

ARTICLE

SYMBIOTIC SECURITY AND FREE SPEECH

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ABSTRACT

The marketplace of ideas exists today within a public square occupied mainly by social media platforms. Sheltered by the state action doctrine, which prohibits speech abridgment only by the government, and the government speech doctrine, which insulates the government’s speech from constitutional constraints, the platforms and the government’s security apparatus have joined together symbiotically to employ new tools of soft censorship, suppressing the free exchange of unwanted information and opinions on a variety of topics. These include vital issues of public health and electoral politics. Shielding the marketplace of ideas from this cartel requires retracting the reach of those doctrines to protect more fully the speech freedom of all participants within it, not merely the platforms’ and government’s speech that now floods the marketplace. The free speech interests of social media users cannot count for naught, nor can the general public’s free speech interest in hearing the speech of others. The machinery of democracy depends upon keeping open these crucial channels of political communication; when those channels are blocked, it is the duty of the courts to re-open them, a task the courts can undertake by invigorating principles already present within existing case law.

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INTRODUCTION

It has long been axiomatic that the Constitution limits only action by the state. Private actors cannot abridge freedom of speech; only the government can be charged with that. It has more recently become accepted that the government's own speech is insulated from constitutional constraints; government could hardly promote its policies if it were limited, say, by First Amendment viewpoint neutrality requirements. The "state action doctrine" and the "government speech doctrine," so-called, are now settled principles of American constitutionalism. Whether the speaker is a private actor or the government, therefore, the speaker's expression is protected—even if its purpose or effect is to curtail the speech of others.

I suggest in this article that over-enforcement of these two doctrines has led to under-protection of the marketplace of ideas. The marketplace of ideas exists today in a public square occupied mainly by social media platforms. Protecting the free exchange of ideas requires safeguarding the speech freedom not only of speakers but also of listeners and the general public. Yet excessive deference to the state action and government speech doctrines has led to a focus only on the freedom of speakers—meaning social media companies that have come to operate in tandem with the government on a range of matters of great consequence. Within that constitutional shelter, the government's security apparatus and private actors can, and often do, join symbiotically to shut down the marketplace of ideas. The marketplace can be protected from this threat, I suggest, only by retracting the reach of those doctrines to protect more fully the speech freedom of all participants within it, not merely speakers. The free speech interests of social media users cannot count for naught, nor can the general public's free speech interest in hearing the speech of others. These are classic elements of political communication. The machinery of democracy depends upon keeping the channels of political communication open; when those channels are blocked, it is the great duty of the courts to re-open them, a task the courts can undertake within the bounds of existing case law.

The article unfolds in four parts. In Part I, I trace the origins and evolution of the security-media complex—I call it a cartel because of the level of conscious parallelism and outright coordination—through the emergence of the nation's double government, describing its recent appearance and

suppression of speech during two prominent series of events: the Covid-19 pandemic and news reports concerning Hunter Biden. Part II suggests that, throughout these efforts, the security apparatus has been entwined symbiotically with the dominant social media platforms to the degree that separating state action from private action and government speech from private speech in any principled manner is not possible. In Part III, I outline a variety of existing constitutional approaches that, invigorated and amplified, could provide starting points for protecting the modern, digitized public square from the cartel. In Part IV, I conclude that the First Amendment's vitality depends upon a deepened commitment by the courts to ensure this protection.

I. FROM DOUBLE GOVERNMENT TO FREE-STANDING POWER

A recent book by Bob Woodward and Robert Costa alleged that General Mark Milley, Chairman of the Joint Chiefs of Staff, promised Speaker of the House Nancy Pelosi that he would thwart any presidential order to take military action, lawful or unlawful, that he considered immoral, unethical, or crazy, and that he ordered subordinates to call him if they received such orders, “no matter where they’re from”¹ Whether General Milley actually positioned himself to foil presidential orders is disputed. The more important question is how the nation arrived at the point where many Americans appeared to agree with the Senate majority whip, Dick Durbin, who, in responding to those allegations, said, “It is a shame we reached that point in America’s history that’s necessary, and I think he did the responsible thing to keep America out of war.”² How did it come about that a general with no command authority could now be seen as properly inserting himself into the constitutional chain of command above the President of the United States? More importantly, why should we care? Aren’t other political rights and civil liberties, such as freedom of speech, independent of structural safeguards such as civilian control of the military and separation of powers?

