International Center for Law & Economics

Knowledge and Decisions in the Information Age: The Law & Economics of Regulating Misinformation on Social-Media Platforms

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ICLE White Paper 2023-09-22

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> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." – *West Virginia Board of Education v. Barnette* (1943)[1]
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> "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth." - *United States v. Alvarez* (2012)[2]

Introduction

In April 2022, the U.S. Department of Homeland Security (DHS) announced the creation of the Disinformation Governance Board, which would be designed to coordinate the agency's response to the potential effects of disinformation threats.[3] Almost immediately upon its announcement, the agency was met with criticism. Congressional Republicans denounced the board as "Orwellian,"[4] and it was eventually disbanded.[5]

The DHS incident followed years of congressional hearings in which Republicans had castigated leaders of the so-called "Big Tech" firms for allegedly censoring conservatives, while Democrats had

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[1] *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

[2] *United States v. Alvarez*, 567 U.S. 709, 728 (2012).

[3] *See* Amanda Seitz, *Disinformation Board to Tackle Russia, Migrant Smugglers*, ASSOCIATED PRESS (Apr. 28, 2022), https://apnews.com/article/russia-ukraine-immigration-media-europe-misinformation-4e873389889bb1d9e2ad8659d9975e9d.

[4] *See, e.g.*, Rep. Doug Lamafa, *Brave New World? Orwellian 'Disinformation Governance Board' Goes Against Nation's Principles*, THE HILL (May 4, 2022), https://thehill.com/opinion/congress-blog/3476632-brave-new-world-orwellian-disinformation-governance-board-goes-against-nations-principles; *Letter to Secretary Mayorkas from Ranking Members of the House Committee on Oversight and Reform* (Apr. 29, 2022), *available at* https://oversight.house.gov/wp-content/uploads/2022/04/Letter-to-DHS-re-Disinformation-Governance-Board-04292022.pdf (stating "DHS is creating the Orwellian-named "Disinformation Governance Board"); Jon Jackson, *Joe Biden's Disinformation Board Likened to Orwell's 'Ministry of Truth'*, NEWSWEEK (Apr. 29, 2022), https://www.newsweek.com/joe-bidens-disinformation-board-likened-orwells-ministry-truth-1702190.

[5] *See* Geneva Sands, *DHS Shuts Down Disinformation Board Months After Its Efforts Were Paused*, CNN (Aug. 24, 2022), https://www.cnn.com/2022/08/24/politics/dhs-disinformation-board-shut-down/index.html.

criticized those same leaders for failing to combat and remove misinformation.[6] Moreover, media outlets have reported on systematic attempts by government officials to encourage social-media companies to remove posts and users based on alleged misinformation. For example, *The Intercept* in 2022 reported on DHS efforts to set up backchannels with Facebook for flagging posts and misinformation.[7]

The "Twitter Files" released earlier this year by the company's CEO Elon Musk—and subsequently reported on by journalists Barry Weiss, Matt Taibbi, and Michael Shellenberger—suggest considerable efforts by government agents to encourage Twitter to remove posts as misinformation and to bar specific users for being purveyors of misinformation.[8] What's more, communications unveiled as part of discovery in the *Missouri v. Biden* case have offered further evidence a variety of government actors cajoling social-media companies to remove alleged misinformation, along with the development of a considerable infrastructure to facilitate what appears to be a joint project to identify and remove the same.[9]

With all of these details coming into public view, the question that naturally arises is what role, if any, does the government have in regulating misinformation disseminated through online platforms? The thesis of this paper is that the First Amendment *forecloses* government agents' ability to regulate misinformation online, but it *protects* the ability of private actors—*i.e.*, the social-media companies themselves—to regulate misinformation on their platforms as they see fit.

The primary reason for this conclusion is the state-action doctrine, which distinguishes public and private action. Public actions are subject to constitutional constraints (such as the First Amendment), while private actors are free from such regulation.[10] A further thesis of this paper is that application

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[6] For an example of this type of hearing, *see Preserving Free Speech and Reining in Big Tech Censorship*, HEARING BEFORE THE U.S. HOUSE ENERGY AND COMMERCE SUBCOMMITTEE ON COMMUNICATIONS AND TECHNOLOGY (Mar. 28, 2023), https://www.congress.gov/event/118th-congress/house-event/115561.

[7] *See* Ken Klippenstein & Lee Fang, *Truth Cops: Leaked Documents Outline DHS's Plans to Police Disinformation*, THE INTERCEPT (Oct. 31, 2022), https://theintercept.com/2022/10/31/social-media-disinformation-dhs.

[8] *See* Matt Taibbi, *Capsule Summaries of all Twitter Files Threads to Date, With Links and a Glossary*, RACKET NEWS (last updated Mar. 17, 2023), https://www.racket.news/p/capsule-summaries-of-all-twitter. For evidence that Facebook received similar pressure from and/or colluded with government officials, see Robby Soave, *Inside the Facebook Files: Emails Reveal the CDC's Role in Silencing COVID-19 Dissent*, REASON (Jan. 19, 2023), https://reason.com/2023/01/19/facebook-files-emails-cdc-covid-vaccines-censorship; Ryan Tracy, *Facebook Bowed to White House Pressure, Removed Covid Posts*, WALL ST. J. (Jul. 28, 2023), https://www.wsj.com/articles/facebook-bowed-to-white-house-pressure-removed-covid-posts-2df436b7.

[9] *See Missouri, et al. v. Biden, et al.*, No. 23-30445 (5th Cir. Sept. 8, 2023), slip op. at 2-14, *available at* https://www.ca5.uscourts.gov/opinions/pub/23/23-30445-CV0.pdf. Hearing *on the Weaponization of the Federal Government*, HEARING BEFORE THE SELECT SUBCOMM. ON THE WEAPONIZATION OF THE FED. GOV'T (Mar. 30, 2023) (written testimony of D. John Sauer), *available at* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2023-03/Sauer-Testimony.pdf.

[10] *See infra* Part I.

of the state-action doctrine to the question of misinformation on online platforms promotes the bedrock constitutional value of "protect[ing] a robust sphere of individual liberty,"[11] while also creating outlets for more speech to counteract false speech.[12]

Part I of this paper outlines a law & economics theory of state-action requirements under the First Amendment and explains its importance for the online social-media space. The right to editorial discretion and Section 230 will also be considered as part of this background law, which places the responsibility for regulating misinformation on private actors like social-media platforms. Such platforms must balance the interests of each side of their platforms to maximize value. This means, in part, setting moderation rules on misinformation that keep users engaged in order to provide increased opportunities to generate revenue from advertisers.

Part II considers various theories of state action and whether they apply to social-media platforms. It appears clear that some state-action theory—like the idea that social-media companies exercise a "traditional, exclusive public function"—are foreclosed in light of *Manhattan Community Access Corp. v. Halleck*. But it remains an open question whether a social-media company could be found a state actor under a coercion or collusion theory under facts that have been revealed in the Twitter Files and litigation over this question.

Part III completes the First Amendment analysis of what government agents can do to regulate misinformation on social media. The answer: not much. The U.S. Constitution forbids direct regulation of false speech simply because it is false. A more difficult question concerns how to define truth and falsity in contested areas of fact, where legal questions may run into vagueness concerns. We recommend that a better way forward is for government agents to invest in telling their own version of the facts, but where they have no authority to mandate or pressure social-media companies into regulating misinformation.

I. A Theory of State Action and Speech Rights on Online Social-Media Platforms

Among the primary rationales for the First Amendment's speech protections is to shield the "marketplace of ideas":[13] in most circumstances, the best remedy for false or harmful speech is "more

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[11] *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

[12] *Cf. Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence").

[13] *See, e.g.*, *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care

speech, not enforced silence."[14] But this raises the question of why private abridgments of speech—such as those enforced by powerful online social-media platforms—should not be subject to the same First Amendment restrictions as government action.[15] After all, if the government can't intervene in the marketplace of ideas by deciding what is true or false, then why should that privilege be held by Facebook or Google?

Here enters the state-action doctrine, which is the legal principle (discussed further below) that, in some cases, private entities may function as extensions of the state. Under this doctrine, the actions of such private actors would give rise to similar First Amendment concerns as if the state had acted on its own. It has been said that there is insufficient theorizing about the "why" of the state-action doctrine.[16] What follows is a theory of why the state-action doctrine is fundamental to protecting those private intermediaries who are best positioned to make marginal decisions about the benefits and harms of speech, including social-media companies through their moderation policies on misinformation.

Governance structures are put in place by online platforms as a response to market pressures to limit misinformation and other harmful speech. At the same time, there are also market pressures to not go too far in limiting speech.[17] The balance that must be struck by online intermediaries is delicate,

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whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.").

[14] *Whitney v. California*, 274 U.S. 357, 377 (1927). *See also*, *Alvarez*, 567 U.S. at 727-28 ("The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth. The theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.' The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.") (citations omitted).

[15] *See, e.g.*, Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Applications–or Lack Thereof–to Third-Party Platforms*, 32 BERK. TECH. L. J. 989 (2017) .

[16] *See id.* at 990, 992 (2017) (emphasizing the need to "talk about the [state action doctrine] until we settle on a view both conceptually and functionally right.") (citing Charles L. Black, Jr., *The Supreme Court, 1966 Term–Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967)).

[17] Or, in the framing of some: to allow too much harmful speech, including misinformation, if it drives attention to the platforms for more ads to be served. *See* Karen Hao, *How Facebook and Google Fund Global Misinformation*, MIT TECH. REV. (Nov. 20, 2021), https://www.technologyreview.com/2021/11/20/1039076/facebook-google-disinformation-clickbait.

and there is no reason to expect government regulators to do a better job than the marketplace in determining the optimal rules. The state-action doctrine protects a marketplace for speech governance by limiting the government's reach into these spaces.

In order to discuss the state-action doctrine meaningfully, we must first outline its basic contours and the *why* identified by the Supreme Court. In Part I.A, we will provide a description of the Supreme Court's most recent First Amendment state-action decision, *Manhattan Community Access Corp. v. Halleck*, where the Court both defines and defends the doctrine's importance. We will also briefly consider how the state-action doctrine's protection of private ordering is bolstered by the right to editorial discretion and by Section 230 of the Communications Decency Act of 1998.

We will then consider whether there are good theoretical reasons to support the First Amendment's state-action doctrine. In Part I.B, we will apply insights from the law & economics tradition associated with the interaction of institutions and dispersed knowledge.[18] We argue that the First Amendment's dichotomy between public and private action allows for the best use of dispersed knowledge in society by creating a marketplace for speech governance. We also argue that, by protecting this marketplace for speech governance from state action, the First Amendment creates the best institutional framework for reducing harms from misinformation.[19]

A. The State-Action Doctrine, the Right to Editorial Discretion, and Section 230

At its most basic, the First Amendment's state-action doctrine says that government agents may not restrict speech, whether through legislation, rules, or enforcement actions, or by putting undue burdens on speech exercised on government-owned property.[20] Such restrictions will receive varying levels of scrutiny from the courts, depending on the degree of incursion. On the other hand, the state-action doctrine means that, as a general matter, private actors may set rules for what speech they are willing to abide or promote, including rules for speech on their own property. With a few exceptions where private actors may be considered state actors,[21] these restrictions will receive no

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[18] *See, e.g.*, THOMAS SOWELL, KNOWLEDGE AND DECISIONS (1980).

[19] That is to say, the marketplace will not *perfectly* remove misinformation, but will navigate the tradeoffs inherent in limiting misinformation without empowering any one individual or central authority to determine what is true.

[20] *See, e.g.*, *Halleck*, 139 S. Ct. at 1928; *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (plurality opinion); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995); Hudgens v. NLRB, 424 U.S. 507, 513 (1976).

[21] *See* Part II below.

scrutiny from courts, and the government may actually help remove those who break privately set speech rules.[22]

In *Halleck*, the Court set out a strong defense of the state-action doctrine under the First Amendment. Justice Brett Kavanaugh, writing for the majority, defended the doctrine based on the text and purpose of the First Amendment:

> Ratified in 1791, the First Amendment provides in relevant part that "Congress shall make no law … abridging the freedom of speech." Ratified in 1868, the Fourteenth Amendment makes the First Amendment's Free Speech Clause applicable against the States: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law …." § 1. The text and original meaning of those Amendments, as well as this Court's longstanding precedents, establish that the Free Speech Clause prohibits only *governmental* abridgment of speech. The Free Speech Clause does not prohibit *private* abridgment of speech…
>
> In accord with the text and structure of the Constitution, this Court's state-action doctrine distinguishes the government from individuals and private entities. ***By enforcing that constitutional boundary between the governmental and the private, the state-action doctrine protects a robust sphere of individual liberty…***
>
> It is sometimes said that the bigger the government, the smaller the individual. Consistent with the text of the Constitution, the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty. Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise.[23]

Applying the state-action doctrine, the Court held that even the heavily regulated operation of cable companies' public-access channels constituted private action. The Court opined that "merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[24] The Court went on to explain:

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[22] For instance, a person could order a visitor to leave their home for saying something offensive and the police would, if called upon, help to eject them as trespassers. In general, courts will enforce private speech restrictions that governments could never constitutionally enact. *See* Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 458-61 (2007) (listing a number of cases where the holding of *Shelley v. Kraemer* that court enforcement of private agreements was state action did *not* extend to the First Amendment, meaning that private agreements to limit speech are enforced).

