing the ads as exploitative of the public health emergency and intentionally misleading.²³⁸ By 2021, however, Facebook was blocking and

8:14 AM), <https://theconversation.com/social-media-companies-are-taking-steps-to-tamp-down-coronavirus-misinformation-but-they-can-do-more-133335>.

²³⁰ *Id.*

²³¹ @MetaNewsRoom, X (Mar. 16, 2020, 8:09 PM) <https://twitter.com/MetaNewsroom/status/1239703497479614466>.

²³² Taylor Lorenz, *Twitter Ends its COVID Misinformation Policy* (Nov. 29, 2022 8:06 PM), <https://www.washingtonpost.com/technology/2022/11/29/twitter-covid-misinformation-policy/>.

²³³ Kristin Burnham, *Facebook News Feed: 5 Changes*, INFORMATION WEEK (June 28, 2014), <https://www.informationweek.com/it-leadership/facebook-news-feed-5-changes#close-modal>; Ken Yeung, *Facebook Says About 10% of News Feed Stories are Actually Read Daily*, VENTURE BEAT (Sept. 14, 2016 10:22 AM), <https://venturebeat.com/social/facebook-says-about-10-of-news-feed-stories-are-actually-read-daily/>.

²³⁴ Gabriel Nichols, *Shadowbanning Is Big Tech’s Big Problem*, ATL. (Apr. 28, 2022 10:22 AM), <https://www.theatlantic.com/technology/archive/2022/04/social-media-shadowbans-tiktok-twitter/629702/>.

²³⁵ Kajal Pawar, *Timeline: How Social Media Platforms Have Responded to COVID-19 Misinformation*, HUMBER NEWS (Jul. 28, 2020), <https://humbernews.ca/2020/07/timeline-how-social-media-platforms-have-responded-to-covid-19>; *Taking Action Against People Who Repeatedly Share Misinformation*, META (May 26, 2021), <https://about.fb.com/news/2021/05/taking-action-against-people-who-repeatedly-share-misinformation/>.

²³⁶ Chakravorti, *supra* note 229.

²³⁷ *Id.*

²³⁸ Kang-Xing Jin, *Keeping People Safe and Informed About the Coronavirus*, META (Dec. 18, 2020), <https://about.fb.com/news/2020/12/coronavirus/#limiting-misinfo>.

demoting content that questioned the efficacy of masking, the origin of COVID-19, vaccine effectiveness, vaccine side effects, lockdowns, and the comparative advantages of natural immunity,²³⁹ even when the questions were in the form of an opinion or included demonstrably true information, including criticism that cited the CDC's own data.²⁴⁰ Simultaneously, social media elevated content that promoted conformity to vaccination, masking, and social isolation policies.²⁴¹ Journalist David Zweig has alleged that Twitter increasingly categorized misinformation with a bias that bent heavily toward establishment dogmas.²⁴²

Social media's initial partnership with public health entities is understandable. In an emergency, reliable information is vital. However, the definition of misinformation grew rapidly and was used to blacklist not only extreme or verifiably false claims, but also the expert opinions of preeminent epidemiologists. Stanford's Dr. Jay Bhattacharya and Harvard's Dr. Martin Kulldorff voiced concerns about "the damaging physical and mental health impacts of the prevailing COVID-19 policies" and advocated for more targeted mitigation policies in an October 2020 letter called the Great Barrington Declaration.²⁴³ The two were joined by more than forty medical experts who claimed that "[c]urrent lockdown policies are producing devastating effects on short and long-term public health. The results (to name a few) include lower childhood vaccination rates, worsening cardiovascular disease outcomes, fewer cancer screenings and deteriorating mental health—leading to greater excess mortality in years to come."²⁴⁴

In particular, the doctors cited statistics that COVID-19 was less dangerous to children than the elderly and argued that keeping children out of school was a "grave injustice" that would leave the "underprivileged disproportionately harmed."²⁴⁵ In March 2021, when a Twitter user asked Kulldorff if he thought

²³⁹ See Guy Rosen, *An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19*, META (Apr. 16, 2020), <https://about.fb.com/news/2020/04/covid-19-misinfo-update/>; see also Thomas Brewster, *Facebook Hashtag Purge Fails to Stop Covid-19 Conspiracy Theories Spreading*, FORBES, <https://www.forbes.com/sites/thomasbrewster/2021/02/23/facebook-and-instagram-hashtag-crackdown-struggles-to-shut-down-covid-19-conspiracies/?sh=546e5c75187b> (Feb. 23, 2021).

²⁴⁰ See David Zweig (@davidzweig), TWITTER (Dec. 26, 2022, 9:10 AM), <https://twitter.com/davidzweig/status/1607378386338340867>.

²⁴¹ See e.g., *Updates to Our Work on COVID-19 Vaccine Misinformation*, BLOG: TWITTER (Mar. 1, 2021), https://blog.twitter.com/en_us/topics/company/2021/updates-to-our-work-on-covid-19-vaccine-misinformation.

²⁴² Zweig, *supra* note 240.

²⁴³ *The Great Barrington Declaration*, GREAT BARRINGTON DECLARATION, <https://gbdeclaration.org/> (last visited Feb. 4, 2024).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

younger age groups and people who already had the virus needed to be vaccinated, Kulldorff responded, “No. Thinking that everyone must be vaccinated is as scientifically flawed as thinking that nobody should. COVID vaccines are important for older high-risk people, and their care-takers. Those with prior natural infection do not need it. Nor children.”²⁴⁶ In response, Twitter labeled Kulldorff’s reply as misleading and disabled all replies and likes, which functionally prevented the tweet from being seen or shared.²⁴⁷ Bhattacharya was likewise blacklisted from being able to trend on Twitter.²⁴⁸ Bhattacharya and Kulldorff were voicing policy recommendations based on their opinions as prominent scientists and medical professionals, and many of their specific concerns have been validated over time.²⁴⁹

White House emails from April 2021 released in January 2023 suggest that the government may have coercively pressured social media companies to obey government requests to censor specific topics and specific American citizens on public social media forums and in private conversations between members of “immigrant communities and communities of color” within WhatsApp.²⁵⁰ One series of emails shows that after Facebook expressed its concern to the White House that removing or “reducing the viral[] content discouraging vaccines”

²⁴⁶ Martin Kulldorff, (@MartinKulldorff), TWITTER (Mar. 15, 2021, 9:44 PM) <https://twitter.com/MartinKulldorff/status/1371638485686358018>.

²⁴⁷ Zweig, *supra* note 240.