The answer to the latter question is an emphatic no. Justice Brandeis’s familiar summary of the object of the separation of powers doctrine is worth recalling. He said:

¹ BOB WOODWARD & ROBERT COSTA, *PERIL*, at xxvii (2021). Nuclear weapons were a particular concern. “Madam Speaker,” Milley reportedly told Pelosi, “you have to take my word for it. I know the system and we’re okay. The president alone can order the use of nuclear weapons. But he doesn’t make the decision alone. One person can order it, several people have to launch it.” *Id.* at xxiv.

² Karoun Demirjian & John Wagner, *Biden Comes to Milley’s Defense After Revelation Top General, Fearing Trump, Conferred with China to Avert War*, WASH. POST (Sept. 16, 2021), https://www.washingtonpost.com/politics/milley-defended-china-call/2021/09/15/3393fa18-1645-11ec-b976-f4a43b740aeb_story.html [<https://perma.cc/WCP4-9X2L>].

The doctrine of the separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.³

Saving the people from autocracy is, of course, also the purpose of the Bill of Rights. Prohibitions against abridgments on free speech, denials of due process, unreasonable searches and seizures, cruel and unusual punishment, and the like also are directed at precluding the exercise of arbitrary power. When structural safeguards such as civilian control of the military or the checking authority of Congress are weakened, so is the protection of civil liberties from arbitrary power. Separation of powers and political freedom are *interdependent*. They are the warp and weft of the fabric of constitutional democracy. They share the same ends, the same means, and rest on the same premises of pluralism, decentralization, and equilibrating political disputation.⁴ Both are oxygenated by the same vascular system with streams of fresh information and opinions. Neither can exist without the other. This was the enduring insight of one of America's greatest First Amendment scholars, Alexander Meiklejohn, who wrote that in a self-governing society, "the governors and the governed are not two distinct groups of persons. There is only one group—the self-governing people. Ruled and rulers are the same individuals."⁵ And he added this crucial point: "Unless we can make clear that distinction," he said, "discussion of freedom of speech or of any other freedom is meaningless and futile."⁶

The vitality of civil and political liberties such as freedom of speech thus depends upon the vitality of structural checks that curb authorities' exercise of undelegated power. The health of self-government is a function of the health of those checks. If authorities break free of those checks, self-government and individual freedom both are threatened.

³ *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

⁴ As Frederick Schauer observed, "[f]reedom of speech . . . can be an integral part of a system of government based on separation of powers and checks and balances." FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 43 (Cambridge Univ. Press 1982). "Political speech, including public deliberation of political issues and open criticism of governmental officials and policies, is an important and arguably necessary method of retaining public control over officials, preventing usurpation of power, and acting as a check on the intrinsic force of the governmental apparatus." *Id.* at 107.

⁵ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 6 (1948).

⁶ *Id.* at 5.

Let us turn, then, to the question posed by General Milley and Senator Durbin: How healthy are those structural checks—how healthy is self-government—in the United States today? The answer, alas, is that in the realm of national security, the rulers and the ruled are no longer the same individuals.