[23] *Halleck*, 139 S. Ct. at 1928, 1934 (citations omitted) (emphasis added).

[24] *Id.* at 1930.

> If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether.[25]

Similarly, the Court has found that private actors have the right to editorial discretion that can't generally be overcome by a government compelling the carriage of speech.[26] In *Miami Herald v. Tornillo*, the Supreme Court ruled that a right-to-reply statute for political candidates was unconstitutional because it "compel[s] editors or publishers to publish that which 'reason tells them should not be published.'"[27] The Court found that the marketplace of ideas was still worth protecting from government-compelled speech, even in a media environment where most localities only had one (monopoly) newspaper.[28] The effect of *Tornillo* was to establish a general rule whereby the limits on media companies' editorial discretion were defined not by government edict but by "the acceptance of a sufficient number of readers—and hence advertisers —to assure financial success; and, second, the journalistic integrity of its editors and publishers."[29]

Section 230 of the Communications Decency Act supplements the First Amendment's protections by granting "providers and users of an interactive computer service" immunity from (most) lawsuits for speech generated by other "information content providers" on their platforms.[30] The effect of this statute is far-ranging in its implications for online speech. It protects online social-media platforms from lawsuits for the third-party speech they host, as well as for the platforms' decisions to take certain third-party speech down.[31]

As with the underlying First Amendment protections, Section 230 augments social-media companies' ability to manage misinformation on their services. Specifically, it shields them from an

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[25] *Id.* at 1930-31.

[26] It is worth noting that application of the right to editorial discretion to social-media companies is a question that will soon be before the Supreme Court in response to common-carriage laws passed in Florida and Texas that would require carriage of certain speech. The 5th and 11th U.S. Circuit Courts of Appeal have come to opposite conclusions on this point. Compare *NetChoice, LLC v. Moody*, 34 F.4th 1196 (11th Cir. 2022) (finding the right to editorial discretion was violated by Florida's common-carriage law) and *NetChoice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022) (finding the right to editorial discretion was not violated by Texas' common-carriage law).

[27] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256 (1974).

[28] *See id.* at 247-54.

[29] *Id.* at 255 (citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94, 117 (1973)),

[30] 47 U.S.C. §230(c).

[31] For a further discussion, *see generally* Geoffrey A. Manne, Ben Sperry, & Kristian Stout, *Who Moderates the Moderators?: A Law & Economics Approach to Holding Online Platforms Accountable Without Destroying the Internet*, 49 RUTGERS COMPUTER & TECH. L. J. 26 (2022).

unwarranted flood of litigation for failing to remove the defamatory speech of third parties when they make efforts to remove some undesirable speech from their platforms.

B. Regulating Speech in Light of Dispersed Knowledge[32]

One of the key insights of the late Nobel *laureate* economist F.A. Hayek was that knowledge is dispersed.[33] In other words, no one person or centralized authority has access to all the tidbits of knowledge possessed by countless individuals spread out through society. Even the most intelligent among us have but a little bit more knowledge than the least intelligent. Thus, the economic problem facing society is not how to allocate "given" resources, but how to "secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know."[34]

This is particularly important when considering the issue of regulating alleged misinformation. As noted above, the First Amendment is premised on the idea that a marketplace of ideas will lead to the best information eventually winning out, with false ideas pushed aside by true ones.[35] Much like the economic problem, there are few, if any, given answers that are true for all time when it comes to opinions or theories in science, the arts, or any other area of knowledge. Thus, the question is: how do we establish a system that promotes the generation and adoption of knowledge, recognizing there will be "market failures" (and possibly, corresponding "government failures") along the way?

Like virtually any other human activity, there are benefits and costs to speech. It is ultimately subjective individual preference that determines how to manage those tradeoffs. Although the First Amendment protects speech from governmental regulation, that does *not* mean that all speech is acceptable or must be tolerated. As noted above, U.S. law places the power to decide what speech to allow in the public square firmly into the hands of the people. The people's preferences are expressed individually and collectively through their participation in online platforms, news media, local organizations, and other fora, and it via that process that society arrives at workable solutions to such questions.

Very few people believe that all speech protected by the First Amendment should be without consequence. Just as very few people, if pressed, would really believe that it is, generally speaking, a wise

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[32] Much of this section is adapted from Ben Sperry, *An L&E Defense of the First Amendment's Protection of Private Ordering*, TRUTH ON THE MARKET (Apr. 23, 2021), https://truthonthemarket.com/2021/04/23/an-le-defense-of-the-first-amendments-protection-of-private-ordering.

[33] *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

[34] *Id.* at 520.

[35] *See supra* notes 13-14 and associated text. *See also* David Schultz, *Marketplace of Ideas*, FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas (last updated by Jun. 2017 by David L. Hudson) (noting the history of the "marketplace of ideas" justification by the Supreme Court for the First Amendment's protection of free speech from government intervention); J.S. MILL, ON LIBERTY, Ch. 2 (1859); JOHN MILTON, AREOPAGITICA (1644).

idea to vest the power to determine what is true or false in a vast governmental bureaucracy. Instead, proposals for government regulation of misinformation generally are offered as an expedient to effect short-term political goals that are perceived to be desirable. But given the dispersed nature of knowledge and given that very few "facts" are set in stone for all time,[36] such proposals threaten to undermine the very process through which new knowledge is discovered and disseminated.

Moreover, such proposals completely fail to account for how "bad" speech has, in fact, long been regulated via informal means, or what one might call "private ordering." In this sense, property rights have long played a crucial role in determining the speech rules of any given space. If a man were to come into another man's house and start calling his wife racial epithets, he would not only have the right to ask that person to leave but could exercise his right as a property owner to eject the trespasser—if necessary, calling the police to assist him. One similarly could not expect to go to a restaurant and yell at the top of her lungs about political issues and expect the venue—even those designated as "common carriers" or places of public accommodation—to allow her to continue.[37] A Christian congregation may in most circumstances be extremely solicitous of outsiders with whom they want to share their message, but they would likewise be well within their rights to prevent individuals from preaching about Buddhism or Islam within their walls.

In each of these examples, the individual or organization is entitled to eject individuals on the basis of their offensive (or misinformed) speech with no cognizable constitutional complaint about the violation of rights to free speech. The nature of what is deemed offensive is obviously context- and listener-dependent, but in each example, the proprietors of the relevant space are able to set and enforce appropriate speech rules. By contrast, a centralized authority would, by its nature, be forced to rely on far more generalized rules. As the economist Thomas Sowell once put it:

> The fact that different costs and benefits must be balanced does not in itself imply *who* must balance them—or even that there must be a single balance for all, or a unitary viewpoint (one "we") from which the issue is categorically resolved.[38]

When it comes to speech, the balance that must be struck is between one individual's desire for an audience and that prospective audience's willingness to listen. Asking government to make

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[36] Without delving too far into epistemology, some argue that this is even the case in the scientific realm. *See, e.g.*, THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962). Even according to the perspective that some things *are* universally true across time and space, they still amount to a tiny fraction of what we call human knowledge. "Information" may be a better term for what economists are actually talking about.

[37] The Supreme Court has recently affirmed that the government may not compel speech by businesses subject to public-accommodation laws. *See* 303 *Creative LLC v. Elenis*, No. 21-476, slip op. (Jun. 30, 2023), *available at* https://www.supremecourt.gov/opinions/22pdf/21-476_c185.pdf. The Court will soon also have to determine whether common-carriage laws can be applied to social-media companies consistent with the First Amendment in the *NetChoice* cases noted above. *See supra* note 26.

[38] SOWELL, *supra* note 18, at 240.

categorical decisions for all of society is substituting centralized evaluation of the costs and benefits of access to communications for the individual decisions of many actors. Rather than incremental decisions regarding how and under what terms individuals may relate to one another—which can evolve over time in response to changes in what individuals find acceptable—governments can only hand down categorical guidelines: "you must allow a, b, and c speech" or "you must not allow z, y, and z speech."

It is therefore a fraught proposition to suggest that government could have both a better understanding of what is true and false, and superior incentives to disseminate the truth, than the millions of individuals who make up society.[39] Indeed, it is a fundamental aspect of both the First Amendment's Establishment Clause[40] and of free-speech jurisprudence[41] that the government is in no position to act as an arbiter of what is true or false.

Thus, as much as the First Amendment protects a marketplace of ideas, by excluding the government as a truth arbiter, it also protects a marketplace for speech governance. Private actors can set the rules for speech on their own property, including what is considered true or false, with minimal interference from the government. And as the Court put it in *Halleck*, opening one's property for the speech of third parties need not make the space take all-comers.[42]

This is particularly relevant in the social-media sphere. Social-media companies must resolve social-cost problems among their users.[43] In his famous work "The Problem of Social Cost," the economist Ronald Coase argued that the traditional approach to regulating externalities was wrong, because it failed to apprehend the reciprocal nature of harms.[44] For example, the noise from a factory is a

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[39] Even those whom we most trust to have considered opinions and an understanding of the facts may themselves experience "expert failure"—a type of market failure—that is made likelier still when government rules serve to insulate such experts from market competition. *See generally* ROGER KOPPL, EXPERT FAILURE (2018).

[40] *See, e.g.*, *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.").

[41] *See, e.g.*, *Alvarez*, 567 U.S. at 728 ("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.").

[42] *Cf. Halleck*, 131 S. Ct. at 1930-31.

[43] For a good explanation, *see* Jamie Whyte, *Polluting Words: Is There a Coasean Case to Regulate Offensive Speech?*, ICLE White Paper (Sep. 2021), *available at* https://laweconcenter.org/wp-content/uploads/2021/09/Whyte-Polluting-Words-2021.pdf.

[44] R.H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2 (1960) ("The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm.").

potential cost to the doctor next door who consequently can't use his office to conduct certain testing, *and simultaneously* the doctor moving his office next door is a potential cost to the factory's ability to use its equipment. In a world of well-defined property rights and low transaction costs, the initial allocation of a right would not matter, because the parties could bargain to overcome the harm in a beneficial manner—*i.e.*, the factory could pay the doctor for lost income or to set up sound-proof walls, or the doctor could pay the factory to reduce the sound of its machines.[45] Similarly, on social media, misinformation and other speech that some users find offensive may be inoffensive or even patently true to other users. There is a reciprocal nature to the harms of offensive speech, much as with other forms of nuisance. But unlike the situation of the factory owner and the doctor, social-media users use the property of social-media companies, who must balance these varied interests to maximize the platform's value.

Social-media companies are what economists call "multi-sided" platforms.[46] They are profit seeking, to be sure, but the way they generate profits is by acting as intermediaries between users and advertisers. If they fail to serve their users well, those users will abandon the platform. Without users, advertisers would have no interest in buying ads. And without advertisers, there is no profit to be made. Social-media companies thus need to maximize the value of their platform by setting rules that keep users sufficiently engaged that there are advertisers who will pay to reach them.

In the cases of Facebook, Twitter, and YouTube, the platforms have set content-moderation standards that restrict many kinds of speech, including misinformation. [47] In some cases, these policies are viewed negatively by some users, particularly given that the First Amendment would foreclose the government from regulating those same types of content. But social-media companies' ability to set and enforce moderation policies could actually be speech-enhancing. Because social-media companies are motivated to maximize the value of their platforms, for any given policy that gives rise to enforcement actions that leave some users disgruntled, there are likely to be an even greater number of users who agree with the policy. Moderation policies end up being speech-enhancing when they promote more speech overall, as the proliferation of harmful speech may push potential users away from the platforms.

Currently, all social-media companies rely on an advertising-driven revenue model. As a result, their primary goal is to maximize user engagement. As we have recently seen, this can lead to situations where advertisers threaten to pull ads if they don't like the platform's speech-governance decisions. After Elon Musk began restoring the accounts of Twitter users who had been banned for what the

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[45] *See id.* at 8-10.

[46] *See generally* DAVID S. EVANS & RICHARD SHMALENSEE, MATCHMAKERS: THE NEW ECONOMICS OF MULTISIDED PLATFORMS (2016).

[47] For more on how and why social-media companies govern online speech, *see* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018).

company's prior leadership believed was promoting hate speech and misinformation, major advertisers left the platform.[48] A different business model (about which Musk has been hinting for some time[49]) might generate different incentives for what speech to allow and disallow. There would, however, still be a need for any platform to allow some speech and not other speech, in line with the expectations of its user base and advertisers. The bottom line is that the motive to maximize profits and the tendency of markets to aggregate information leaves the platforms themselves best positioned to make these incremental decisions about their users' preferences, in response to the feedback mechanism of consumer demand.

Moreover, there is a fundamental difference between private action and state action, as alluded to by the Court in *Halleck*: one is voluntary, and the other based on coercion. If Facebook or Twitter suspends a user for violating community rules, that decision terminates a voluntary association. When the government removes someone from a public forum for expressing legal speech, its censorship and use of coercion are inextricably intertwined. The state-action doctrine empowers courts to police this distinction because the threats to liberty are much greater when one party in a dispute over the content of a particular expression is also empowered to impose its will with the use of force.