²⁴⁸ Bari Weiss (@bariweiss), TWITTER (Dec. 8, 2022, 7:30 PM), <https://twitter.com/bariweiss/status/1601011428579717121>; *see also* Blake Montgomery, *The Twitter Files, Part Two, Explained*, GIZMODO (Dec. 9, 2022), <https://gizmodo.com/elon-musk-twitter-files-bari-weiss-part-two-shadow-ban-1849876635>; Justin Hart, *The Twitter Blacklisting of Jay Bhattacharya*, WALL ST. J. (Dec. 9, 2022, 6:23 PM), <https://www.wsj.com/articles/the-twitter-blacklisting-of-jay-bhattacharya-medical-expert-covid-lockdown-stanford-doctor-shadow-doctor-shadow-banned-censorship-11670621083>.

²⁴⁹ *See, e.g.*, Bianca Vazquez Toness & Sharon Lurye, *Massive Learning Setbacks Show Covid’s Sweeping Toll on Kids*, HECHINGER REP. (Oct. 28, 2022), <https://hechingerreport.org/massive-learning-setbacks-show-covids-sweeping-toll-on-kids/> (“The Covid-19 pandemic devastated poor children’s well-being, not just by closing their schools, but also by taking away their parents’ jobs, sickening their families and teachers and adding chaos and fear to their daily lives. The scale of disruption to American kids’ education is evident in a district-by-district analysis of test scores.”); *see also* Jen Christensen, *Pandemic ‘Immunity Gap’ Is Probably Behind Surge in RSV Cases, Scientists Say*, CNN (Oct. 28, 2022, 5:07 PM), <https://www.cnn.com/2022/10/26/health/rsv-immunity-gap/index.html>; Laura Kurtzman, *COVID-19 Vaccines, Prior Infection Reduce Transmission of Omicron*, UCSF (Jan. 2, 2023), <https://www.ucsf.edu/news/2022/12/424546/covid-19-vaccines-prior-infection-reduce-transmission-omicron>; *Late-stage Cancer Diagnoses Rise After Pandemic-Related Drop in Screenings*, HEALIO (Jul 25, 2022), <https://www.healio.com/news/hematology-oncology/20220722/lateststage-cancer-diagnoses-rise-after-pandemicrelated-drop-in-screenings>.

²⁵⁰ Jenin Younes & Aaron Kheriaty, *The White House Covid Censorship Machine*, WALL ST. J. (Jan. 8, 2023, 5:23 PM), <https://www.wsj.com/articles/white-house-covid-censorship-machine-social-media-facebook-meta-executive-rob-flaherty-free-speech-google-11673203704>.

did not qualify as “actionable misinformation” and involved censoring information that was “often-true,” the White House responded by blaming Facebook for election skepticism and the January 6 insurrection.²⁵¹ White House Director of Digital Media Rob Flaherty asked for “assurances, based in data, that you are not doing the same thing again here.”²⁵²

Less than a week later, Flaherty requested an explanation from Facebook about how *Fox News* host Tucker Carlson’s criticism of the government’s vaccine policy could be trending on its platform.²⁵³ On behalf of the White House, Flaherty asked to be shown what “[r]eduction actually looks like,” and Facebook responded that it would immediately take the *Fox News* post down.²⁵⁴ Nine days after the exchange, Flaherty forwarded Facebook an internal White House memo that blamed Facebook for COVID vaccine misinformation.²⁵⁵ On July 16, 2021, when asked if he had a message for social media platforms like Facebook, President Biden replied, “They’re killing people.”²⁵⁶

Journalists who have evaluated the government’s response to COVID-19 claim that FOIA requests, internal Twitter documents, and litigation discovery have “exposed a sprawling censorship regime involving the White House as well as the Center for Disease Control and Prevention, the Department of Homeland Security, the Federal Bureau of Investigation, and other agencies. . . . [T]hese included truthful messages casting doubt on the efficacy of masks and challenging Covid-19 vaccine mandates.”²⁵⁷ Multiple reports have concluded that the federal government aggressively pressured social media companies to censor specific viewpoints and specific citizens, including members of the press and experts in the healthcare industry.²⁵⁸

Partnering with policymakers who have a personal, political stake in the popular perception of their programs is problematic. At best, social media’s reliance on public agencies as a viewpoint measuring stick is a recipe for unconscious groupthink and the type of echo chamber that social media has become infamous for. Worse, it provides a significant opportunity to target political opponents and silence public criticism. Regardless of whether COVID-19 viewpoint censorship was the result of noble or nefarious intent, censoring speech during a period of factual uncertainty and widespread anxiety contributes

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See Hart, *supra* note 248.

to greater distrust of government²⁵⁹ at a time when institutional trust is most valuable.

D. Case Study 2: Suppression of the *New York Post*'s Hunter Biden Laptop Story

On October 14, 2020, two weeks before the general presidential election, Facebook and Twitter took unprecedented action to censor the spread of a *New York Post* article²⁶⁰ that contained unflattering accusations about the family business dealings of then-presidential candidate Joe Biden, supported by information purportedly found on a laptop that the then-candidate's son Hunter had abandoned at a repair shop.²⁶¹

In response to the story, Twitter blocked users from posting links to the *New York Post* article or photos of its content. Users who attempted to share the original story were unable to do so and were instead shown a Twitter notice that said, "We can't complete this request because this link has been identified by Twitter or our partners as being potentially harmful."²⁶² Anyone attempting to click or retweet an existing link to the article was unable to do so and received an explanation that the "link may be unsafe."²⁶³ Facebook also restricted the ability of users to link to the article, alleging questions about its validity and stating, "This is part of our standard process to reduce the spread of misinformation."²⁶⁴ The response to the *New York Post* article was novel in two ways. First, the extent to which the access was blocked—total shut down of "URL sharing via tweet or DM with zero context"²⁶⁵ across multiple platforms—was unprecedented. Second, the actions were directed not at a meme, a bot, or an unverified individual user, but at an American news publication.

Initially, Twitter and Facebook claimed that the article was censored due to

²⁵⁹ Powell & Prasad, *supra* note 227.

²⁶⁰ Emma-Jo Morris & Gabrielle Fonrouge, *Smoking-Gun Email Reveals How Hunter Biden Introduced Ukrainian Businessman to VP Dad*, N.Y. POST (Oct. 14, 2020, 5:00 AM), <https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad/>.