A. *The Rise of Post-War Double Government*

The erosion of the separation of powers in the security realm opened the door for what I have earlier referred to in these pages as a system of double government.⁷ The late Dean Acheson, archdeacon of the national security priesthood, spoke for many associates when he articulated its animating premise early in the Cold War. “If you truly had a democracy and did what the people wanted,” Acheson said, “you’d go wrong every time.”⁸ To avoid this misfortune, the people were taught that critical decisions concerning national security are made by the nation’s “Madisonian institutions” the presidency, Congress, and the courts. But the Madisonian institutions evolved into mostly front pieces. In reality, most consequential national security decisions since the Truman administration were made by a largely concealed directorate consisting of several hundred leaders of the military, law enforcement, and intelligence departments and agencies of the executive government. They did so not as part of any vast conspiracy to subvert the constitutional order but in response to deep-seated structural incentives, long-recognized principles of organizational behavior, and political imperatives arising from the perceived security needs of the world’s strongest super-power. Yet these managers, I suggest, operated increasingly free from constitutional limits restraints, moving the nation steadily toward autocracy.

Over decades of confronting both real and inflated threats, the courts, Congress, and even presidents have deferred to the expertise and experience of these security managers. More and more topics went into the ever-expanding security portfolio. No judge, senator, or president wanted to risk responsibility for a devastating national security mistake. The courts, for their part, wove together an elaborate jurisprudence of ripeness, mootness, the state secrets doctrine, the political question doctrine, and lack of standing to avoid reaching the merits of national security disputes.⁹ By the early 2000s, congressional

⁷ See Michael J. Glennon, *National Security and Double Government*, 5 HARV. NAT’L SEC. J. 1 (2014). The article is elaborated in a book, MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT (Oxford Univ. Press 2015).

⁸ MICHAEL H. HUNT, THE AMERICAN ASCENDANCY: HOW THE UNITED STATES GAINED AND WIELDED GLOBAL DOMINANCE 149 (2007) (quoting Walter LaFeber, *American Policy-Makers, Public Opinion, and the Outbreak of the Cold War, 1945-50*, in THE ORIGINS OF THE COLD WAR IN ASIA 60 (Yōnosuke Nagai & Akira Iriye eds., 1977)).

⁹ See Glennon, *supra* note 7, at 46–60.

oversight became increasingly, in the word of the 9-11 Commission, “dysfunctional”¹⁰—more hindsight than oversight. Congress knew little and cared less about a vast array of constitutionally questionable activities ranging from black site prisons to torture to mass domestic surveillance. Blame-avoiding, credit-seeking members of Congress were more than happy to steer clear of potentially career-imperiling positions on issues that the “true professionals” in the security bureaucracy would eagerly handle. Even the Executive had every incentive to defer to the security managers’ judgment, resulting in remarkable policy continuity from one administration to the next on drone strikes, troop deployments, telephone and internet surveillance, covert action, whistleblower and leak prosecutions, claims of state secrets, and numerous other matters. Obama—who campaigned on the promise of “change we can believe in”—might just as well have been referring to the entire national security “community” when he explained to his staff that “[t]he CIA gets what it wants.”¹¹ The beauty of this deferential arrangement was that whatever went wrong, responsibility and accountability were easily diffused among myriad agencies and leaders in a faceless national security apparatus.¹²

The resulting inter-dependence between the security managers and the Madisonian officials, and the massive transfer of power that it brought about, occurred almost entirely behind closed doors—where it necessarily needed to stay. For the system of double government to survive, both the security

¹⁰ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 420 (2004).

¹¹ MARK MAZZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY, AND A WAR AT THE ENDS OF THE EARTH* 228 (2013).

¹² *See, e.g.*, a 2013 briefing by State Department spokesperson Jen Psaki (asked about the continuation of military assistance to Egypt in apparent violation of the law):

QUESTION: And who ultimately made the decision not to make a determination?

MS. PSAKI: Well, obviously, there’s a factor as it relates to the legal component, which our legal office here played a significant role in, and certainly this was discussed and agreed to through the interagency process.

QUESTION: But who decided? I mean, the buck stops somewhere. As Harry Truman said, it stopped with him. Does the buck stop with the President in this case, or with the Secretary, or with the acting legal advisor of the State Department, or who? Who made the decision?