Imagine instead that courts were to decide that they, in fact, were best situated to balance private interests in speech against other interests, or even among speech interests. There are obvious limitations on courts' access to knowledge that couldn't be easily overcome through the processes of adjudication, which depend on the slow development of articulable facts and categorical reasoning over a lengthy period of time and an iterative series of cases. Private actors, on the other hand, can act relatively quickly and incrementally in response to ever-changing consumer demand in the marketplace. As Sowell put it:

> The courts' role as watchdogs patrolling the boundaries of governmental power is essential in order that others may be secure and free on the other side of those boundaries. But what makes watchdogs valuable is precisely their ability to distinguish those people

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[48] *See* Kate Conger, Tiffany Hsu, & Ryan Mac, *Elon Musk's Twitter Faces Exodus of Advertisers and Executives*, THE NEW YORK TIMES (Nov. 1, 2022), https://www.nytimes.com/2022/11/01/technology/elon-musk-twitter-advertisers.html ("[A]dvertisers — which provide about 90 percent of Twitter's revenue — are increasingly grappling with Mr. Musk's ownership of the platform. The billionaire, who is meeting advertising executives in New York this week, has spooked some advertisers because he has said he would loosen Twitter's content rules, which could lead to a surge in misinformation and other toxic content."); Ryan Mac & Tiffany Hsu, *Twitter's US Ad Sales Plunge 59% as Woes Continue*, THE NEW YORK TIMES (Jun. 5, 2013), https://www.nytimes.com/2023/06/05/technology/twitter-ad-sales-musk.html ("Six ad agency executives who have worked with Twitter said their clients continued to limit spending on the platform. They cited confusion over Mr. Musk's changes to the service, inconsistent support from Twitter and concerns about the persistent presence of misleading and toxic content on the platform.").

[49] *See, e.g.*, Brian Fung, *Twitter Prepares to Roll Out New Paid Subscription Service That Includes Blue Checkmark*, CNN (Nov. 5, 2022), https://www.cnn.com/2022/11/05/business/twitter-blue-checkmark-paid-subscription/index.html.

> who are to be kept at bay and those who are to be left alone. A watchdog who could not make that distinction would not be a watchdog at all, but simply a general menace.
>
> The voluntariness of many actions—*i.e.*, personal freedom—is valued by many simply for its own sake. In addition, however, voluntary decision-making processes have many advantages which are lost when courts attempt to prescribe results rather than define decision-making boundaries.[50]

The First Amendment's complementary right of editorial discretion also protects the right of publishers, platforms, and other speakers to be free from an obligation to carry or transmit government-compelled speech.[51] In other words, not only is private regulation of speech not state action, but as a general matter, private regulation of speech is protected by the First Amendment from government action. The limits on editorial discretion are marketplace pressures, such as user demand and advertiser support, and social mores about what is acceptable to be published.[52]

There is no reason to think that social-media companies today are in a different position than was the newspaper in *Tornillo*.[53] These companies must determine what, how, and where content is presented within their platform. While this right of editorial discretion protects social-media companies' moderation decisions, its benefits accrue to society at-large, who get to use those platforms to interact with people from around the world and to thereby grow the "marketplace of ideas."

Moreover, Section 230 amplifies online platforms' ability to make editorial decisions by immunizing most of their choices about third-party content. In fact, it is interesting to note that the heading for Section 230 is "Protection for private blocking and screening of offensive material."[54] In other words, Section 230 is meant, along with the First Amendment, to establish a market for speech governance free from governmental interference.

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[50] SOWELL, *supra* note 18, at 244.

[51] *See Halleck*, 139 S. Ct. at 1931 ("The Constitution does not disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property.").

[52] *Cf.* Tornillo, 418 U.S. at 255 ("The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers.").

[53] *See* Ben Sperry & R.J. Lehmann, *Gov. Desantis' Unconstitutional Attack on Social Media*, TAMPA BAY TIMES (Mar. 3, 2021), https://www.tampabay.com/opinion/2021/03/03/gov-desantis-unconstitutional-attack-on-social-media-column ("Social-media companies and other tech platforms find themselves in a very similar position [as the newspaper in *Tornillo*] today. Just as newspapers do, Facebook, Google and Twitter have the right to determine what kind of content they want on their platforms. This means they can choose whether and how to moderate users' news feeds, search results and timelines consistent with their own views on, for example, what they consider to be hate speech or misinformation. There is no obligation for them to carry speech they don't wish to carry, which is why DeSantis' proposal is certain to be struck down.").

[54] *See* 47 U.S.C. §230.

Social-media companies' abilities to differentiate themselves based on functionality and moderation policies are important aspects of competition among them.[55] How each platform is used may differ depending on those factors. In fact, many consumers use multiple social-media platforms throughout the day for different purposes.[56] Market competition, not government power, has enabled internet users to have more avenues than ever to get their message out.[57]

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[55] *See, e.g.*, Jennifer Huddleston, *Competition and Content Moderation: How Section 230 Enables Increased Tech Marketplace Entry*, at 4, Cato Policy Analysis No. 922 (Jan. 31, 2022), *available at* https://www.cato.org/sites/cato.org/files/2022-01/policy-analysis-922.pdf ("The freedom to adopt content moderation policies tailored to their specific business model, their advertisers, and their target customer base allows new platforms to please internet users who are not being served by traditional media. In some cases, the audience that a new platform seeks to serve is fairly narrowly tailored. This flexibility to tailor content moderation policies to the specific platform's community of users, which Section 230 provides, has made it possible for websites to establish online communities for a highly diverse range of people and interests, ranging from victims of sexual assault, political conservatives, the LGBTQ+ community, and women of color to religious communities, passionate stamp collectors, researchers of orphan diseases, and a thousand other affinity groups. Changing Section 230 to require websites to accept all comers, or to limit the ability to moderate content in a way that serves specific needs, would seriously curtail platforms' ability to serve users who might otherwise be ignored by incumbent services or traditional editors.").

[56] *See, e.g.*, Rui Gu, Lih-Bin Oh, & Kanliang Wang, *Multi-Homing On SNSS: The Role of Optimum Stimulation Level and Perceived Complementarity in Need Gratification*, 53 INFORMATION & MANAGEMENT 752 (2016), *available at* https://kd.nsfc.gov.cn/paperDownload/ZD19894097.pdf ("Given the increasingly intense competition for social networking sites (SNSs), ensuring sustainable growth in user base has emerged as a critical issue for SNS operators. Contrary to the common belief that SNS users are committed to using one SNS, anecdotal evidence suggests that most users use multiple SNSs simultaneously. This study attempts to understand this phenomenon of users' multi-homing on SNSs. Building upon optimum stimulation level (OSL) theory, uses and gratifications theory, and literature on choice complementarity, a theoretical model for investigating SNS users' multi-homing intention is proposed. An analysis of survey data collected from 383 SNS users shows that OSL positively affects users' perceived complementarity between different SNSs in gratifying their four facets of needs, namely, interpersonal communication, self-presentation, information, and entertainment. Among the four dimensions of perceived complementarity, only interpersonal communication and information aspects significantly affect users' intention to multi-home on SNSs. The results from this study offer theoretical and practical implications for understanding and managing users' multi-homing use of SNSs.").

[57] *See, e.g.*, *How Has Social Media Emerged as a Powerful Communication Medium*, UNIVERSITY CANADA WEST BLOG (Sep. 25, 2022), https://www.ucanwest.ca/blog/media-communication/how-has-social-media-emerged-as-a-powerful-communication-medium:

> Social media has taken over the business sphere, the advertising sphere and additionally, the education sector. It has had a long-lasting impact on the way people communicate and has now become an integral part of their lives. For instance, WhatsApp has redefined the culture of IMs (instant messaging) and taken it to a whole new level. Today, you can text anyone across the globe as long as you have an internet connection. This transformation has not only been brought about by WhatsApp but also Facebook, Twitter, LinkedIn and Instagram. The importance of social media in communication is a constant topic of discussion.
>
> Online communication has brought information to people and audiences that previously could not be reached. It has increased awareness among people about what is happening in other parts of the world. A perfect example of the social media's reach can be seen in the way the story about the Amazon Rainforest fire spread. It started with a single post and was soon present on everyone's newsfeed across different social media platforms.
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> Movements, advertisements and products are all being broadcasted on social media platforms, thanks to the increase in the social media users. Today, businesses rely on social media to create brand awareness as well as to promote and sell their products. It allows organizations to reach customers, irrespective of geographical boundaries. The internet has facilitated a resource to humankind that has unfathomable reach and benefits.

If social-media users and advertisers demand less of the kinds of content commonly considered to be misinformation, platforms will do their best to weed those things out. Platforms won't always get these determinations right, but it is by no means clear that centralizing decisions about misinformation by putting them in the hands of government officials would promote the societal interest in determining the truth.

It is true that content-moderation policies make it more difficult for speakers to communicate some messages, but that is precisely why they exist. There is a subset of protected speech to which many users do not wish to be subject, including at least some perceived misinformation. Moreover, speakers have no inherent right to an audience on a social-media platform. There are always alternative means to debate the contested issues of the day, even if it may be more costly to access the desired audience.

In sum, the First Amendment's state-action doctrine assures us that *government* may not make the decision about what is true or false, or to restrict a citizen's ability to reach an audience with ideas. Governments do, however, protect *social-media companies*' rights to exercise editorial discretion on their own property, including their right to make decisions about regulating potential misinformation. This puts the decisions in the hands of the entities best placed to balance the societal demands for online speech and limits on misinformation. In other words, the state-action doctrine protects the marketplace of ideas.

II. Are Online Platforms State Actors?

As the law currently stands, the First Amendment grants online platforms the right to exercise their own editorial discretion, free from government intervention. By contrast, if government agents pressure or coerce platforms into declaring certain speech misinformation, or to remove certain users, a key driver of the marketplace of ideas—the action of differentiated actors experimenting with differing speech policies—will be lost.[58]

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[58] Governmental intervention here could be particularly destructive if it leads to the imposition of "expert" opinions from insulated government actors from the "intelligence community." Koppl, in his study on expert failure, described the situation as "the entangled deep state," stating in relevant part:

> The entangled deep state is an only partially hidden informal network linking the intelligence community, military, political parties, large corporations including defense contractors, and others. While the interests of participants in the entangled deep state often conflict, members of the deep state share a common interest in maintaining the status quo of the political system independently of democratic processes. Therefore, denizens of the entangled deep state may sometimes have an incentive to act, potentially in secret, to tamp down resistant voices and to weaken forces challenging the political status quo… The entangled deep state produces the rule of experts. Experts must often choose for the people because the knowledge on the basis of which choices are made is secret, and the very choice being made may also be a secret involving, supposedly, "national security."… The "intelligence community" has incentives that are not aligned with the general welfare or with democratic process. Koppl, *supra* note 39, at 228, 230-31.

Today's public debate is not actually centered on a binary choice between purely private moderation and legislatively enacted statutes to literally define what is true and what is false. Instead, the prevailing concerns relate to the circumstances under which some government activity—such as chastising private actors for behaving badly, or informing those actors about known threats—might transform online platforms' moderation policies into *de facto* state actions. That is, at what point do private moderation decisions constitute state action? To this end, we will now consider sets of facts under which online platforms could be considered state actors for the purposes of the First Amendment.

In *Halleck*, the Supreme Court laid out three exceptions to the general rule that private actors are not state actors:

> Under this Court's cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity.[59]

Below, we will consider each of these exceptions, as applied to online social-media platforms. Part II.A will make the case that *Halleck* decisively forecloses the theory that social-media platforms perform a "traditional, exclusive public function," as has been found by many federal courts. Part II.B will consider whether government agents have coerced or encouraged platforms to make specific enforcement decisions on misinformation in ways that would transform their moderation actions into state action. Part II.C will look at whether the social-media companies have essentially colluded with government actors, through either joint action or in a relationship sufficiently intertwined as to be symbiotic.

A. 'Traditional, Exclusive Public Function'

The classic case that illustrates the traditional, exclusive public function test is *Marsh v. Alabama*.[60] There, the Supreme Court found that a company town, while private, was a state actor for the purposes of the First Amendment. At issue was whether the company town could prevent a Jehovah's Witness from passing out literature on the town's sidewalks. The Court noted that "[o]wnership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[61] The Court then situated the question as one

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[59] *Halleck*, 139 S. Ct. at 1928 (internal citations omitted).

[60] 326 U.S. 501 (1946).

[61] *Id.* at 506.

where it was being asked to balance property rights with First Amendment rights. Within that framing, it found that the First Amendment's protections should be in the "preferred position."[62]

Despite nothing in *Marsh* suggesting a limitation to company towns or the traditional, exclusive public function test, future courts eventually cabined it. But there was a time when it looked like the Court would expand this reasoning to other private actors who were certainly not engaged in a traditional, exclusive public function. A trio of cases involving shopping malls eventually ironed this out.