²⁶¹ Kari Paul, *Facebook and Twitter Restrict Controversial New York Post Story on Joe Biden*, GUARDIAN (Oct. 14, 2020, 10:36), <https://www.theguardian.com/technology/2020/oct/14/facebook-twitter-new-york-post-hunter-biden>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Jack Dorsey (@jack), TWITTER (Oct. 14, 2020, 7:55 PM), <https://twitter.com/jack/status/1316528193621327876>; see also Letter from James Comer, Ranking Member, House Comm. on Oversight and Reform, to Jack Dorsey, CEO, Twitter, Inc. (Oct. 15, 2020), <https://oversight.house.gov/wp-content/uploads/2020/10/Letter-to-Twitter-10-15-20.pdf>.

its violation of private community standards regarding hacked information.²⁶⁶ Twitter executives later disavowed the decision as a “mistake.”²⁶⁷ Executives stated that the article had not been a violation of any clear community standard, and that the decision to take action against the article was made by Yoel Roth, Twitter’s Head of Safety and Integrity at the time, because it reminded him of the 2016 Russian hack of the Democratic National Committee.²⁶⁸ Former Twitter executives have denied that they acted in concert with government officials to remove the story, but Roth acknowledged that the relationship between Twitter and government employees merited increased transparency.²⁶⁹

On October 19, five days after the *New York Post* article was published, 51 U.S. intelligence veterans signed a letter supporting the platforms’ decision to block its dissemination and claimed that “the arrival on the US political scene of emails purportedly belonging to Vice President Biden’s son Hunter . . . has all the classic earmarks of a Russian information operation.”²⁷⁰ Although the letter was signed by individuals primarily from the Obama administration who were no longer serving in an official capacity,²⁷¹ the list of recognizable, high profile names underscores a perception that the government supported the blocking of the article for national security reasons.

In an investigation of why the platforms took unprecedented action against the *New York Post*, the Republican-led House Subcommittee on Government Weaponization expressed concern about a June 2020 meeting led by the government funded think-tank Aspen Institute, which trained journalists from the *New York Times*, *Washington Post*, CNN, and content “censors at Twitter and Facebook to treat information leaks, however accurate, as likely the result of Russian hacking, and to make the story about the hacking, not the contents of

²⁶⁶ David Morgan, *Former Twitter Execs Tell Republicans They Erred On Hunter Biden Laptop Story*, REUTERS (Jan. 8, 2023, 6:06 PM), <https://www.reuters.com/world/us/republican-led-us-house-panel-probes-twitter-block-hunter-biden-story-2023-02-08/>.

²⁶⁷ Laura Romero, *Former Twitter Execs Say Removal of Hunter Biden Laptop Story Was a ‘Mistake’*, ABC NEWS (Feb. 9, 2023), <https://abc7news.com/former-twitter-execs-say-removal-of-hunter-biden-laptop-story-was-a/12790381/> (“The New York Post chose not to delete its original tweets, so Twitter made an exception after two weeks to retroactively apply the new policy to the Post’s tweets . . . In hindsight, Twitter should have reinstated the Post account immediately.”).

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Press Release, Jim Clapper et al., Public Statement on the Hunter Biden Emails, POLITICO (Oct. 19, 2020), <https://www.politico.com/f/?id=00000175-4393-d7aa-af77-579f9b330000>.

²⁷¹ Natasha Bertrand, *Hunter Biden Story Is Russian Disinfo, Dozens of Former Intel Officials Say*, POLITICO (Oct. 19, 2020, 10:30 PM) <https://www.politico.com/news/2020/10/19/hunter-biden-story-russian-disinfo-430276>.

the hack.”²⁷²

One of the signatories of the October 19 intelligence letter, a former Defense Intelligence Agency deputy director, claimed two years later that “all of us figured that a significant portion of that content had to be real to make any Russian disinformation credible.”²⁷³ The former deputy director stated that he did not regret signing the letter because “the laptop’s ‘chain of custody’ left open the possibility that ‘Russians or even ill-intended conservative elements could have planted stuff in there.’”²⁷⁴

A subsequent investigation found that the laptop had been in the FBI’s possession since 2019,²⁷⁵ and an FBI whistleblower has alleged that agents were told not to look at the Hunter Biden laptop until after the election.²⁷⁶ In 2023, former CIA director Mike Morell, who helped coordinate the letter, testified to the House Judiciary Committee that he was asked by Secretary of State Antony Blinken for help discrediting the *New York Post* story.²⁷⁷ At the time, Blinken had been a senior member of the Biden 2020 presidential campaign.²⁷⁸

Regardless of how the decision was made to remove the story and who

²⁷² Shellenberger, *supra* note 184, at 40; *see generally* Michael Shellenberger (@ShellenbergerMD), TWITTER (Dec. 19, 2022, 12:47 PM), <https://twitter.com/shellenberger/status/1604896328453980160?s=20>.

²⁷³ Glenn Kessler, *The Hunter Biden Laptop and Claims of ‘Russian Disinfo’*, WASH. POST (Feb. 13, 2023, 3:00 AM), <https://www.washingtonpost.com/politics/2023/02/13/hunter-biden-laptop-claims-russian-disinfo/>.

²⁷⁴ Caitlin Doornbos, *Ex-Top Intel Official Douglas Wise Knew Hunter Biden Laptop ‘Had to Be Real’ But Signed ‘Disinfo’ Letter Anyway*, N.Y. POST, <https://nypost.com/2023/01/16/ex-top-intel-official-douglas-wise-knew-hunter-biden-laptop-had-to-be-real-but-signed-disinfo-letter/> (Jan. 16, 2023, 11:40 PM).

²⁷⁵ *See Hearing on the Weaponization of the Fed. Government: Hearing Before the Select Subcomm. on the Weaponization of the Fed. Government of the H. Comm. on the Judiciary*, 118th Cong. 9–10 (2023); *see generally* Daniel Chaitin, *Jim Jordan Puts a Dozen Intel Veterans on Notice Over Hunter Biden Laptop Letter*, HOUSE JUDICIARY COMM. (Feb. 6, 2023), <https://judiciary.house.gov/media/in-the-news/jim-jordan-puts-dozen-intel-veterans-notice-over-hunter-biden-laptop-letter>.

²⁷⁶ Kristine Frazao, *FBI Whistleblower: Agents Told Not to Look at Hunter Biden Laptop Until After Election*, ABC 3, <https://weartv.com/news/nation-world/fbi-whistleblower-agents-told-not-to-look-at-hunter-biden-laptop-until-after-election-why-facebook-suppressed-damaging-hunter-biden-story-ahead-of-2020-election-hunter-biden-allegations-chuck-grassley-merrick-garland-fbi-doj> (Aug. 29, 2022, 11:37 PM).