MS. PSAKI: Well, I’m not going to read out who was where on what and all the players involved in this.

QUESTION: I’m not asking that. I’m asking who made the decision.

MS. PSAKI: This was agreed to by the national security team. Beyond that, I’m not going to—I don’t have anything.

QUESTION: Why are you afraid to say who made the decision?

MS. PSAKI: I’m not afraid of anything, Arshad. I’m just not—I’m not getting into more specifics than that for you.

managers and the Madisonian institutions needed to appear publicly to be on the same page. It was necessary always to project a persuasive public image of harmony; if the impression of a single, unified edifice were shattered, public confidence would falter.

The arrangement's stability relied upon each participant's source of legitimacy. When a president claimed the need to act immediately in response to a national security emergency, say, to blockade Cuba in response to a Soviet missile build-up, people respected the President's decision because of the electoral connection—the President had been chosen through an election by the people. The President's judgment was also accepted because he relied upon, and was known to rely upon, bona fide experts in assessing that threat. If a president publicly demeans the only available experts, or replaces them with sycophants, or bases his decisions on his own gut feelings or ideology, why should people believe that he is making the right decisions?

As with the President, the security managers' power also depended upon their constitutional legitimacy. But unlike the President, they have no direct electoral connection; their legitimacy flows from the President's. No one voted for Richard Helms, Avril Haines, or Bill Burns. Their institutional authority is derivative: it is tied to and justified by the president's legitimacy. Should that link be broken, the source of their legitimacy would vanish. To retain that authority, extra-constitutional scaffolding would therefore be necessary to shore up that legitimacy—scaffolding that might be provided in the form of direct support from the public.

B. The Breakup of Double Government

But the link was broken during the Trump administration. Barely a week went by in which a salvo was not exchanged between the President and managers of the security bureaucracy.¹³ The President tweeted that the former

¹³ Portions of this section draw upon my earlier articles. See Michael J. Glennon, *Populism, Elites, and National Security*, XXXI HUMANITAS 35, 39 (2018), https://css.cua.edu/humanitas_journal/populism-elites-and-national-security/ [<https://perma.cc/2ZX7-2USP>]; Michael J. Glennon, *Security Breach: Trump's Tussle with the Bureaucratic State*, HARPER'S MAG. (June 2017), <https://harpers.org/archive/2017/06/security-breach/> [<https://perma.cc/9PLX-KNAR>].

FBI director is an “untruthful slime ball,”¹⁴ compared the CIA to Nazis,¹⁵ and described its former leaders as hacks;¹⁶ the security managers and their alumni colleagues responded with a counter-barrage of name-calling and leaks. The *Washington Post*¹⁷ cited nine senior intelligence sources for one critical story, the *New York Times*¹⁸ cited four for another. The forging of new alliances between the security managers and influential domestic constituencies then proceeded in full swing. As the battle lines hardened to the shock of an astounded public, the security managers found ready support within mainstream and social media that were still reeling from the 2020 election results and not eager to witness, let alone enable, Trump’s political reemergence.

The frequent appearances of former intelligence and law enforcement officials as commentators and analysts on major television networks¹⁹ helped elevate the security apparatus into a friendly, autonomous institution. Completely forgotten was the historical record of these agencies when they were left unchecked.²⁰ Constituencies that earlier had been wary of

¹⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 13, 2018, 5:17 AM), <https://media-cdn.factba.se/realdonaldtrump-twitter/984767560494313472.jpg> [<https://perma.cc/23TZ-MSEQ>]. Trump’s tweets are only available through an archive, as Trump was banned from Twitter on Jan. 8, 2021. Twitter, *Permanent Suspension of @realDonaldTrump*, TWITTER BLOG (Jan. 8, 2021), https://blog.twitter.com/en_us/topics/company/2020/suspension [<https://perma.cc/F26X-65HU>].