First, in *Food Employees v. Logan Valley Plaza*,[63] the Court—noting the "functional equivalence" of the business block in *Marsh* and the shopping center[64] —found that the mall could not restrict the peaceful picketing of a grocery store by a local food-workers union.[65]

But then, the Court seemingly cabined-in both *Logan Valley* and *Marsh* just a few years later in *Lloyd Corp. v. Tanner*.[66] Noting the "economic anomaly" that was company towns, the Court said *Marsh* "simply held that where private interests were substituting for and performing the customary functions of government, First Amendment freedoms could not be denied where exercised in the customary manner on the town's sidewalks and streets."[67] Moreover, the Court found that *Logan Valley* applied "only in a context where the First Amendment activity was related to the shopping center's operations."[68] The general rule, according to the Court, was that private actors had the right to restrict access to property for the purpose of exercising free-speech rights.[69] Importantly, "property does not lose its private character merely because the public is generally invited to use it for designated purposes."[70] Since the mall did not dedicate any part of its shopping center to public use in a way that would entitle the protestors to use it, the Court allowed it to restrict hand billing by Vietnam protestors within the mall.[71]

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[62] *Id.* at 509 ("When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.").

[63] 391 U.S. 308 (1968).

[64] *See id.* at 316-19. In particular, see *id.* at 318 ("The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in Marsh.").

[65] *See id.* at 325.

[66] 407 U.S. 551 (1972).

[67] *Id.* at 562.

[68] *Id.*

[69] *See id.* at 568 ("[T]he courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.").

[70] *Id.* at 569.

[71] *See id.* at 570.

Then, in *Hudgens v. NLRB*,[72] the Court went a step further and reversed *Logan Valley* and severely cabined-in *Marsh*. Now, the general rule was that "the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."[73] *Marsh* is now a narrow exception, limited to situations where private property has taken on *all* attributes of a town.[74] The Court also found that the reasoning—if not the holding—of *Tanner* had already reversed *Logan Valley*.[75] The Court concluded bluntly that "under the present state of the law the constitutional guarantee of free expression has no part to play in a case such as this."[76] In other words, private actors, even those that open themselves up to the public, are not subject to the First Amendment. Following *Hudgens*, the Court would further limit the public-function test to "the exercise by a private entity of powers traditionally exclusively reserved to the State."[77] Thus, the "traditional, *exclusive* public function" test.

Despite this history, recent litigants against online social-media platforms have argued, often citing *Marsh*, that these platforms are the equivalent of public parks or other public forums for speech.[78] On top of that, the Supreme Court itself has described social-media platforms as the "modern public square."[79] The Court emphasized the importance of online platforms because they:

> allow[] users to gain access to information and communicate with one another about it on any subject that might come to mind… [give] access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."[80]

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[72] 424 U.S. 507 (1976).

[73] *Id.* at 513.

[74] *See id.* at 516 ("Under what circumstances can private property be treated as though it were public? The answer that Marsh gives is when that property has taken on all the attributes of a town, i. e., `residential buildings, streets, a system of sewers, a sewage disposal plant and a "business block" on which business places are situated.' (*Logan Valley*, 391 U.S. at 332 (Black, J. dissenting) (quoting *Marsh*, 326 U.S. at 502)).

[75] *See id.* at 518 ("It matters not that some Members of the Court may continue to believe that the *Logan Valley* case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be. And in the performance of that duty we make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case.").

[76] *Id.* at 521.

[77] *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974).

[78] *See, e.g.*, the discussion about *Prager University v. Google* below.

[79] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

[80] *Id.* (internal citation omitted).

Seizing upon this language, many litigants have argued that online social-media platforms are public forums for First Amendment purposes. To date, all have failed in federal court under this theory,[81] and the Supreme Court officially foreclosed it in *Halleck*.

In *Halleck*, the Court considered whether a public-access channel operated by a cable provider was a government actor for purposes of the First Amendment under the traditional, exclusive public function test. Summarizing the caselaw, the Court said the test required more than just a finding that the government at some point exercised that function, or that the function serves the public good. Instead, the government must have "traditionally *and* exclusively performed the function."[82]

The Court then found that operating as a public forum for speech is *not* a function traditionally and exclusively performed by the government. On the contrary, a private actor that provides a forum for speech normally retains "editorial discretion over the speech and speakers in the forum"[83] because "[it] is not an activity that only governmental entities have traditionally performed."[84] The Court reasoned that:

> If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum. Private property owners and private lessees would face the unappetizing choice of allowing all comers or closing the platform altogether.[85]

If the applicability of *Halleck* to the question of whether online social-media platforms are state actors under the "traditional, exclusive public function" test isn't already clear, there have been appellate courts who have squarely addressed the question. In *Prager University v. Google, LLC*,[86] the 9th U.S. Circuit Court of Appeals took on the question of whether social-media platforms are state actors subject to First Amendment. Prager relied primarily upon *Marsh* and Google's representations that YouTube is a "public forum" to argue that YouTube is a state actor under the traditional, public

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[81] *See, e.g.*, *Brock v. Zuckerberg*, 2021 WL 2650070, at *3 (S.D.N.Y. Jun. 25, 2021); *Freedom Watch, Inc. v. Google Inc.*, 816 F. App'x 497, 499 (D.C. Cir. 2020); *Zimmerman v. Facebook, Inc.*, 2020 WL 5877863 at *2 (N.D. Cal. Oct. 2, 2020); *Ebeid v. Facebook, Inc.*, 2019 WL 2059662 at *6 (N.D. Cal. May 9, 2019); *Green v. YouTube, LLC*, 2019 WL 1428890, at *4 (D.N.H. Mar. 13, 2019); *Nyabwa v. FaceBook*, 2018 WL 585467, at *1 (S.D. Tex. Jan. 26, 2018); *Shulman v. Facebook.com*, 2017 WL 5129885, at *4 (D.N.J. Nov. 6, 2017).

[82] *Halleck*, 139 S. Ct. at 1929 (emphasis in original).

[83] *Id.* at 1930.

[84] *Id.*

[85] *Id.* at 1930-31.

[86] 951 F.3d 991 (9th Cir. 2020).

function test.[87] Citing primarily *Halleck*, along with a healthy dose of both *Hudgens* and *Tanner*, the 9th Circuit rejected this argument, for the reasons noted above. [88] YouTube was *not* a state actor just because it opened itself up to the public as a forum for free speech.

In sum, there is no basis for arguing that online social-media platforms fit into the narrow *Marsh* exception to the general rule that private actors can use their own editorial discretion over own their digital property to set their own rules for speech, including misinformation policies.

That this exception to the general private/state action dichotomy has been limited as applied to social-media platforms is consistent with the reasoning laid out above on the law & economics of the doctrine. Applying the *Marsh* theory to social-media companies would make all of their moderation decisions subject to First Amendment analysis. As will be discussed more below in Part III.A, this would severely limit the platforms' ability to do anything at all with regard to online misinformation, since government actors can do very little to regulate such speech consistent with the First Amendment.

The inapplicability of the *Marsh* theory of state action means that a robust sphere of individual liberty will be protected. Social-media companies will be able to engage in a vibrant "market for speech governance" with respect to misinformation, responding to the perceived demands of users and advertisers and balancing those interests in a way that maximizes the value of their platforms in the presence of market competition.

B. Government Compulsion or Encouragement

In light of the revelations highlighted in the introduction of this paper from *The Intercept*, the "Twitter Files," and subsequent litigation in *Missouri v. Biden*,[89] the more salient theory of state action is that online social-media companies were either compelled by or colluded in joint action with the federal government to censor speech under their misinformation policies. This section will consider the government compulsion or encouragement theory and Part II.C below will consider the joint action/entwinement theory.

At a high level, the government may not coerce or encourage private actors to do what it may itself not do constitutionally.[90] But state action can be found for a private decision under this theory "only

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[87] *See id.* at 997-98. *See also, Prager University v. Google*, LLC, 2018 WL 1471939, at *6 (N.D. Cal. Mar. 26, 2018) ("Plaintiff primarily relies on the United States Supreme Court's decision in *Marsh v. Alabama* to support its argument, but *Marsh* plainly did not go so far as to hold that any private property owner "who operates its property as a public forum for speech" automatically becomes a state actor who must comply with the First Amendment.").

[88] *See PragerU*, 951 F.3d at 996-99 (citing *Halleck* 12 times, *Hudgens* 3 times, and *Tanner* 3 times).

[89] *See supra* n. 7-9 and associated text.

[90] *Cf. Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("It is axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.").

when it has exercised coercive power or has provided such significant encouragement, either overt or cover, that the choice must in law be deemed to be that of the State."[91] But "[m]ere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible" for private actions.[92] While each case is very fact-specific,[93] courts have developed several tests to determine when government compulsion or encouragement would transform a private actor into a state actor for constitutional purposes.

For instance, in *Bantam Books v. Sullivan*,[94] the Court considered whether letters sent by a legislatively created commission to book publishers declaring certain books and magazines objectionable for sale or distribution was sufficient to transform into state action the publishers' subsequent decision not to publish further copies of the listed publications. The commission had no legal power to apply formal legal sanctions and there were no bans or seizures of books.[95] In fact, the book distributors were technically "free" to ignore the commission's notices.[96] Nonetheless, the Court found "the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim."[97] Particularly important to the Court was that the notices could be seen as a threat to refer them for prosecution, regardless how the commission styled them. As the Court stated:

> People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around, and [the distributor's] reaction, according to uncontroverted testimony, was no exception to this general rule. The Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications *ex proprio vigore*. It would be naive to credit the State's assertion that these blacklists are in the nature of mere legal advice, when they plainly serve as instruments of regulation...[98]

Similarly, in *Carlin Communications v. Mountain States Telephone Co.*,[99] the 9th U.S. Circuit Court of Appeals found it was state action when a deputy county attorney threatened prosecution of a regional telephone company for carrying an adult-entertainment messaging service.[100] "With this threat,

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[91] *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

[92] *Id.* at 1004-05.

[93] *Id.* (noting that "the factual setting of each case will be significant").

[94] 372 U.S. 58 (1963).

[95] *See id.* at 66-67.

[96] *See id.* at 68.

[97] *Id.* at 67.

[98] *Id.* at 68-69.

[99] 827 F.2d 1291 (9th Cir. 1987).

[100] *See id.* at 1295.

Arizona 'exercised coercive power' over Mountain Bell and thereby converted its otherwise private conduct into state action…"[101] The court did *not* find it relevant whether or not the motivating reason for the removal was the threat of prosecution or the telephone company's independent decision.[102]

In a more recent case dealing with Backpage.com, the 7th U.S. Circuit Court of Appeals found a sheriff's campaign to shut down the site by cutting off payment processing for ads from Visa and Mastercard was impermissible under the First Amendment.[103] There, the sheriff sent a letter to the credit-card companies asking them to "cease and desist" from processing payment for advertisements on Backpage.com and for "contact information" for someone within the companies he could work with.[104] The court spent considerable time distinguishing between "attempts to convince and attempts to coerce,"[105] coming to the conclusion that "Sheriff Dart is not permitted to issue and publicize dire threats against credit card companies that process payments made through Backpage's website, including threats of prosecution (albeit not by him, but by other enforcement agencies that he urges to proceed against them), in an effort to throttle Backpage."[106] The court also noted "a threat is actionable and thus can be enjoined even if it turns out to be empty—the victim ignores it, and the threatener folds his tent."[107]

In sum, the focus under the coercion or encouragement theory is on what the state objectively did and not on the subjective understanding of the private actor. In other words, the question is whether the state action is reasonably understood as coercing or encouraging private action, not whether the private actor was actually responding to it.

To date, several federal courts have dismissed claims that social-media companies are state actors under the compulsion/encouragement theory, often distinguishing the above cases on the grounds that the facts did not establish a true threat, or were not sufficiently connected to the enforcement action again the plaintiff.

For instance, in *O'Handley v. Weber*,[108] the 9th U.S. Circuit Court of Appeals dealt directly with the question of the coercion theory in the context of social-media companies moderating

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[101] *Id.*

[102] *See id.* ("Simply by 'command[ing] a particular result,' the state had so involved itself that it could not claim the conduct had actually occurred as a result of private choice.") (*quoting Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963)).

[103] *See Backpage.com, LLC v. Dar*, 807 F.3d 229 (7th Cir. 2015).

[104] *See id.* at 231, 232.

[105] *Id.* at 230.

[106] *Id.* at 235.

[107] *Id.* at 231.

[108] 2023 WL 2443073 (9th Cir. Mar. 10, 2023).

misinformation, allegedly at the behest of California's Office of Elections Cybersecurity (OEC). The OEC flagged allegedly misleading posts on Facebook and Twitter and the social-media companies removed most of those flagged posts.[109] First, the court found there was no threats from the OEC like those in *Carlin*, nor any incentive offered to take the posts down.[110] The court then distinguished between "attempts to convince and attempts to coerce,"[111] noting that "[a] private party can find the government's stated reasons for making a request persuasive, just as it can be moved by any other speaker's message. The First Amendment does not interfere with this communication so long as the intermediary is free to disagree with the government and to make its own independent judgment about whether to comply with the government's request."[112] The court concluded that the OEC did not pressure Twitter to take any particular action against the plaintiff, but went even further by emphasizing that, even if their actions could be seen as a specific request to remove his post, Twitter's compliance was "purely optional."[113] In other words, if there is no threat in a government actor's request to take down content, then it is not impermissible coercion or encouragement.