²⁷⁷ Joseph Clark, *Biden Campaign Behind Attacks on Hunter Laptop Story, CIA ex-official Testified*, WASH. TIMES (Apr. 20, 2023), <https://www.washingtontimes.com/news/2023/apr/20/michael-morell-cia-ex-official-said-biden-campaign/>; Harriet Alexander, *Ex-Acting CIA Director Reveals He Had 50 Spies Sign a Letter Saying Hunter Biden Laptop Scandal Was Russian Disinformation to HELP Joe ‘Win the Presidential Election’*, DAILY MAIL ONLINE, <https://www.dailymail.co.uk/news/article-11997959/Ex-CIA-chief-spills-got-spies-write-false-Hunter-Biden-laptop-letter-help-Biden.html> (Apr. 21, 2023, 12:06 PM).

²⁷⁸ Clark, *supra* note 277; Alexander, *supra* note 277.

ultimately made it, the information alleged by the *New York Post* article has since been verified and the documents the article cited were eventually found to be legitimate.²⁷⁹ Critics claim that the absurdity of the intelligence veterans' claims was obvious when they were made:

In the long history of Kremlin dirty tricks, there's no precedent for so implausible a caper. The officials couldn't even say clearly what they meant. A real laptop had been stolen by the Russians and leaked to the press? A fake laptop had been created with thousands of uncannily real-looking documents, photos, videos and emails, most of them diabolically designed to have no news or scandal value? The *New York Post* produced not only a complete and sufficient account of how it obtained the laptop data. It produced a dated subpoena showing the FBI was already in possession of the original laptop for months and would know if the data were fake.²⁸⁰

The content moderation relationship between sitting government officials and social media executives during the COVID-19 pandemic and the 2020 election is now the subject of political investigations,²⁸¹ Supreme Court litigation,²⁸² and fervid public discourse.²⁸³ DHS has responded to accusations of censorship by stating that social media platforms "independently decide whether to remove or modify" posts that the government has flagged as misinformation.²⁸⁴ In an October 2022 statement, Twitter claimed it "do[es] not coordinate with other entities when making content moderation decisions, and [it] independently evaluate[s] content."²⁸⁵

Journalist Michael Shellenberger has claimed that investigation of COVID-era documents reveals an expansive network of "government agencies, academic institutions, and nongovernmental organizations that are actively censoring American citizens, often without their knowledge, on a range of issues, including

²⁷⁹ Craig Timberg et al., *Here's How the Post Examined Hunter Biden Laptop*, WASH. POST (Mar. 30, 2022, 11:00 AM), <https://www.washingtonpost.com/technology/2022/03/30/hunter-biden-laptop-data-examined/>.

²⁸⁰ Holman W. Jenkins, Jr., *Hunter Biden's Laptop and 2020's First Big Lie*, WALL ST. J. (Dec. 13, 2022, 5:47 PM), <https://www.wsj.com/articles/2020s-first-big-lie-hunter-biden-business-laptop-51-intelligence-officials-censorship-press-twitter-national-media-11670965437>.

²⁸¹ See generally Chaitin, *supra* note 275.

²⁸² Nina Totenberg, *Supreme Court examines whether government can combat disinformation online*, NPR (Mar. 18, 2024, 5:00 AM), <https://www.npr.org/2024/03/18/1238122337/supreme-court-social-media-disinformation-first-amendment>.

²⁸³ Nichols, *supra* note 234.

²⁸⁴ Klippenstein & Fang, *supra* note 177.

²⁸⁵ *Id.*

on the origins of COVID, COVID vaccines, emails relating to Hunter Biden’s business dealings, climate change, renewable energy, fossil fuels, and many other issues.”²⁸⁶ A leader at one of these institutions, the Election Integrity Partnership (“EIP”), described the EIP’s purpose as filling “the gap of the things that the government could not do themselves” because the government “lacked both . . . the funding and the legal authorizations.”²⁸⁷

IV. MISINFORMATION POLICIES USED DURING THE EARLY 2020S RAISE FIRST AMENDMENT ISSUES

The First Amendment prohibits Congress from making laws that abridge the freedom of speech, press, peaceful assembly, and opportunity to petition the Government for redress of grievances.²⁸⁸ By extension, it also prevents executive and administrative agencies from abridging the same rights, and, through incorporation by the Fourteenth Amendment, protects citizens from state-level free speech regulations as well.²⁸⁹ In addition, “[i]t is axiomatic that the government cannot do indirectly what it is prohibited from doing directly.”²⁹⁰ According to George Washington University’s Jonathan Turley, “[i]f government officials are directing or facilitating . . . censorship, it raises serious First Amendment questions.”²⁹¹

In March 2024, the Supreme Court heard arguments by several states that the federal government impermissibly facilitated the censorship of conservative viewpoints during the COVID-19 pandemic,²⁹² and the case raises several big picture questions about permissible government actions within online forums.²⁹³

²⁸⁶ Shellenberger, *supra* note 184, at 4 (footnotes omitted).

²⁸⁷ *Id.* at 37-38 (“The Election Integrity Partnership (EIP), the seed of the censorship industrial complex, was founded by two universities, a think tank, and a social media analytics firm, Stanford Internet Observatory, Washington University’s (UW) Center for an Informed Public, The Atlantic Council’s Digital Forensics Research Lab; and Graphika. EIP claims it classified 21,897,364 individual posts comprising unique ‘misinformation incidents’ from August 15, 2020 to December 12, 2020 from a larger 859 million set of tweets connected to ‘misinformation narratives.’”) (footnote omitted).

²⁸⁸ U.S. CONST. amend. I.

²⁸⁹ *Incorporation of the First Amendment*, FREE SPEECH CTR., <https://firstamendment.mtsu.edu/article/incorporation-of-the-first-amendment/#:~:text=The%20First%20Amendment%20declares%20that,Congress%20to%20enact%20such%20laws.%E2%80%9D> (Feb. 18, 2024).

²⁹⁰ Shellenberger, *supra* note 184, at 5. (footnote omitted) (quoting Klippenstein & Fang, *supra* note 177).

²⁹¹ *Id.*

²⁹² See *Murthy v. Missouri*. SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/murthy-v-missouri-3/> (last visited Apr. 25, 2024).

²⁹³ Mark Sherman, *Supreme Court Seems Favorable to Biden Administration Over Efforts to Combat Social Media Posts*, AP, <https://apnews.com/article/supreme-court-biden-administration-social-media-132df16a8b086cd7ed72954f3b4c2c04> (Mar. 18, 2024).