¹⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 11, 2017, 4:48 PM), <https://media-cdn.factba.se/realdonaldtrump-twitter/819164172781060096.jpg> [<https://perma.cc/NK7E-6RRN>].

¹⁶ Brandon Carter, *Trump Slams Former US Intel Leaders as ‘Political Hacks’*, THE HILL (Nov. 11, 2017), <http://thehill.com/homenews/administration/359894-trump-slams-former-us-intel-leaders-as-political-hacks> [<https://perma.cc/B3BY-HVTV>].

¹⁷ Greg Miller, Adam Entous & Ellen Nakashima, *National Security Adviser Flynn Discussed Sanctions with Russian Ambassador, Despite Denials, Officials Say*, WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/world/national-security/national-security-adviser-flynn-discussed-sanctions-with-russian-ambassador-despite-denials-officials-say/2017/02/09/f85b29d6-ee11-11e6-b4ff-ac2cf509efe5story.html?utm_term=.4d19880d10f9 [<https://perma.cc/63B6-J72A>].

¹⁸ Michael S. Schmidt, Mark Mazzetti & Matt Apuzzo, *Trump Campaign Aides Had Repeated Contacts with Russian Intelligence*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/us/politics/russia-intelligence-communications-trump.html> [<https://perma.cc/RZ4T-R6U8>].

¹⁹ For a detailed account of television networks’ reliance upon former security officials as analysts following the search of Trump’s Mar-a-Lago home, see Matt Taibbi, *Sweeps Week on FBI TV!*, TK NEWS BY MATT TAIBBI (Aug. 16, 2022), https://taibbi.substack.com/p/sweeps-week-on-fbi-tv?utm_source=substack&utm_medium=email [<https://perma.cc/9N58-JVAY>].

²⁰ The most comprehensive account appeared over 40 years ago, when the Church Committee issued its report. See S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES OF THE UNITED STATES SENATE, S. Rep. No. 94-755 (1976). The

unaccountable power became its keenest admirers, oblivious to reversions to form.²¹ Senate Majority Leader Charles Schumer warned Trump in 2017 to heed the security managers' wishes. The President, Schumer said, was "being really dumb" in taking on the intelligence community.²² "Let me tell you," Schumer said, "you take on the intelligence community, they have six ways

report describes COINTELPRO, the FBI's program aimed at exposing and disrupting the activities of thousands of groups and individuals who were engaged in constitutionally protected conduct aimed at protesting the Vietnam War or campaigning for civil rights. The FBI mailed hundreds of anonymous letters to civil rights activists; one was sent to Martin Luther King, intending to drive him to suicide. It describes OPERATION CHAOS, the CIA's own domestic spy program, and OPERATION LINGUAL, under which the CIA illegally opened and read thousands of international letters every year to and from American citizens. It also describes OPERATION MINARET, under which the NSA placed 1,500 individuals on a watch list and listened in on telephone conversations with no court warrants. It revealed that even the Army engaged in domestic surveillance, spying on political officials, anti-war and civil rights activists, and church leaders, and sharing the information it gathered with the FBI, CIA, and local police departments. These were not rare, one-off pranks undertaken by a lone cowboy. These were painstakingly planned, deliberate operations in which America's most trusted security services, under the direction of their leaders and acting over a period of many years, "turned their dark arts against the very people they were created to protect," as Loch Johnson has written. LOCH K. JOHNSON, *SPY WATCHING: INTELLIGENCE ACCOUNTABILITY IN THE UNITED STATES* xi (Oxford Univ. Press 2017). Their actions represented a violation of the public trust, an attempt to alter the people's form of government without the people's knowledge or consent.