In *Hart v. Facebook*,[114] the plaintiff argued that the federal government defendants had—through threats of removing Section 230 immunity and antitrust investigations, as well as comments by President Joe Biden stating that social-media companies were "killing people" by not policing misinformation about COVID-19—coerced Facebook and Twitter into removing his posts.[115] The plaintiff also pointed to recommendations from Biden and an advisory from Surgeon General Vivek Murthy as further evidence of coercion or encouragement. The court rejected this evidence, stating that "the government's vague recommendations and advisory opinions are not coercion. Nor can coercion be inferred from President Biden's comment that social media companies are 'killing people'… A President's one-time statement about an industry does not convert into state action all later decisions by actors in that industry that are vaguely in line with the President's preferences."[116] But even more importantly, the court found that there was no connection between the allegations of coercion and the removal of his particular posts: "Hart has not alleged any connection between any (threat of) agency investigation and Facebook and Twitter's decisions… even if Hart had plausibly pleaded that

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[109] *See id.* at *2-3.

[110] *See id.* at *5-6.

[111] *Id.* at *6.

[112] *Id.*

[113] *Id.*

[114] 2022 WL 1427507 (N.D. Cal. May 5, 2022).

[115] *See id.* at *8.

[116] *Id.*

the Federal Defendants exercised coercive power over the companies' misinformation policies, he still fails to specifically allege that they coerced action *as to him*."[117]

Other First Amendment cases against social-media companies alleging coercion or encouragement from state actors have been dismissed for reasons similar to those in *Hart*.[118] In *Missouri et al. v. Biden, et al.*,[119] the U.S. District Court for the Western District of Louisiana became the first court to find social-media companies could be state actors for purposes of the First Amendment due to a coercion or encouragement theory. After surveying (most of the same) cases as above, the court found that:

> Here, Plaintiffs have clearly alleged that Defendants attempted to convince social-media companies to censor certain viewpoints. For example, Plaintiffs allege that Psaki demanded the censorship of the "Disinformation Dozen" and publicly demanded faster censorship of "harmful posts" on Facebook. Further, the Complaint alleges threats, some thinly veiled and some blatant, made by Defendants in an attempt to effectuate its censorship program. One such alleged threat is that the Surgeon General issued a formal "Request for Information" to social-media platforms as an implied threat of future regulation to pressure them to increase censorship. Another alleged threat is the DHS's publishing of repeated terrorism advisory bulletins indicating that "misinformation" and "disinformation" on social-media platforms are "domestic terror threats." While not a direct threat, equating failure to comply with censorship demands as enabling acts of domestic terrorism through repeated official advisory bulletins is certainly an action social-media companies would not lightly disregard. Moreover, the Complaint contains over 100 paragraphs of allegations detailing "significant encouragement" in private (*i.e.*, "covert") communications between Defendants and social-media platforms.
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> The Complaint further alleges threats that far exceed, in both number and coercive power, the threats at issue in the above-mentioned cases. Specifically, Plaintiffs allege and link threats of official government action in the form of threats of antitrust legislation and/or enforcement and calls to amend or repeal Section 230 of the CDA with calls for more aggressive censorship and suppression of speakers and viewpoints that government officials disfavor. The Complaint even alleges, almost directly on point with the threats in *Carlin* and *Backpage*, that President Biden threatened civil liability and criminal prosecution against Mark Zuckerberg if Facebook did not increase censorship of political speech. The Court finds that the Complaint alleges significant encouragement and

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[117] *Id.* (emphasis in original).

[118] *See, e.g.*, *Trump v. Twitter*, 602 F.Supp.3d 1213, 1218-26 (2022); *Children's Health Def. v. Facebook*, 546 F.Supp.3d 909, 932-33 (2021).

[119] 2023 WL 2578260 (W.D. La. Mar. 20, 2023). *See also Missouri, et al. v. Biden, et al.*, 2023 WL 4335270 (W.D. La. Jul. 4., 2023) (memorandum opinion granting the plaintiffs' motion for preliminary injunction).

> coercion that converts the otherwise private conduct of censorship on social-media platforms into state action, and is unpersuaded by Defendants' arguments to the contrary.[120]

There is obvious tension between *Missouri v. Biden* and the *O'Handley* and *Hart* opinions. As noted above, the *Missouri v. Biden* court did attempt to incorporate *O'Handley* into its opinion. That court tried to distinguish *O'Handley* on the grounds that the OEC's conduct at issue was a mere advisory, whereas the federal defendants in *Missouri v. Biden* made threats against the plaintiffs.[121]

It is perhaps plausible that *Hart* can also be read as consistent with *Missouri v. Biden*, in the sense that while Hart failed to allege sufficient facts of coercion/encouragement or a connection with his specific removal, the plaintiffs in *Missouri v. Biden* did. Nonetheless, the *Missouri v. Biden* court accepted many factual arguments that were rejected in *Hart*, such as those about the relevance of certain statements made by President Biden and his press secretary; threats to revoke Section 230 liability protections; and threats to start antitrust proceedings. Perhaps the difference is that the factual allegations in *Missouri v. Biden* were substantially longer and more detailed than those in *Hart*. And while the *Missouri v. Biden* court did not address it in its First Amendment section, they did note that the social-media companies' censorship actions generated sufficient injury-in-fact to the plaintiffs to establish standing.[122] In other words, it could just be that what makes the difference is the better factual pleading in *Missouri v. Biden*, due to more available revelations of government coercion and encouragement.[123]

On the other hand, there may be value to cabining *Missouri v. Biden* with some of the criteria in *O'Handley* and *Hart*. For instance, there could be value in the government having the ability to share information with social-media companies and make requests to review certain posts and accounts that may purvey misinformation. *O'Handley* emphasizes that there is a difference between convincing and coercing. This is not only important for dealing with online misinformation, but with things like terrorist activity on the platforms. Insofar as *Missouri v. Biden* is too lenient in allowing cases to go forward, this may be a fruitful distinction for courts to clarify.[124]

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[120] 2023 WL 2578260 at *30-31.

[121] *See id.*

[122] *See id.* at *17-19.

[123] It is worth noting that all of these cases were decided at the motion-to-dismiss stage, during which all of the plaintiffs' allegations are assumed to be true. The plaintiffs in *Missouri v. Biden* will have to prove their factual case of state action. Now that the Western District of Louisiana has ruled on the motion for preliminary injunction, it is likely that there will be an appeal before the case gets to the merits.

[124] The district court in *Missouri v. Biden* discussed this distinction further in the memorandum ruling on request for preliminary injunction:

> The Defendants argue that by making public statements, this is nothing but government speech. However, it was not the public statements that were the problem. It was the alleged use of government agencies and employees to coerce

Similarly, the requirement in *Hart* that a specific moderation decision be connected to a particular government action is very important to limit the universe of activity subject to First Amendment analysis. The *Missouri v. Biden* court didn't deal sufficiently with whether the allegations of coercion and encouragement were connected to the plaintiffs' content and accounts being censored. As *Missouri v. Biden* reaches the merits stage of the litigation, the court will also need to clarify the evidence needed to infer state action, assuming there is no explicit admission of direction by state actors.[125]

Under the law & economics theory laid out in Part I, the coercion or encouragement exception to the strong private/state action distinction is particularly important. The benefits of private social-media companies using their editorial judgment to remove misinformation in response to user and advertiser demand is significantly reduced when the government coerces, encourages, or otherwise

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> and/or significantly encourage social-media platforms to suppress free speech on those platforms. Plaintiffs point specifically to the various meetings, emails, follow-up contacts, and the threat of amending Section 230 of the Communication Decency Act. Plaintiffs have produced evidence that Defendants did not just use public statements to coerce and/or encourage social-media platforms to suppress free speech, but rather used meetings, emails, phone calls, follow-up meetings, and the power of the government to pressure social-media platforms to change their policies and to suppress free speech. Content was seemingly suppressed even if it did not violate social-media policies. It is the alleged coercion and/or significant encouragement that likely violates the Free Speech Clause, not government speech, and thus, the Court is not persuaded by Defendants' arguments here.

Missouri v. Biden, 2023 WL 4335270, at *56 (W.D. La. July 4, 2023).

[125] While the district court did talk in significantly greater detail about specific allegations as to each federal defendant's actions in coercing or encouraging changes in moderation policies or enforcement actions, there is still a lack of specificity as to how it affected the plaintiffs. *See id.* at *45-53 (applying the coercion/encouragement standard to each federal defendant). As in its earlier decision at the motion-to-dismiss stage, the court's opinion accompanying the preliminary injunction does deal with this issue to a much greater degree in its discussion of standing, and specifically of traceability. *See id.* at *61-62:

> Here, Defendants heavily rely upon the premise that social-media companies would have censored Plaintiffs and/or modified their content moderation policies even without any alleged encouragement and coercion from Defendants or other Government officials. This argument is wholly unpersuasive. Unlike previous cases that left ample room to question whether public officials' calls for censorship were fairly traceable to the Government; the instant case paints a full picture. A drastic increase in censorship, deboosting, shadow-banning, and account suspensions directly coincided with Defendants' public calls for censorship and private demands for censorship. Specific instances of censorship substantially likely to be the direct result of Government involvement are too numerous to fully detail, but a birds-eye view shows a clear connection between Defendants' actions and Plaintiffs injuries.
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> The Plaintiffs' theory of but-for causation is easy to follow and demonstrates a high likelihood of success as to establishing Article III traceability. Government officials began publicly threatening social-media companies with adverse legislation as early as 2018. In the wake of COVID-19 and the 2020 election, the threats intensified and became more direct. Around this same time, Defendants began having extensive contact with social-media companies via emails, phone calls, and in-person meetings. This contact, paired with the public threats and tense relations between the Biden administration and social-media companies, seemingly resulted in an efficient report-and-censor relationship between Defendants and social-media companies. Against this backdrop, it is insincere to describe the likelihood of proving a causal connection between Defendants' actions and Plaintiffs' injuries as too attenuated or purely hypothetical.
>
> The evidence presented thus goes far beyond mere generalizations or conjecture: Plaintiffs have demonstrated that they are likely to prevail and establish a causal and temporal link between Defendants' actions and the social-media companies' censorship decisions. Accordingly, this Court finds that there is a substantial likelihood that Plaintiffs would not have been the victims of viewpoint discrimination but for the coercion and significant encouragement of Defendants towards social-media companies to increase their online censorship efforts.

induces moderation decisions. In such cases, the government is essentially engaged in covert regulation by deciding for private actors what is true and what is false. This is inconsistent with a "marketplace of ideas" or the "marketplace for speech governance" that the First Amendment's state-action doctrine protects.

There is value, however, to limiting the *Missouri v. Biden* holding to ensure that not all requests by government agents automatically transform moderation decisions into state action, and in connecting coercion or encouragement to particular allegations of censorship. Government actors, as much as private actors, should be able to alert social-media companies to the presence of misinformation and even persuade social-media companies to act in certain cases, so long as that communication doesn't amount to a threat. This is consistent with a "marketplace for speech governance." Moreover, social-media companies shouldn't be considered state actors for all moderation decisions, or even all moderation decisions regarding misinformation, due to government coercion or encouragement in general. Without a nexus between the coercion or encouragement and a particular moderation decision, social-media companies would lose the ability to use their editorial judgment on a wide variety of issues in response to market demand, to the detriment of their users and advertisers.

C. Joint Action or Symbiotic Relationship

There is also state action for the purposes of the First Amendment when the government acts jointly with a private actor,[126] when there is a "symbiotic relationship" between the government and a private actor,[127] or when there is "inextricable entwinement" between a private actor and the government.[128] None of these theories is necessarily distinct,[129] and it is probably easier to define them through examples.[130]

In *Lugar v. Edmonson Oil Co.*, the plaintiff, an operator of a truck stop, was indebted to his supplier.[131] The defendant was a creditor who used a state law in Virginia to get a prejudgment attachment to the truck-stop operator's property, which was then executed by the county sheriff.[132] A hearing was held 34 days later, pursuant to the relevant statute.[133] The levy at-issue was dismissed because the

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[126] *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941-42 (1982).

[127] *See Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 294 (2001).

[128] *See id.* at 296.

[129] For instance, in *Mathis v. Pacific Gas & Elec. Co.*, 75 F.3d 498 (9th Cir. 1996), the 9th Circuit described the plaintiff's "joint action" theory as one where a private person could only be liable if the particular actions challenged are "inextricably intertwined" with the actions of the government. *See id.* at 503.

[130] *See Brentwood*, 531 U.S. at 296 (noting that "examples may be the best teachers").

[131] *See Lugar*, 457 U.S. at 925.