Regardless of the outcome of *Murthy v. Missouri*, debate about how much state actors directly pressured private platforms to censor Americans during the early 2020s is likely to continue, and broad concern about government misinformation efforts will not be resolved by a single holding—especially as the issue has been further complicated by the rapid proliferation of generative artificial intelligence since November 2022.²⁹⁴

Despite the rapidly evolving nature of communication, broad government intervention against misinformation is problematic for four reasons: 1) it is impermissible as a categorical exception to the First Amendment; 2) it fails to present a compelling government interest; 3) it does not satisfy the *Clark* test for time, place, and manner limitations; and 4) it is bad policy that conflicts with the historical wisdom and intellectual matrix that inspired the First Amendment.

A. Failure to Qualify as a Categorical Exception

As discussed in Part II, the Supreme Court has rejected attempts to expand the list of recognized categorical exceptions to the First Amendment as Orwellian.²⁹⁵ Documents suggesting that adverse discourse about national defense policy, election integrity, vaccination efficacy, global warming, and even conspiracy theories may be categorized as misinformation are perfectly illustrative of Justice Kennedy’s concern that government power to regulate untruthful or misinformed statements in the public square “has no clear limiting principle.”²⁹⁶

Although the structure of the Internet presents novel regulatory puzzles, government fear of false or destabilizing ideas going viral is not a novel government interest. In fact, America’s founders explicitly rejected this government interest when they ratified the First Amendment. America was founded in the shadow of the British Star Chamber—a group of executive-appointed experts tasked with keeping the peace in an era where new technology led to the rapid decentralization of communication and a resulting surge in misinformation, sedition, and heresy.²⁹⁷ Accordingly, concern about misinformation is the precise issue that informed the intellectual matrix of the

²⁹⁴ Catherine Thorbecke, *A Year After ChatGPT’s Release, the AI Revolution Is Just Beginning*, CNN, <https://www.cnn.com/2023/11/30/tech/chatgpt-openai-revolution-one-year/index.html> (Nov. 30, 2023).

²⁹⁵ *United States v. Alvarez*, 567 U.S. 709, 723 (2012). (“That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out.”).

²⁹⁶ *Id.*

²⁹⁷ *See supra* Part I.

First Amendment. Falsely categorizing a contemporary issue as a novel issue presents an unacceptable risk that the preeminent constitutional right of American citizens will be eroded into nonexistence for future generations.

Of the existing categorical exceptions outlined by *Chaplinsky*,²⁹⁸ online misinformation would be most analogous in purpose to the historically recognized categories of libel and fighting words. As discussed in Part II, the scope of what non-protected speech can fall within these exceptions was significantly narrowed during the twentieth century.

Misinformation is and should be distinguishable from libel. First, libel claims must prove both requisite intent and measurable harm,²⁹⁹ while the DHS definition of misinformation encompasses intentionally spread falsehood, unintentionally spread falsehood, and injurious truth.³⁰⁰ Libel law should not encompass misinformation, defined as unintentionally spread falsehood, because public figures are required to prove that published statements have been made with actual malice in order to recover.³⁰¹ Disinformation, defined as intentionally spread falsehood, is arguably the category of misinformation most analogous to libel. However, libel is a private right of action intended to make an injured person whole, whereas the issue of disinformation is a general concern for the overall welfare of the American information ecosystem. Libel should remain a private right of action, not a preemptive general police power to be flexed by the state.

Further, DHS defines malinformation as being “*based on fact*, but used out of context to mislead, harm, or manipulate.”³⁰² Government intervention against the dissemination of harmful facts is an unconstitutional return to the Star Chamber’s exercise of parliamentary privilege against destabilizing speech.³⁰³ The First Amendment invokes a stringent protection of citizens’ ability to circulate truthful yet destabilizing content.³⁰⁴ In the United States, the government does not have a parliamentary privilege to patrol narratives in order to save face or keep peace, no matter how well-intentioned that desire may be.

Regulation of fighting words may not be “based on non-proscribable content.”³⁰⁵ The First Amendment protects public flag burnings,³⁰⁶ protests at

²⁹⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

²⁹⁹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964).

³⁰⁰ *Foreign Influence Operations and Disinformation*, *supra* note 195.

³⁰¹ *Masson v. New Yorker Magazine*, 501 U.S. 496, 510 (1991).

³⁰² *Foreign Influence Operations and Disinformation*, *supra* note 195 (emphasis added).

³⁰³ *The Crown v. John Peter Zenger, 1735*, HIST. SOC’Y OF THE N.Y. CTS., <https://history.nycourts.gov/case/crown-v-zenger/> (last visited, Apr. 14, 2023).

³⁰⁴ *See generally Sullivan*, 376 U.S. at 254; *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) *See*

³⁰⁵ *R.A.V. v. St. Paul*, 505 U.S. 377, 383–84 (1992).

³⁰⁶ *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

military funerals,³⁰⁷ advocacy for violence against minority groups,³⁰⁸ and even the right to parade through a community of Holocaust survivors while extolling the accomplishments of Nazi Germany.³⁰⁹ *A fortiori*, fighting words doctrine cannot be used to target discordant opinions about public health policy and elections.

Some may argue that polarizing online rhetoric should qualify as incitement under the *Brandenburg* test, because online posts may be intended to inspire imminent lawless action, and the echo chamber effect may actually increase the likelihood that such rhetoric will be directed toward those most likely to take extreme action. Some online speech may in fact qualify as incitement. However, speech that criticizes the government, questions the legitimacy of institutions, or disparages organizations or individuals is not incitement merely because such criticism is based on unverified assumptions, mistakes of fact, or even bigotry. The promulgation of ignorant opinions is fundamentally distinguishable from the incitement of imminent lawless action. In the realm of political debate, the solution is more speech, not less.

Misinformation is an impermissible categorical exception to the First Amendment. Accordingly, the state would need to pass strict or intermediate scrutiny in order to justify the regulation of misinformation.

B. Failure to Present a Compelling Interest

To pass strict scrutiny, the government must prove that the law serves a compelling government interest and is narrowly tailored to serve that interest.³¹⁰ The Supreme Court has held that ambiguous proof or marginal percentage point advances are insufficient to overcome strict scrutiny.³¹¹ To be considered narrowly tailored, a law must be actually necessary to solve an actual problem.³¹² The idea of a diminishing ability to identify reliable information raises broad concerns about the future viability of an informed electorate. However, as currently defined, misinformation suffers from vague standards and inconsistent applications.

According to *Reuters*, “in countries where systematic academic research exists, problematic information is still a small subset of all the information circulating.”³¹³ Measuring the impact of misinformation is difficult because of

³⁰⁷ See *Snyder v. Phelps*, 562 U.S. 443, 460 (2011).

³⁰⁸ See *R.A.V.*, 505 U.S. at 396.