²¹ Virtually every one of the newly exalted champions of morality in government—James Clapper, Michael Hayden, John Brennan, Mike Morrell, Leon Panetta, Robert Gates—lined up behind President Trump and pushed for the approval of Gina Haspel's nomination to head the CIA. Their gift to the nation was a CIA director who ran a secret prison where unspeakably gruesome practices occurred, who destroyed records of what happened, and who then continued the cover-up during her confirmation hearings. See Julian E. Barnes and Scott Shane, *Cables Detail C.I.A. Waterboarding at Secret Prison Run by Gina Haspel*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/us/politics/waterboarding-gina-haspel-cia-prison.html> [<https://perma.cc/W6YD-GT6V>] (detailing the cables from the prison Haspel oversaw); Annabelle Timsit, *What Happened at the Thailand 'Black Site' Run by Trump's CIA Pick*, THE ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/international/archive/2018/03/gina-haspel-black-site-torture-cia/555539/> [<https://perma.cc/5WGX-FPD3>]; Glenn Greenwald, *Will Democrats Unite to Block Trump's Torturer, Gina Haspel, as CIA Chief? If Not, What do They #Resist?*, THE INTERCEPT (May 8, 2018), <https://theintercept.com/2018/05/08/will-democrats-unite-to-block-trumps-torturer-gina-haspel-as-cia-chief-if-not-what-do-they-resist/> [<https://perma.cc/5C8H-8ZJM>] (documenting Clapper's and Brennan's support for Haspel). Senator Ron Wyden, a member of the Senate Intelligence Committee, said that the process by which Haspel was confirmed was "a stark failure of Senate oversight, and it is about as flagrant an example as I have ever seen. The Senate should have stood up to this self-serving abuse of power, but it did not." 164 CONG. REC. S2736 (daily ed. May 17, 2018) (statement of Sen. Wyden).

²² Mallory Shelbourne, *Schumer: Trump 'Really Dumb' for Attacking Intelligence Agencies*, THE HILL (Jan. 3, 2017), <https://thehill.com/homenews/administration/312605-schumer-trump-being-really-dumb-by-going-after-intelligence-community/> [<https://perma.cc/PU8Y-KGGZ>].

from Sunday at getting back at you.”²³ The next year, a former top official in both the CIA and FBI, Phillip Mudd, reiterated Schumer’s warning on CNN:

So, the FBI people—I’m going to tell you—are ticked, and they’re going to be saying, I guarantee it, you think you could push us off this because you can try to intimidate the director, you’d better think again, Mr. President. You’ve been around for 13 months; we’ve been around since 1908. I know how this game is going to be played, and we’re going to win.²⁴

Bill Kristol, a prominent political commentator, said that he would prefer the deep state to the Trump state.²⁵ The *New Yorker* predicted that the intelligence community’s managers would challenge Trump before Congress. “This is just the sort of thing we want to see happening” as part of “the fabled ‘checks and balances’ in the U.S. system.”²⁶ “God bless the ‘deep state,’” wrote *Washington Post* columnist Eugene Robinson.²⁷ Its existence should be celebrated, he urged: “The deep state stands between us and the abyss.”²⁸ If the “President does not serve the best interests of the nation,” Robinson said, the “loyal and honorable deep state” has the higher duty to step in and stop him.²⁹

It is hard to overstate the significance of the unprecedented, seismic split between the Oval Office and the nation’s security directors. No longer would the security agencies depend upon elected politicians for their legitimacy—now they would generate their own legitimacy with support directly from the body politic. No longer was the so-called “deep state” deep—it was entirely out in the open, soon taken as a fact by nearly three-fourths of the public.³⁰ No longer would the security managers operate behind the scenes—now they were openly competitors for power. The final freeing of the

²³ *Id.*

²⁴ Tim Hains, *Former CIA Official Phil Mudd Warns Trump: “Think Again” About War with Intel Community, “We’re Going to Win”*, REALCLEAR POLITICS (Feb. 4, 2018), https://www.realclearpolitics.com/video/2018/02/04/phil_mudd_warns_trump_in_war_with_intelligence_community_were_going_to_win.html [<https://perma.cc/4FYT-BVSG>].