[132] *See id.*

[133] *See id.*

creditor failed to satisfy the statute. The plaintiff then brought a Section 1983 claim against the defendant on grounds that it had violated the plaintiff's Due Process rights by taking his property without first providing him with a hearing. The Supreme Court took the case to clarify how the state-action doctrine applied in such matters. The Court, citing previous cases, stated that:

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.[134]

The Court also noted that "we have consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor.'"[135] Accordingly, the Court found that the defendant's use of the prejudgment statute was state action that violated Due Process.[136]

In *Burton v. Wilmington Parking Authority*,[137] the Court heard a racial-discrimination case in which the question was whether state action was involved when a restaurant refused to serve black customers in a space leased from a publicly owned building attached to a public parking garage.[138] The Court determined that it was state action, noting that "[i]t cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits... Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."[139] While Court didn't itself call this theory the "symbiotic relationship" test in *Burton*, later Court opinions did exactly that.[140]

Brentwood Academy v. Tennessee Secondary School Athletic Association arose concerned a dispute between a private Christian school and the statewide athletics association governing interscholastic sports over a series of punishments for alleged "undue influence" in recruiting athletes.[141] The central issue was whether the athletic association was a state actor. The Court analyzed whether state actors were

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[134] *Id.* at 941 (internal citations omitted).

[135] *Id.*

[136] *See id.* at 942.

[137] 365 U.S. 715 (1961).

[138] *See id.* at 717-20.

[139] *Id.* at 724.

[140] *See Rendell-Baker v. Kohn*, 457 U.S. 830, 842-43 (1982).

[141] *See Brentwood*, 531 U.S. at 292-93.

so "entwined" with the private actors in the association to make the resulting action state action.[142] After reviewing the record, the Court noted that 84% of the members of the athletic association were public schools and the association's rules were made by representatives from those schools.[143] The Court concluded that the "entwinement down from the State Board is therefore unmistakable, just as the entwinement up from the member public schools is overwhelming. Entwinement will support a conclusion that an ostensibly private organization ought to be charged with a public character and judged by constitutional standards; entwinement to the degree shown here requires it."[144]

Other cases have also considered circumstances in which government regulation, combined with other government actions, can create a situation where private action is considered that of the government. In *Skinner v. Railway Labor Executives Association*,[145] the Court considered a situation where private railroads engaged in drug testing of employees, pursuant to a federal regulation that authorized them to adopt a policy of drug testing and preempted state laws restricting testing.[146] The Court stated that "[t]he fact that the Government has not compelled a private party to perform a search does not, by itself, establish that the search is a private one. Here, specific features of the regulations combine to convince us that the Government did more than adopt a passive position toward the underlying private conduct."[147] The Court found the preemption of state law particularly important, finding "[t]he Government has removed all legal barriers to the testing authorized by Subpart D and indeed has made plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions."[148]

Each of these theories has been pursued by litigants who have had social-media posts or accounts removed by online platforms due to alleged misinformation, including in the *O'Handley* and *Hart* cases discussed earlier.

For instance, in *O'Handley*, the 9th Circuit rejected that Twitter was a state actor under the joint-action test. The court stated there were two ways to prove joint action: either by a conspiracy theory that required a "meeting of the minds" to violate constitutional rights, or by a "willful participant" theory that requires "a high degree of cooperation between private parties and state officials."[149] The court rejected the conspiracy theory, stating there was no meeting of the minds to violate

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[142] *See id.* at 296 ("[A] challenged activity may be state action… when it is 'entwined with governmental policies,' or when government is 'entwined in [its] management or control.'") (internal citations omitted).

[143] *See id.* at 298-301.

[144] *Id.* at 302.

[145] 489 U.S. 602 (1989).

[146] *See id.* at 606-12, 615.

[147] *Id.* at 615.

[148] *Id.*

[149] *O'Handley*, 2023 WL 2443073, at *7.

constitutional rights because Twitter had its own independent interest in "not allowing users to leverage its platform to mislead voters."[150] The court also rejected the willful-participant theory because Twitter was free to consider and reject flags made by the OEC in the Partner Support Portal under its own understanding of its policy on misinformation.[151] The court analogized the case to *Mathis v. Pac. Gas & Elec. Co.*,[152] finding this "closely resembles the 'consultation and information sharing' that we held did not rise to the level of joint action."[153] The court concluded that "this was an arm's-length relationship, and Twitter never took its hands off the wheel."[154]

Similarly, in *Hart*, the U.S. District Court for the Northern District of California rejected the joint action theory as applied to Twitter and Facebook. The court found that much of the complained-of conduct by Facebook predated the communications with the federal defendants about misinformation, making it unlikely that there was a "meeting of the minds" to deprive the plaintiff of his constitutional rights.[155] The court also found "the Federal Defendants' statements… far too vague and precatory to suggest joint action," adding that recommendations and advisories are both vague and unenforceable.[156] Other courts followed similar reasoning in rejecting First Amendment claims against social-media companies.[157]

Finally, in *Children's Health Defense v. Facebook*,[158] the court considered the argument of whether Section 230, much like the regulation at issue in *Skinner*, could make Facebook into a joint actor with the state when it removes misinformation. The U.S. District Court for the Northern District of California distinguished *Skinner*, citing a previous case finding "[u]nlike the regulations in *Skinner*, Section 230 does not require private entities to do anything, nor does it give the government a right to supervise or obtain information about private activity."[159]

For the first time, a federal district court found state action under the joint action or entwinement theory in *Missouri v. Biden*. The court found that:

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[150] *Id.*

[151] *See id.* at *7-8.

[152] 75 F.3d 498 (9th Cir. 1996).

[153] *O'Handley*, 2023 WL 2443073, at *8.

[154] *Id.*

[155] *Hart*, 2022 WL 1427507, at *6.

[156] *Id.* at *7.

[157] *See, e.g.*, *Fed. Agency of News LLC v. Facebook, Inc.*, 432 F. Supp. 3d 1107, 1124-27 (N.D. Cal. 2020); *Children's Health Def. v. Facebook Inc.*, 546 F. Supp. 3d 909, 927-31 (N.D. Cal. 2021); *Berenson v. Twitter*, 2022 WL1289049, at *3 (N.D. Cal. Apr. 29, 2022).

[158] 546 F. Supp. 3d 909 (N.D. Cal. 2021).

[159] *Id.* at 932 (*citing* Divino Grp. LLC v. Google LLC, 2021 WL 51715, at *6 (N.D. Cal. Jan. 6, 2021)).

> Here, Plaintiffs have plausibly alleged joint action, entwinement, and/or that specific features of Defendants' actions combined to create state action. For example, the Complaint alleges that "[o]nce in control of the Executive Branch, Defendants promptly capitalized on these threats by pressuring, cajoling, and openly colluding with social-media companies to actively suppress particular disfavored speakers and viewpoints on social media." Specifically, Plaintiffs allege that Dr. Fauci, other CDC officials, officials of the Census Bureau, CISA, officials at HHS, the state department, and members of the FBI actively and directly coordinated with social-media companies to push, flag, and encourage censorship of posts the Government deemed "Mis, Dis, or Malinformation."[160]

The court also distinguished *O'Handley*, finding there was more than an "arms-length relationship" between the federal defendants and the social-media companies:

> Plaintiffs allege a formal government-created system for federal officials to influence social-media censorship decisions. For example, the Complaint alleges that federal officials set up a long series of formal meetings to discuss censorship, setting up privileged reporting channels to demand censorship, and funding and establishing federal-private partnership to procure censorship of disfavored viewpoints. The Complaint clearly alleges that Defendants specifically authorized and approved the actions of the social-media companies and gives dozens of examples where Defendants dictated specific censorship decisions to social-media platforms. These allegations are a far cry from the complained-of action in *O'Handley*: a single message from an unidentified member of a state agency to Twitter.[161]

Finally, the court also found similarities between *Skinner* and *Missouri v Biden* that would support a finding of state action:

> Section 230 of the CDA purports to preempt state laws to the contrary, thus removing all legal barriers to the censorship immunized by Section 230. Federal officials have also made plain a strong preference and desire to "share the fruits of such intrusions," showing "clear indices of the Government's encouragement, endorsement, and participation" in censorship, which "suffice to implicate the [First] Amendment."
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> The Complaint further explicitly alleges subsidization, authorization, and preemption through Section 230, stating: "[T]hrough Section 230 of the Communications Decency Act (CDA) and other actions, the federal government subsidized, fostered, encouraged, and empowered the creation of a small number of massive social-media companies with disproportionate ability to censor and suppress speech on the basis of speaker, content, and viewpoint." Section 230 immunity constitutes the type of "tangible financial aid," here worth billions of dollars per year, that the Supreme Court identified in *Norwood*, 413 U.S. at 466, 93 S.Ct. 2804. This immunity also "has a significant tendency to

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[160] *Missouri v. Biden*, 2023 WL 2578260, at *33.

[161] *Id.*

> facilitate, reinforce, and support private" censorship. *Id.* Combined with other factors such as the coercive statements and significant entwinement of federal officials and censorship decisions on social-media platforms, as in *Skinner*, this serves as another basis for finding government action.[162]

Again, there is tension in the opinions of these cases on the intersection of social media and the First Amendment under the joint-action or symbiotic-relationship test. But there are ways to read the cases consistently. First, there were far more factual allegations in *Missouri v. Biden* relative to the *O'Handley*, *Hart*, or *Children's Health Defense* cases, particularly regarding how involved the federal defendants were in prodding social-media companies to moderate misinformation. There is even a way to read the different legal conclusions on Section 230 and *Skinner* consistently. The court in *Biden v. Missouri* made clear that it wasn't Section 230 alone that made it like *Skinner*, but the combination of Section 230 immunity with other factors present:

> The Defendants' alleged use of Section 230's immunity—and its obvious financial incentives for social-media companies—as a metaphorical carrot-and-stick *combined* with the alleged back-room meetings, hands-on approach to online censorship, and other factors discussed above transforms Defendants' actions into state action. As Defendants note, Section 230 was designed to "reflect a deliberate absence of government involvement in regulating online speech," but has instead, according to Plaintiffs' allegations, become a tool for coercion used to encourage significant joint action between federal agencies and social-media companies.[163]

While there could be dangers inherent in treating Section 230 alone as an argument that social-media companies are state actors, the court appears inclined to say it is not Section 230 but rather the threat of removing it, along with the other dealings and communications from the federal government, that makes this state action.

Under the law & economics theory outlined in Part I, the joint-action or symbiotic-relationship test is also an important exception to the general dichotomy between private and state action. In particular, it is important to deter state officials from engaging in surreptitious speech regulation by covertly interjecting themselves into social-media companies' moderation decisions. The allegations in *Missouri v. Biden*, if proven true, do appear to outline a vast and largely hidden infrastructure through which federal officials use backchannels to routinely discuss social-media companies' moderation decisions and often pressure them into removing disfavored content in the name of misinformation. This kind of government intervention into the "marketplace of ideas" and the "market for private speech governance" takes away companies' ability to respond freely to market incentives in

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[162] *Id.* at *33-34.

[163] *Id.* at *34.

moderating misinformation, and replaces their own editorial discretion with the opinions of government officials.

III. Applying the First Amendment to Government Regulation of Online Misinformation

A number of potential consequences might stem from a plausible claim of state action levied against online platforms using one of the theories described above. Part III.A will explore the likely result, which is that a true censorship-by-deputization scheme enacted through social-media companies would be found to violate the First Amendment. Part III.B will consider the question of remedies: even if there is a First Amendment violation, those whose content or accounts have been removed may not be restored. Part III.C will then offer alternative ways for the government to deal with the problem of online misinformation without offending the First Amendment.

A. If State Action Is Found, Removal of Content Under Misinformation Policies Would Violate the First Amendment

At a high level, First Amendment jurisprudence does allow for government regulation of speech in limited circumstances. In those cases, the threshold question is whether the type of speech at issue is protected speech and whether the regulation is content-based.[164] If it is, then the government must show the state action is narrowly tailored to a compelling governmental interest: this is the so-called "strict scrutiny" standard.[165] A compelling governmental interest is the highest interest the state has, something considered necessary or crucial, and beyond simply legitimate or important.[166] "Narrow tailoring" means the regulation uses the least-restrictive means "among available, effective alternatives."[167] While not an impossible standard for the government to reach, "[s]trict scrutiny leave[s] few survivors."[168] Moreover, prior restraints of speech, which are defined as situations where speech is restricted before publication, are presumptively unconstitutional.[169]

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[164] A government action is content based if it can't be applied without considering its content. *See, e.g.*, *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

[165] *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010) ("Laws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'") (internal citations omitted).

[166] *See Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1881 (2021) ("A government policy can survive strict scrutiny only if it advances 'interests of the highest order'...").

[167] *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). In that case, the Court compared the Children's Online Protection Act's age-gating to protect children from online pornography to blocking and filtering software available in the marketplace, and found those alternatives to be less restrictive. The Court thus struck down the regulation. *See id.* at 666-70.

[168] *Alameda Books v. City of Los Angeles*, 535 U.S. 425, 455 (2002).

[169] *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

Only for content- and viewpoint-neutral "time, place, and manner restrictions" will regulation of protected speech receive less than strict scrutiny.[170] In those cases, as long as the regulation serves a "significant" government interest, and there are alternative channels available for the expression, the regulation is permissible.[171]

There are also situations where speech regulation—whether because the regulation aims at conduct but has speech elements or because the speech is not fully protected for some other reason—receives "intermediate scrutiny."[172] In those cases, the government must show the state action is narrowly tailored to an important or substantial governmental interest, and burdens no more speech than necessary.[173] Beyond the levels of scrutiny to which speech regulation is subject, state actions involving speech also may be struck down for overbreadth[174] or vagueness.[175] Together, these doctrines work to protect a very large sphere of speech, beyond what is protected in most jurisdictions around the world.