³⁰⁹ *National Socialist Party of Am. V. Skokie*, 432 U.S. 43, 44 (1977).

³¹⁰ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 799 (2011).

³¹¹ *Id.* at 799–800.

³¹² *Id.* at 799.

³¹³ Nielsen, *supra* note 200.

disagreement about what substantively qualifies as misinformation, but studies have concluded that “fake news” constitutes only about 0.15 percent of American’s daily media consumption.³¹⁴ During the period immediately preceding the 2016 election, three out of four Americans never visited a fake news website.³¹⁵ Although one in four *did* visit at least one fake news site, most of these visits were isolated to the 10 percent of people with the most politically conservative online presence.³¹⁶ Subsequent studies concluded that because the exposure to fake news was so concentrated within the same echo chamber, the fake news had no measurable impact on voter behavior.³¹⁷ Studies also indicate that a small group of “heavy Internet users” comprises the bulk of visits to fake news websites.³¹⁸ Accordingly, this identified group of heavy Internet users is actually comprised of individuals who are *more* engaged in the use of established, mainstream news media websites, not less.³¹⁹

The data suggests that the consumption of misinformation does not pose a compelling, immediate threat to American citizens’ information infrastructure. Foreign state-sponsored disinformation campaigns are real, but the current data does not support a conclusion that the disinformation campaigns have been effective or have led to any changes in voter behavior or electoral outcome. While it is difficult to effectively measure the consumption of misinformation, there is even less data about how effective the government misinformation strategy is at protecting the marketplace of ideas, especially because the extent of the government’s misinformation strategy is not fully understood and the strategy may outsource enforcement to third party platforms. The existing data fails to support a compelling interest and fails to link an actual solution to an actual problem. Accordingly, government intervention against misinformation fails to satisfy the requirements of strict scrutiny.

C. Failure to Pass the Time, Place, and Manner Test

The government can restrict the time, place, and manner of speech and protest in circumstances where the restrictions are 1) content neutral, 2) justified without reference to content of speech, 3) narrowly tailored to a significant government interest, and 4) when there are significant alternative channels for the speakers’ message to be shared.³²⁰ The court must inquire “whether the government has

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296-99 (1984).

adopted a regulation of speech because of disagreement with the message it conveys”³²¹ and whether the regulation is “justified without reference to the content of the regulated speech.”³²²

Government intervention against misinformation is not content neutral; it targets and flags content relating to health, safety, elections, and other public policy issues,³²³ and the intervention is explicitly justified in reference to the content of the speech. For example, reports have alleged that the government flagged policy criticism such as the Great Barrington Declaration³²⁴ as misinformation during the COVID-19 pandemic because of disagreement with the messages conveyed. Thus, state intervention against misinformation fails the first two requirements of the test.

The test also requires that a TPM restriction be narrowly tailored to a significant government interest. EIP organizations argue that removal of misinformation is appropriate because “whenever any US citizen post[s] what DHS consider[s] to be misinformation online, it is . . . considered a ‘cyber attack’ against critical infrastructure.”³²⁵ Yet the vast majority of EIP censorship is related to mere “delegitimization” content, defined as “any speech that casts doubt on any kind of election process, outcome, or integrity.”³²⁶

Delegitimization content constituted a staggering 99 percent of 22 million posts that were labeled misinformation incidents by the EIP in the lead-up to the 2020 election.³²⁷ In congressional testimony, Shellenberger reported that the EIP works closely with government partners at DHS to classify “entire political narratives as misinformation, and automatically flag[] individual US citizens’ posts” that support ideas categorized as “de facto misinformation.”³²⁸ The definition of misinformation is broad and ill-defined, and thus fails to qualify as a narrowly tailored restriction.

Finally, the TPM test considers whether the restriction leaves significant alternative channels for communication. In a 2018 address to the Aspen Institute, DiResta stated, “When we can monitor the system *as a whole* and we can understand the spread of information throughout the system we can find

³²¹ *Rock Against Racism*, 491 U.S. at 791.

³²² *Id.* (internal emphasis and quotation marks omitted).

³²³ *See generally* Shellenberger, *supra* note 284.

³²⁴ *See supra* Part III.

³²⁵ Shellenberger, *supra* note 184, at 37-38 (quoting Mike Benz, *DHS Censorship Agency Had Strange First Mission: Banning Speech That Casts Doubt On ‘Red Mirage, Blue Shift’ Election Events*, FOUND. FOR FREEDOM ONLINE (Nov. 9, 2022), <https://foundationforfreedomonline.com/dhs-censorship-agency-had-strange-first-mission-banning-speech-that-casts-doubt-on-red-mirage-blue-shift-election-events/>).

³²⁶ Shellenberger, *supra* note 184, at 39.

³²⁷ *Id.*

³²⁸ *Id.* at 38–39.

opportunities to intercede.”³²⁹ Efforts to combat misinformation are intended to monitor the marketplace of ideas as a whole, with the goal of interceding throughout that system. In other words, the strategy behind combatting misinformation is to take action against specific content across as many channels of communication as possible in order to minimize the spread of that content. Thus, this strategy also fails to satisfy the final factor of the TPM test. Government intervention against misinformation therefore fails all four factors of intermediate scrutiny in the context of speech.

Widespread government intervention against misinformation is also bad policy that flouts Enlightenment principles and disregards the intellectual matrix of the First Amendment.

D. The Problem with Truth

Ronald Reagan once famously remarked, “The trouble with our liberal friends is not that they’re ignorant; it’s that they know so much that isn’t so.”³³⁰ Regardless of one’s political views, this statement is memorable not only as a pithy political jab, but because it succinctly expresses a fundamental issue with the idea of truth in general. In *A Letter Concerning Toleration*, John Locke made a similar observation about truth when he explained the necessity of separating church from state.³³¹ Stipulating that there was indeed “but one Truth, one way to heaven,” Locke nevertheless pointed out a very practical problem: the fallibility of those who claim to know the truth, then force others to align with it.³³² Most modern controversies about truth and misinformation involve topics and assertions that are more investigable and verifiable than the issues at the

³²⁹ *Id.* at 27 (emphasis added) (citing Tom Fanning et al., “Deep Dive: Cybersecurity and the Broad Geopolitical Risk of Digital Life” (lecture, Aspen Ideas Festival, Aspen Institute, 2018), YOUTUBE (June 27, 2018), <https://www.youtube.com/watch?v=6ZQbQ3UpO8Y>).

³³⁰ Ronald Reagan, *A Time for Choosing*, (Oct. 27, 1964), <https://www.reaganlibrary.gov/reagans/ronald-reagan/time-choosing-speech-october-27-1964> (advocating for the Barry Goldwater 1964 presidential campaign).