²⁵ Bill Kristol (@BillKristol), TWITTER (Feb. 14, 2017, 8:36 AM), <https://twitter.com/billkristol/status/831497364661747712?lang=en> [<https://perma.cc/3QF7-VZST>].

²⁶ John Cassidy, *Trump Isolates Himself with C.I.A. Attack*, NEW YORKER (Dec. 12, 2016), https://www.newyorker.com/news/john-cassidy/trump-isolates-himself-with-c-i-a-attack?mbid=feed_ns [<https://perma.cc/Z39P-4DL4>].

²⁷ Eugene Robinson, *Opinion, God Bless the ‘Deep State’*, WASH. POST (July 19, 2018), https://www.washingtonpost.com/opinions/god-bless-the-deep-state/2018/07/19/de36bd00-8b8a-11e8-85ae-511bc1146b0b_story.html [<https://perma.cc/ZB2E-ZAPT>].

²⁸ *Id.*

²⁹ *Id.*

³⁰ MONMOUTH UNIV. POLLING INST., NATIONAL: PUBLIC TROUBLED BY ‘DEEP STATE’ 2 (Mar. 19, 2018), https://www.monmouth.edu/polling-institute/documents/monmouthpoll_us_031918.pdf [<https://perma.cc/U9D5-LXVQ>].

security managers from Madisonian control was made possible by the validation of their independence by influential elements of the public.

Constitutionally, the security managers' new, stand-alone power marked an epic break from the nation's structure of governance. The Constitution sets up only three branches of government, and the security bureaucracy is not one of them. The security bureaucracy is not empowered to check the other three branches; it is expected to be checked *by* them. Under the Constitution, power is delegated *to* the security bureaucracy, not *by* it. Inverting that constitutional hierarchy of power in the security realm represents an entirely different form of government, a system in which the governed and the governors are not the same.

It was not only constitutional principles that mandated a nonpartisan security apparatus. At least as important as the constitutional subordination of the security apparatus was its traditional political subordination. The origins and history of the political dimensions of the norm are explained in Samuel Huntington's classic 1957 study, *The Soldier and the State*. Huntington focuses on civilian control of the military, but much of his analysis applies equally to the military's partners within the intelligence and law enforcement bureaucracy, which shares in its power and influence and which now performs frequently overlapping functions. The essence of civilian control, Huntington wrote, "is a clear distinction between political and military responsibilities and the institutional subordination of the latter to the former."³¹ The "exclusion of the military from political power . . . has been so effective that Americans have called it a fundamental principle of their system of government."³² Integrally tied to this political norm are underlying constitutional precepts, as the Supreme Court has pointed out. Keeping the military "insulated from both the reality and the appearance of acting as a handmaiden for partisan political cause or candidates . . . ," the Court said in *Greer v. Spock*, "is wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control."³³

With their link to that constitutional tradition threadbare and their electoral connection frayed as a result of the punch-up with Trump, the security leaders faced a continuing risk of becoming too detached from the wellsprings of public support. Yet the benefits of free-standing authority could be momentous. Drawing on their own independent legitimacy could now buttress them from assaults by the political branches of the sort launched in the mid-

³¹ SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 163 (1957).

³² *Id.* at 189–90.

³³ *Greer v. Spock*, 424 U.S. 828, 839 (1976).

seventies by the Church and Pike Committees; they could be not merely a fourth, co-equal branch of government but guardians of the guardians, the *superior* branch of the government, entitled to check misguided efforts of the other branches and to resist their encroachments. Alliances with friendly domestic constituencies could cement that power. All the more beneficial could be ties to groups experienced in information control and appreciative of its utility.