The initial question that arises with alleged misinformation is how to even define it. Neither social-media companies nor the government actors on whose behalf they may be acting are necessarily experts in misinformation. This can result in "void-for-vagueness" problems.

In *Høeg v. Newsom*,[176] the U.S. District Court for the Eastern District of California considered California's state law AB 2098, which would charge medical doctors with "unprofessional conduct" and subject them to discipline if they shared with patients "false information that is contradicted by contemporary scientific consensus contrary to the standard of care" as part of treatment or advice.[177]

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[170] The classic example being an ordinance on noise that doesn't require the government actor to consider the content or viewpoint of the speaker in order to enforce. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[171] *See id.* at 791 ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'") (internal citations omitted).

[172] *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (finding "the appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.").

[173] *See id.* ("[A] content-neutral regulation will be sustained if 'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'") (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

[174] *See Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (holding that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep").

[175] *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (holding that a law must have "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement").

[176] 2023 WL 414258 (E.D. Cal. Jan. 25, 2023).

[177] Cal. Bus. & Prof. Code § 2270.

The court stated that "[a] statute is unconstitutionally vague when it either 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement'"[178] and that "[v]ague statutes are particularly objectionable when they 'involve sensitive areas of First Amendment freedoms" because "they operate to inhibit the exercise of those freedoms.'"[179] The court rejected the invitation to apply a lower vagueness standard typically used for technical language because "contemporary scientific consensus" has no established technical meaning in the scientific community.[180] The court also asked a series of questions that would be particularly relevant to social-media companies acting on behalf of government actors in efforts to combat misinformation:

> [W]ho determines whether a consensus exists to begin with? If a consensus does exist, among whom must the consensus exist (for example practicing physicians, or professional organizations, or medical researchers, or public health officials, or perhaps a combination)? In which geographic area must the consensus exist (California, or the United States, or the world)? What level of agreement constitutes a consensus (perhaps a plurality, or a majority, or a supermajority)? How recently in time must the consensus have been established to be considered "contemporary"? And what source or sources should physicians consult to determine what the consensus is at any given time (perhaps peer-reviewed scientific articles, or clinical guidelines from professional organizations, or public health recommendations)?[181]

The court noted that defining the consensus with reference to pronouncements from the U.S. Centers for Disease Control and Prevention or the World Health Organization would be unhelpful, as those entities changed their recommendations on several important health issues over the course of the COVID-19 pandemic:

> Physician plaintiffs explain how, throughout the course of the COVID-19 pandemic, scientific understanding of the virus has rapidly and repeatedly changed. (Høeg Decl. ¶¶ 15-29; Duriseti Decl. ¶¶ 7-15; Kheriaty Decl. ¶¶ 7-10; Mazolewski Decl. ¶¶ 12-13.) Physician plaintiffs further explain that because of the novel nature of the virus and ongoing disagreement among the scientific community, no true "consensus" has or can exist at this stage. (*See id.*) Expert declarant Dr. Verma similarly explains that a "scientific consensus" concerning COVID-19 is an illusory concept, given how rapidly the scientific understanding and accepted conclusions about the virus have changed. Dr. Verma explains in detail how the so-called "consensus" has developed and shifted, often within mere months, throughout the COVID-19 pandemic. (Verma Decl. ¶¶ 13-42.) He also explains how certain conclusions once considered to be within the scientific consensus

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[178] *Høeg*, 2023 WL 414258, at *6 (internal citations omitted).

[179] *Id.* at *7.

[180] *See id.*

[181] *Id.* at *8.

> were later proved to be false. (Id. ¶¶ 8-10.) Because of this unique context, the concept of "scientific consensus" as applied to COVID-19 is inherently flawed.[182]

As a result, the court determined that "[b]ecause the term 'scientific consensus' is so ill-defined, physician plaintiffs are unable to determine if their intended conduct contradicts the scientific consensus, and accordingly 'what is prohibited by the law.'"[183] The court upheld a preliminary injunction against the law because of a high likelihood of success on the merits.[184]

Assuming the government could define misinformation in a way that wasn't vague, the next question is what level of First Amendment scrutiny would such edicts receive? It is clear for several reasons that regulation of online misinformation would receive, and fail, the highest form of constitutional scrutiny.

First, the threat of government censorship of speech through social-media misinformation policies could be considered a prior restraint. Prior restraints occur when the government (or actors on their behalf) restrict speech before publication. As the Supreme Court has put it many times, "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[185]

In *Missouri v. Biden*, the court found the plaintiffs had plausibly alleged prior restraints against their speech, and noted that "[t]hreatening penalties for future speech goes by the name of 'prior restraint,' and a prior restraint is the quintessential first-amendment violation."[186] The court found it relevant that social-media companies could "silence" speakers' voices at a "mere flick of the switch,"[187] and noted this could amount to "a prior restraint by preventing a user of the social-media platform from voicing their opinion at all."[188] The court further stated that "bans, shadow-bans, and other forms of restrictions on Plaintiffs' social-media accounts, are… de facto prior restraints, [a] clear violation of the First Amendment."[189]

Second, it is clear that any restriction on speech based upon its truth or falsity would be a content-based regulation, and likely a viewpoint-based regulation, as it would require the state actor to take a side on a matter of dispute.[190] Content-based regulation requires strict scrutiny, and a reasonable

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[182] *Id.* at *9.

[183] *Id.* at *9.

[184] *See id.* at *12.

[185] New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting *Bantam Books*, 372 U.S. at 70).

[186] *Missouri v. Biden*, 2023 WL2578260, at *35 (quoting *Backpage.com*, 807 F.3d at 230).

[187] *See id.* (comparing the situation to cable operators in the *Turner Broadcasting* cases).

[188] *Id.*

[189] *Id.*

[190] *See* discussion of United States v. Alvarez, 567 U.S. 709 (2012) below.

case can be made that viewpoint-based regulation of speech is *per se* inconsistent with the First Amendment.[191]

In *Missouri v. Biden*, the court noted that "[g]overnment action, aimed at the suppression of particular views on a subject which discriminates on the basis of viewpoint, is presumptively unconstitutional."[192] The court found that "[p]laintiffs allege a regime of censorship that targets specific viewpoints deemed mis-, dis-, or malinformation by federal officials. Because Plaintiffs allege that Defendants are targeting particular views taken by speakers on a specific subject, they have alleged a clear violation of the First Amendment, i.e., viewpoint discrimination."[193]

Third, even assuming there is clearly false speech that government agents (and social-media companies acting on their behalf) could identify, false speech presumptively receives full First Amendment protection. In *United States v. Alvarez*[194] the Supreme Court stated that while older cases may have stated that false speech does not receive full protection, those were "confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'"[195] In other words, there was no "general exception to the First Amendment for false statements."[196] Thus, as protected speech, any regulation of false speech, as such, would run into strict scrutiny.

In order to survive First Amendment scrutiny, government agents acting through social-media companies would have to demonstrate a parallel or alternative justification to regulate the sort of low-value speech the Supreme Court has recognized as outside the protection of the First Amendment.[197] These exceptions include defamation, fraud, the tort of false light, false statements to government officials, perjury, falsely representing oneself as speaking for the government (and impersonation), and other similar examples of fraud or false speech integral to criminal conduct.[198]

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[191] *See Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1885 (2018) ("In a traditional public forum — parks, streets, sidewalks, and the like — the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited.").

[192] *Missouri v. Biden*, 2023 WL2578260, at *35.

[193] *Id.*

[194] 567 U.S. 709 (2012).

[195] *Id.* at 717 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

[196] *Id.* at 718.

[197] *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.")

[198] *See Alvarez*, 567 U.S. at 718-22.

But the *Alvarez* Court noted that, even in areas where false speech does not receive protection, such as fraud and defamation, the Supreme Court has found the First Amendment requires that claims of fraud be based on more than falsity alone.[199]

When it comes to fraud,[200] for instance, the Supreme Court has repeatedly noted that the First Amendment offers no protection.[201] But "[s]imply labeling an action one for 'fraud'... will not carry the day."[202] Prophylactic rules aimed at protecting the public from the (sometimes fraudulent) solicitation of charitable donations, for instance, have been found to be unconstitutional prior restraints on several occasions by the Court.[203] The Court has found that "in a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a fundraiser to fraud liability... Exacting proof requirements... have been held to provide sufficient breathing room for protected speech."[204]

As for defamation,[205] the Supreme Court found in *New York Times v. Sullivan*[206] that "[a]uthoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and

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[199] *See id.* at 719 ("Even when considering some instances of defamation and fraud, moreover, the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood."). This means that the First Amendment was found to limit common law actions against false speech which did not receive constitutional protection.

[200] Under the common law, the elements of fraud include (1) a misrepresentation of a material fact or failure to disclose a material fact the defendant was obligated to disclose, (2) intended to induce the victim to rely on the misrepresentation or omission, (3) made with knowledge that the statement or omission was false or misleading, (4) the plaintiff relied upon the representation or omission, and (5) suffered damages or injury as a result of the reliance. *See, e.g.*, *Mandarin Trading Ltd v. Wildenstein*, 919 N.Y.S.2d 465, 469 (2011); *Kostryckyj v. Pentron Lab. Techs., LLC*, 52 A.3d 333, 338-39 (Pa. Super. 2012); *Masingill v. EMC Corp.*, 870 N.E.2d 81, 88 (Mass. 2007). Similarly, commercial speech regulation on deceptive or misleading advertising or health claims have also been found to be consistent with the First Amendment. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976) ("Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today does not prohibit the State form insuring that the stream of commercial information flow cleanly as well as freely.").

[201] *See, e.g.*, *Donaldson v. Read Magazine, Inc.* 333 U.S. 178, 190 (1948) (the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established").

[202] *Illinois, ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 617 (2003).

[203] *See, e.g.*, *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Riley v. National Federation of Blind of N. C., Inc.*, 487 U.S. 781 (1988).

[204] *Madigan*, 538 U.S. at 620.

[205] Under the old common-law rule, proving defamation required a plaintiff to present a derogatory statement and demonstrate that it could hurt their reputation. The falsity of the statement was presumed, and the defendant had the burden to prove the statement was true in all of its particulars. Re-publishing something from someone else could also open the new publisher to liability. *See generally* Samantha Barbas, *The Press and Libel Before* New York Times v. Sullivan, 44 COLUM. J.L. & ARTS 511 (2021).

[206] 376 U.S. 254 (1964).

especially one that puts the burden of proving truth on the speaker."[207] In *Sullivan*, the Court struck down an Alabama defamation statute, finding that in situations dealing with public officials, the *mens rea* must be actual malice: knowledge that the statement was false or reckless disregard for whether it was false.[208]

Since none of these exceptions would apply to online misinformation dealing with medicine or election law, social-media companies' actions on behalf of the government against such misinformation would likely fail strict scrutiny. While it is possible that a court would find protecting public health or election security to be a compelling interest, the government would still face great difficulty showing that a ban on false information is narrowly tailored. It is highly unlikely that a ban on false information, as such, will ever be the least-restrictive means of controlling a harm. As the Court put it in *Alvarez*:

> The remedy for speech that is false is speech that is true… Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.[209]

As argued above in Part I, a vibrant marketplace of ideas requires that individuals have the ability to express their ideas, so that the best ideas win. This means counter-speech is better than censorship from government actors to help society determine what is true. The First Amendment's protection against government intervention into the marketplace of ideas promotes a better answer to online misinformation. Thus, a finding that government actors can't use social-media actors to censor, based on vague definitions of misinformation, through prior restraints and viewpoint discrimination, and aimed at protected speech, is consistent with an understanding of the world where information is dispersed.

B. The Problem of Remedies for Social-Media 'Censorship': The First Amendment Still Only Applies to Government Action

There is a problem, however, for plaintiffs who win cases against social-media companies that are found to be state actors when they remove posts and accounts due to alleged misinformation: the remedies are limited.

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[207] *Id.* at 271. *See also id.* at 271-72 ("Erroneous statement is inevitable in free debate, and [] it must be protected if the freedoms of expression are to have the 'breathing space that they need to survive.'") (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963)).
[208] *Id.* at 279-80.
[209] *Id.* at 727-28.