³³¹ JOHN LOCKE, *A LETTER CONCERNING TOLERATION* 6–8 (William Popple trans., 1689).

³³² *Id.* at 8–9 (“For there being but one Truth, one way to heaven; what hope is there that more Men would be led into it, if they had no other Rule to follow but the Religion of the Court; and were put under a necessity to quit the Light of their own Reason and oppose the Dictates of their own Consciences; and blindly to resign up themselves to the Will of their Governors, and to the Religion, which either Ignorance, Ambition, or Superstition had chanced to establish in the Countries where they were born? In the variety and contradiction of Opinions in Religion, wherein the Princes of the World are as much divided as in their Secular Interests, the narrow way would be much straightened; one Country alone would be in the right, and all the rest of the World would be put under an Obligation of following their Princes in the ways that lead to Destruction; and that which heightens the absurdity, and very ill suits the Notion of a Deity, Men would owe their eternal Happiness or Misery to the places of their Nativity.”).

heart of Locke's discussion on competing national religions. However, modern assertions about health, science, and misinformation itself are similarly fallible and should be subject to continual scrutiny.

A person can simultaneously believe in objective truth and recognize the value and necessity of further scientific inquiry. Science has never been merely a list of truths and untruths; it is more appropriately understood to be the systematic *search* for truths. The scientific method is defined by continuous critical assessment: observe the world, ask a question about it, form a testable explanation of what has been observed, predict results based on that hypothesis, test the prediction using an empirical method capable of repetition, and use the results to make a new hypothesis to find additional answers.³³³ Without constant scrutiny through the scientific method, science becomes dogmatic, and conclusions become founded on habit, fear, and groupthink rather than logic and empirical evidence.

Failure to question scientific conclusions causes real-world harm. Scientific complacency stunts discovery and innovation, which denies individuals and societies the benefits of previously unknown treatments or unharnessed opportunities for technological efficiency. In addition, widespread acceptance of faulty science has also led to abhorrent social outcomes. For example, nineteenth century discoveries by Charles Darwin in the field of biological evolution contributed to widely accepted theories of eugenics during the first half of the twentieth century,³³⁴ which were then used to scientifically justify policy decisions such as forced sterilization of the mentally disabled,³³⁵ Jim Crow laws,³³⁶ and the genocides that occurred during the Holocaust.³³⁷

Some actors who implemented such devastating policies undoubtedly had pre-existing animosity or political agendas toward minorities, and then used the

³³³ See *The Scientific Method: How the Scientific Method Is Used to Test a Hypothesis*, KHAN ACAD., <https://www.khanacademy.org/science/biology/intro-to-biology/science-of-biology/a/the-science-of-biology> (last visited Apr. 14, 2024).

³³⁴ See *Social Darwinism*, BRITANNICA, <https://www.britannica.com/topic/social-Darwinism> (last visited Apr. 14, 2023); see also *Social Darwinism: Misusing Darwin's Theory*, AM. MUSEUM OF NAT. HIST., <https://www.amnh.org/exhibitions/darwin/evolution-today/social-darwinism> (last visited Jan. 31, 2023).

³³⁵ See generally *Buck v. Bell*, 274 U.S. 200 (1927).

³³⁶ P. Preston Reynolds, *UVA and the History of Race: Eugenics, the Racial Integrity Act, Health Disparities*, UNIV. OF VA. (Jan. 9, 2020), <https://news.virginia.edu/content/uva-and-history-race-eugenics-racial-integrity-act-health-disparities> (“[Virginia eugenics] laws codified Jim Crow into every aspect of community life, and in doing so, denied African Americans access to medical care, jobs and fair wages, as well as higher education and professional training. Simply put, eugenic laws created the ‘one drop rule,’ where one drop of African American blood restricted a person of color to life behind the veil.”).

³³⁷ *Holocaust Encyclopedia: Eugenics*, U.S. HOLOCAUST MEM'L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/eugenics> (Oct. 23, 2020).

trend in eugenics pseudoscience as a convenient justification for disgraceful violations of human rights.³³⁸ However, other actors were tragically sincere in their desire to use modern scientific theories to implement the best societal outcomes possible.³³⁹ Without further questioning of such broadly held views, Chief Justice Warren would have had nothing to cite in Footnote 11 to *Brown v. Board of Education*, which justified the overturning of *Plessy v. Ferguson* by citing more modern authority about the psychological harms of segregation on young Black students.³⁴⁰ The underlying notion that scientific understanding and consensus evolve is critically important to modern discourse about so-called irrefutable science and its misguided use as justification for policing online conversations that criticize laws, officials, and policy decisions.

When Fauci claimed he had intentionally misled the public in March 2020 about the effectiveness of masks in order to “avoid a run on masks needed by health care workers” and later admitted that he had “nudged” his public data for herd immunity in order to promote vaccination rates, his actions were characterized by some as “noble lies.”³⁴¹ Noble or not, such an allegedly calculated policy scheme falls under the DHS’s own definition of misinformation.³⁴² Inconsistent and intentionally misleading remarks by public health authorities provoked the same confusion and social discord in the United States about COVID-19 that policymakers had warned would come from foreign disinformation. Public health attempts to regulate misinformation threw gasoline onto the fire of destabilizing so-called Plandemic conspiracy theories and called it water.

When criticized for allegedly “cherry-picking facts to concoct a narrative so the public would only know what they wanted people to know” and coordinating with Facebook to censor speech, Fauci responded, “Attacks on me, quite frankly, are attacks on science All of the things I have spoken about, consistently, from the very beginning, have been based on science. Sometimes those things

³³⁸ See generally Reynolds, *supra* note 336.

³³⁹ See *Holocaust Encyclopedia: Eugenics*, *supra* note 337 (stating “[w]hile today eugenics may be regarded as a pseudoscience, it was seen as cutting edge science in the early decades of the twentieth century. Eugenics societies sprang up throughout most of the industrialized world”); see, e.g., *Buck v. Bell*, 274 U.S. 200, 207–08 (1927) (stating that “[i]t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes [S]o far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.”).

³⁴⁰ Michael Heise, *Brown v. Board of Education, Footnote 11, and Multidisciplinarity*, 90 CORNELL L. REV. 279, 292–96 (2005).

³⁴¹ Powell & Prasad, *supra* note 227.

³⁴² *Foreign Influence Operations and Disinformation*, *supra* note 195.

were inconvenient truths for people.”³⁴³

In response, critics have accused Fauci and health agencies of promulgating convenient *un*truths on behalf of policymakers. In an analysis of multiple instances of misleading vaccine and hospitalization data released by the CDC regarding COVID-19, one article concluded:

Together, these are all information choices made by government agencies and/or officials about vaccination of young adults. Amplifying out-of-date statistics and building a model to support vaccination that has questionable assumptions work to support rapid deployment of two doses of mRNA to all healthy kids aged 12 to 17. That may be the CDC’s policy pursuit, and one we are sympathetic to. However, distorting evidence to achieve this result is a form of a noble lie. Accurately reporting current risks to adolescents, and exploring other dosing possibilities, is part of the unbiased scientific exploration of data.³⁴⁴

The authors continued:

We worry that vaccine policy among supporters of vaccines is increasingly anchored to the irrational views of those who oppose them—by always pursuing the opposite. Exaggerating the risk of the virus in the moment and failing to explore middle ground positions appear to be the antithesis of the anti-vax movement, which is an extremist effort to refuse vaccination. This seems a reflexive attempt to vaccinate at all costs—by creating fear in the public (despite falling adolescent rates) and pushing the notion that two doses of mRNA at the current dose level or nothing at all are the only two choices—a logical error called the fallacy of the excluded middle.³⁴⁵

Policy flip-flopping on mask and vaccine efficacy and the CDC’s alleged intentional use of inconsistent data at a time of political polarization “contributed to the evolution of masks from a basic, precautionary mitigation strategy to a badge of political allegiance.”³⁴⁶ This cloth-mask badge of political allegiance was required by local, state, and national jurisdictions long after further studies—including studies conducted by the CDC—discredited the health benefits of cloth masks.³⁴⁷

³⁴³ Carlie Porterfield, *Dr. Fauci on GOP Criticism: ‘Attacks on Me, Quite Frankly, Are Attacks on Science,’* FORBES, <https://www.forbes.com/sites/carlieporterfield/2021/06/09/fauci-on-gop-criticism-attacks-on-me-quite-frankly-are-attacks-on-science/?sh=1516ee354542> (Dec. 10, 2021, 8:30 AM).

³⁴⁴ Powell & Prasad, *supra* note 227.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ Apoorva Mandavilli, *The CDC Concedes That Cloth Masks Do Not Protect Against the Virus as Effectively as Other Masks*, N.Y. TIMES,

Retrospective consideration of how data was used to promote policy and bolster a supposed scientific justification for viewpoint censorship raises serious red flags about the effort to use manipulable raw data to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters and force citizens to confess by word or act their faith therein.”³⁴⁸ It also brings to mind George Orwell’s dystopic observation that “[s]anity is not statistical.”³⁴⁹ Orwell posited through his fictional character Winston that “being in a minority, even a minority of one, [does] not make you mad. There [is] truth and there [is] untruth, and if you [cling] to the truth even against the whole world, you [are] not mad.”³⁵⁰

This is the wisdom of civil liberty recognized by John Milton in *Areopagitica*,³⁵¹ and the reason that freedom from prescribed orthodoxy is the “fixed star in our constitutional constellation.”³⁵² The Supreme Court has held that “the very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials.”³⁵³ This includes the freedom to express criticism of the government and opposing policy viewpoints, even in matters of healthcare, science, unflattering information about public figures, and the electoral process.

In addition to the apparent circulation of deliberate misinformation allegedly intended to elicit socially beneficial behavior, COVID-19 policymakers and their social media partners simply got a lot wrong. Despite prevailing views about misinformation and false news, being wrong is not nefarious; it is an unavoidable part of being fallible, as all individuals and institutions are. In 2020, the COVID-19 virus was a novel, highly contagious, and deadly airborne disease spread by respiration,³⁵⁴ and fear of the virus was both understandable and justified. Policymakers at all levels of government are often faced with the difficult reality that they must make decisions and implement policy before they can discover every fact.³⁵⁵

As time has passed and further study has produced more data about transmission, vaccines, and masks, many COVID-19 policies about social distancing, school closures, vaccine mandates, and masking young children have

<https://www.nytimes.com/2022/01/14/health/cloth-masks-covid-cdc.html> (Jan. 15, 2022).

³⁴⁸ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 n.10 (1943).

³⁴⁹ GEORGE ORWELL, 1984 219 (1949).

³⁵⁰ *Id.*

³⁵¹ *See* MILTON, *supra* note 1, at 99.

³⁵² *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 n.10 (1943).

³⁵³ *Id.* a 638.

³⁵⁴ *See Indoor Air and Coronavirus (COVID-19)*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19#:~:text=People%20who%20are%20infected%20with,exercise%2C%20coughing%2C%20sneezing> (last visited Apr. 11, 2024).

³⁵⁵ *See* Emily Oster, *Let’s Declare a Pandemic Amnesty*, ATL. (Oct. 31, 2022), <https://www.theatlantic.com/ideas/archive/2022/10/covid-response-forgiveness/671879/>.

not aged well.³⁵⁶ However, even if these policies were implemented based on the best information available at the time and with the noblest intent to save lives during a global pandemic, that would still fail to justify government-facilitated censorship of contradicting views. French philosopher Albert Camus wrote, “The welfare of the people in particular has always been the alibi of tyrants, and it provides the further advantage of giving the servants of tyranny a good conscience.”³⁵⁷ The First Amendment protects Americans from this precise form of misguided tyranny when it takes the form of viewpoint censorship.

CONCLUSION

What began as an effort to protect elections from foreign propaganda has, in less than half a decade, rapidly evolved into something that resembles a domestic censorship regime. Regardless of how much state-sponsored viewpoint intervention occurred during COVID-19 and the 2020 election, the algorithmic nature of the online information market presents an opportunity for surreptitious government regulation of unpopular viewpoints. Online viewpoint censorship raises grave implications for the marketplace of ideas as emerging artificial intelligence systems use Internet content to train generative AI, because that AI will implicitly reflect the censorship that occurred in its source material.

Although new technology has changed the way the world communicates and has further decentralized the flow of ideas, government fear of a misinformed, rowdy population is not a new phenomenon and does not justify the dimming of Americans’ constitutional North Star. The First Amendment was born from a historical framework that parallels contemporary concerns about misinformation. State intervention against online speech is not a sign of progress. Instead, it unconstitutionally slides Americans back into a Star Chamber.

³⁵⁶ *See id.*

³⁵⁷ ALBERT CAMUS, *HOMAGE TO AN EXILE* (1955) reprinted in ALBERT CAMUS: *RESISTANCE, REBELLION, AND DEATH* 98, 101 (Justin O’Brien, trans., 1988).