First, once the state action is removed through injunction, social-media companies would be free to continue to moderate misinformation as they see fit, free from any plausible First Amendment claim. For instance, in *Carlisle Communications*, the 9th Circuit found that, once the state action was enjoined, the telecommunications company was again free to determine whether or not to extend its service to the plaintiff. As the court put it:

> Mountain Bell insists that its new policy reflected its independent business judgment. Carlin argues that Mountain Bell was continuing to yield to state threats of prosecution. However, the factual question of Mountain Bell's true motivations is immaterial.
>
> This is true because, inasmuch as the state under the facts before us may not coerce or otherwise induce Mountain Bell to deprive Carlin of its communication channel, Mountain Bell is now free to once again extend its 976 service to Carlin. Our decision substantially immunizes Mountain Bell from state pressure to do otherwise. Should Mountain Bell not wish to extend its 976 service to Carlin, it is also free to do that. Our decision modifies its public utility status to permit this action. Mountain Bell and Carlin may contract, or not contract, as they wish.[210]

This is consistent with the district court's actions in *Missouri v. Biden*. There, the court granted the motion for a preliminary injunction, but it only applied against government action and not against the social-media companies at all.[211] For instance, the injunction prohibits a number of named federal officials and agencies from:

> (1) meeting with social-media companies for the purpose of urging, encouraging, pressuring, or inducing in any manner the removal, deletion, suppression, or reduction of content containing protected free speech posted on social-media platforms;
>
> (2) specifically flagging content or posts on social-media platforms and/or forwarding such to social-media companies urging, encouraging, pressuring, or inducing in any manner for removal, deletion, suppression, or reduction of content containing protected free speech;
>
> (3) urging, encouraging, pressuring, or inducing in any manner social-media companies to change their guidelines for removing, deleting, suppressing, or reducing content containing protected free speech;
>
> (4) emailing, calling, sending letters, texting, or engaging in any communication of any kind with social-media companies urging, encouraging, pressuring, or inducing in any manner for removal, deletion, suppression ,or reduction of content containing protected free speech;

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[210] *Carlin Commc'ns*, 827 F.2d at 1297.

[211] *See Missouri, et al. v. Biden, et al.*, Case No. 3:22-CV-01213 (W.D. La. Jul. 4, 2023), *available at* https://int.nyt.com/data/documenttools/injunction-in-missouri-et-al-v/7ba314723d052bc4/full.pdf.

> (5) collaborating, coordinating, partnering, switchboarding, and/or jointly working with the Election Integrity Partnership, the Virality Project, the Stanford Internet Observatory, or any like project or group for the purpose of urging, encouraging, pressuring, or inducing in any manner removal, deletion, suppression, or reduction of content posted with social-media companies containing protected free speech;
>
> (6) threatening, pressuring, or coercing social-media companies in any manner to remove, delete, suppress, or reduce posted content of postings containing protected free speech;
>
> (7) taking any action such as urging, encouraging, pressuring, or inducing in any manner social-media companies to remove, delete, suppress, or reduce posted content protected by the Free Speech Clause of the First Amendment to the United States Constitution;
>
> (8) following up with social-media companies to determine whether the social-media companies removed, deleted, suppressed, or reduced previous social-media postings containing protected free speech;
>
> (9) requesting content reports from social-media companies detailing actions taken to remove, delete, suppress, or reduce content containing protected free speech; and
>
> (10) notifying social-media companies to Be on The Lookout (BOLO) for postings containing protected free speech.[212]

In other words, a social-media company would not necessarily even be required to reinstate accounts or posts of those who have been excluded under their misinformation policies. It would become a question of whether, responding to marketplace incentives *sans* government involvement, the social-media companies continue to find it in their interest to enforce such policies against those affected persons and associated content.

Another avenue for private plaintiffs may be with a civil rights claim under Section 1983.[213] If it can be proved that social-media companies participated in a joint action with government officials to restrict First Amendment rights, it may be possible to collect damages from them, as well as from government officials.[214] Plaintiffs may struggle, however, to prove compensatory damages, which

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[212] *Id. See also Missouri, et al. v. Biden, et al.*, 2023 WL 4335270, at *45-56 (W.D. La. Jul. 4., 2023) (memorandum ruling on request for preliminary injunction). *But see Missouri, et al. v. Biden, et al.*, No. 23-30445 (5th Cir. Sept. 8, 2023), slip op., *available at* https://www.ca5.uscourts.gov/opinions/pub/23/23-30445-CV0.pdf (upholding the injunction but limiting the parties it applies to); *Murthy et al. v. Missouri, et al.*, No: 3:22-cv-01213 (Sept. 14, 2023) (order issued by Justice Aliso issuing an administrative stay of the preliminary injunction until Sept. 22, 2023 at 11:509 p.m. EDT).

[213] 42 U.S.C. §1983.

[214] *See, e.g., Adickes v. SH Kress & Co.*, 398 U.S. 144, 152 (1970) ("Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress

would require proof of harm. Categories of harm like physical injury aren't relevant to social-media moderation policies, leaving things like diminished earnings or impairment of reputation. In most cases, it is likely that the damages to plaintiffs are *de minimis* and hardly worth the expense of filing suit. To receive punitive damages, plaintiffs would have to prove "the defendant's conduct is… motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[215] This seems like it would be difficult to establish against the social-media companies unless there was an admission in the record that those companies' goal was to suppress rights, rather than that they were attempting in good faith to restrict misinformation or simply acceding to government inducements.

The remedies available for constitutional violations in claims aimed at government officials are consistent with a theory of the First Amendment that prioritizes protecting the marketplace of ideas from intervention. While it leaves many plaintiffs with limited remedies against the social-media companies once the government actions are enjoined or deterred, it does return the situation to one where the social-media companies can freely compete in a market for speech governance on misinformation, as well.

C. What Can the Government Do Under the First Amendment in Response to Misinformation on Social-Media Platforms?

If direct government regulation or implicit intervention through coercion or collusion with social-media companies is impermissible, the question may then arise as to what, exactly, the government can do to combat online misinformation.

The first option was already discussed in Part III.A in relation to *Alvarez* and narrow tailoring: counter-speech. Government agencies concerned about health or election misinformation could use social=media platforms to get their own message out. Those agencies could even amplify and target such counter-speech through advertising campaigns tailored to those most likely to share or receive misinformation.

Similarly, government agencies could create their own apps or social-media platforms to publicize information that counters alleged misinformation. While this may at first appear to be an unusual step, the federal government does, through the Corporation for Public Broadcasting, subsidize public television and public radio. If there is a fear of online misinformation, creating a platform where

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store, or to cause her subsequent arrest because she was a white person in the company of Negroes. The involvement of a state official in such a conspiracy plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, whether or not the actions of the police were officially authorized, or lawful… Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983.") (internal citations omitted).

[215] *Smith v. Wade*, 461 U.S. 30, 56 (1983).

the government can promote its own point of view could combat online misinformation in a way that doesn't offend the First Amendment.

Additionally, as discussed above in Part II.B in relation to *O'Handley* and the distinction between convincing and coercion: the government may flag alleged misinformation and even attempt to persuade social-media companies to act, so long as such communications involve no implicit or explicit threats of regulation or prosecution if nothing is done. The U.S. District Court for the Western District of Louisiana distinguished between constitutional government speech and unconstitutional coercion or encouragement in its memorandum accompanying its preliminary injunction in *Missouri v. Biden*:

> Defendants also argue that a preliminary injunction would restrict the Defendants' right to government speech and would transform government speech into government action whenever the Government comments on public policy matters. The Court finds, however, that a preliminary injunction here would not prohibit government speech… The Defendants argue that by making public statements, this is nothing but government speech. However, it was not the public statements that were the problem. It was the alleged use of government agencies and employees to coerce and/or significantly encourage social-media platforms to suppress free speech on those platforms. Plaintiffs point specifically to the various meetings, emails, follow-up contacts, and the threat of amending Section 230 of the Communication Decency Act. Plaintiffs have produced evidence that Defendants did not just use public statements to coerce and/or encourage social-media platforms to suppress free speech, but rather used meetings, emails, phone calls, follow-up meetings, and the power of the government to pressure social-media platforms to change their policies and to suppress free speech. Content was seemingly suppressed even if it did not violate social-media policies. It is the alleged coercion and/or significant encouragement that likely violates the Free Speech Clause, not government speech, and thus, the Court is not persuaded by Defendants' arguments here.[216]

As the court highlights, there is a special danger in government communications that remain opaque to the public. Requests for action from social-media companies on misinformation should all be public information and not conducted behind closed doors or in covert communications. Such transparency would make it much easier for the public and the courts to determine whether state actors are engaged in government speech or crossing the line into coercion or substantial encouragement to suppress speech.

On the other hand, laws like the recent SB 262 in Florida[217] go beyond the delicate First Amendment balance that courts have tried to achieve. That law would limit government officials' ability to share

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[216] *See* Missouri, et al. v. Biden, et al., 2023 WL 4335270, at *55, 56 (W.D. La. Jul. 4., 2023).

[217] Codified at Fla. Stat. § 112.23, *available at* https://casetext.com/statute/florida-statutes/title-x-public-officers-employees-and-records/chapter-112-public-officers-and-employees-general-provisions/part-i-conditions-of-employment-retirement-travel-expenses/section-11223-government-directed-content-moderation-of-social-media-platforms-prohibited.

any information with social-media companies regarding misinformation, limiting contacts to the removal of criminal content or accounts, or an investigation or inquiry to prevent imminent bodily harm, loss of life, or property damage.[218] While going beyond the First Amendment standard may be constitutional, these restrictions could be especially harmful when the government has information that may not be otherwise available to the public. As important as it is to restrict government intervention, it would harm the marketplace of ideas to prevent government participation altogether.

Finally, Section 230 reform efforts aimed at limiting immunity in instances where social-media companies have "red flag" knowledge of defamatory material would be another constitutional way to address misinformation.[219] For instance, if a social-media company was presented with evidence that a court or arbitrator finds certain statements to be untrue, it could be required to make reasonable efforts to take down such misinformation, and keep it down.

Such a proposal would have real-world benefits. For instance, in the recent litigation brought by Dominion Voting Systems against Fox News, the court found the various factual claims about Dominion rigging the election for Joseph Biden were false.[220] While there was no final finding of liability due to Fox and Dominion coming to a settlement,[221] if Dominion were to present the court's findings to a social-media company, the company would, under this proposal, have an obligation to remove content that repeats the claims the court found to be false. Similarly, an arbitrator finding that MyPillow CEO Mike Lindell's claims that he had evidence of Chinese interference in the election were demonstrably false[222] could be enough to have those claims removed, as well. Rudy Giuliani's recent finding of liability for defamation against two Georgia election workers could similarly be removed.[223]

However, these benefits may be limited by the fact that not every defamation claim resolves with a court finding falsity of a statement. Some cases settle before it gets that far, and the underlying claims remain unproven allegations. And, as discussed above, defamation itself is not easy to prove,

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[218] *Id.*

[219] For more on this proposal, Manne, Stout, & Sperry, *supra* note 31, at 106-112.

[220] *See Dominion Voting Sys. v. Fox News Network, LLC*, C.A. No.: N21C-03-257 EMD (Sup. Ct. Del. Mar. 31, 2023), *available at* https://www.documentcloud.org/documents/23736885-dominion-v-fox-summary-judgment.

[221] *See, e.g.*, Jeremy W. Peters & Katie Robertson, *Fox Will Pay $787.5 Million to Settle Defamation Suit*, NEW YORK TIMES (Apr. 18, 2023), https://www.nytimes.com/live/2023/04/18/business/fox-news-dominion-trial-settlement#fox-dominion-defamation-settle.

[222] *See, e.g.*, Neil Vigdor, *'Prove Mike Wrong' for $5 Million, Lindell Pitched. Now, He's Told to Pay Up.*, NEW YORK TIMES (Apr. 20, 2023), https://www.nytimes.com/2023/04/20/us/politics/mike-lindell-arbitration-case-5-million.html.

[223] *See* Stephen Fowler, *Judge Finds Rudy Giuliani Liable for Defamation of Two Georgia Election Workers*, NATIONAL PUBLIC RADIO (Aug. 30, 2023), https://www.npr.org/2023/08/30/1196875212/judge-finds-rudy-giuliani-liable-for-defamation-of-two-georgia-election-workers.

especially for public figures who must also be able to show "actual malice."[224] As a result, many cases won't even be brought. This means there could be quite a bit defamatory information put out into the world that courts or arbitrators are unlikely to have occasion to consider.

On the other hand, to make a social-media company responsible for removing allegedly defamatory information in the absence of some competent legal authority finding the underlying claim false could be ripe for abuses that could have drastic chilling effects on speech. Thus, any Section 230 reform must be limited to those occasions where a court or arbitrator of competent authority (and with some finality of judgment) has spoken on the falsity of a statement.

Conclusion

There is an important distinction in First Amendment jurisprudence between private and state action. To promote a free market in ideas, we must also protect private speech governance, like that of social-media companies. Private actors are best placed to balance the desires of people for speech platforms and the regulation of misinformation.

But when the government puts its thumb on the scale by pressuring those companies to remove content or users in the name of misinformation, there is no longer a free marketplace of ideas. The First Amendment has exceptions in its state-action doctrine that would allow courts to enjoin government actors from initiating coercion of or collusion with private actors to do that which would be illegal for the government to do itself. Government censorship by deputization is no more allowed than direct regulation of alleged misinformation.

There are, however, things the government can do to combat misinformation, including counter-speech and nonthreatening communications with social-media platforms. Section 230 could also be modified to require the takedown of adjudicated misinformation in certain cases.

At the end of the day, the government's role in defining or policing misinformation is necessarily limited in our constitutional system. The production of true knowledge in the marketplace of ideas may not be perfect, but it is the least bad system we have yet created.

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[224] *See supra* notes 206-09 and associated text.