It was thus no surprise that the national security mission should expand as it has. No longer would its aim be merely to protect the physical safety of the American people; now it would be to combat mis-, dis-, and mal-information³⁴ and (as the new National Security Adviser Jake Sullivan proclaimed) “inequality in all forms,”³⁵ at home and abroad. Milley articulated the scope of this broader mission in a telling justification of a (mis-targeted) military strike, which he characterized as “righteous”³⁶—what is moral, good, virtuous. These themes would later resonate within quarters that had hitherto been critical.

Yet a security apparatus immersed in the political fray risks alienating other segments of the public that have a different view on what is righteous. One solution is to eliminate the fracas by eliminating its cause: conflicting ideas. This is tricky to carry out by law, given the traditional restrictions of the First Amendment. “Eliminating such ideas [was the] very purpose”³⁷ of a state statute struck down in 2021 by the Tenth Circuit Court of Appeals. Workarounds are therefore required. One is to operate through private partners whose speech is protected by the First Amendment. Applicants are not in short supply. Corporate media and regulation-averse social media, for example, are ever-eager to ingratiate themselves with an appreciative security bureaucracy.

³⁴ U.S. Dep’t of Homeland Sec., *National Terrorism Advisory System Bulletin* (Feb. 7, 2022), <https://www.dhs.gov/ntas/advisory/national-terrorism-advisory-system-bulletin-february-07-2022> (last visited May 9, 2022) [<https://perma.cc/Y5XW-9C4Q>] (abbreviating mis-, dis-, and mal-information as “MDM” and noting that “MDM” contributes to the heightened threat environment faced by the United States).

³⁵ C-SPAN, *Biden Foreign Policy and National Security Team Announcement* (Nov. 24, 2020), <https://www.c-span.org/video/?478351-1/biden-foreign-policy-national-security-team-announcement> (Sullivan addressed President Biden and the nation, stating “Sir, we will be vigilant in the face of enduring threats from nuclear weapons to terrorism, but you have also tasked us with re-imagining our national security for the unprecedented combination of crises we face at home and abroad: The pandemic, the economic crisis, the climate crisis, technological disruption, threats to democracy, racial injustice, and inequality in all forms”) [<https://perma.cc/LRA6-WE3G>].

³⁶ Eric Schmitt & Helene Cooper, *Pentagon Acknowledges Aug. 29 Drone Strike in Afghanistan Was a Tragic Mistake that Killed 10 Civilians*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/09/17/us/politics/pentagon-drone-strike-afghanistan.html> [<https://perma.cc/Y8WQ-EVLP>].

³⁷ 303 Creative Ltd. Liab. Co. v. Elenis, 6 F.4th 1160, 1178 (10th Cir. 2021) *cert. granted in part*, 142 S. Ct. 1106 (2022).

Another is to rely upon the government's own speech to recommend ways its partners can counter misinformation, disinformation, and mal-information—called “MDM” by the Department of Homeland Security.³⁸ Because the government's speech is deemed exempt from First Amendment restriction,³⁹ it can flood media with approved messaging, stigmatizing dissidents and neutralizing their speech. Isolating out-of-the-mainstream cranks not only keeps “unacceptable views”⁴⁰ (in Canadian Prime Minister Justin Trudeau's memorable words) out of the marketplace but solidifies support among friendly domestic groups that can forestall any assault on the information managers' power.⁴¹ Compiling and disseminating dissidents' “social credit scores” could, hypothetically, easily be accomplished within the limits and protections of state action and government speech.⁴² Skillful information control manufactures *acceptable* views.

Ham-handed information control, on the other hand, can easily backfire. Overt censorship—jailing dissidents, closing presses, jamming broadcasts, etc.—is very twentieth century. Its unintended consequences make the costs of open censorship far greater than its benefits. Publicly visible censorship creates martyrs or heroes out of suppressed authors. It gives their squelched messaging a “forbidden fruit” quality, making it more attractive and credible than it otherwise would be. It drives those messages underground where they are less open to rational rebuttal. It alienates the public and generates distrust.⁴³ Not only for legal reasons but for practical reasons, observable censorship is *passé*.

What's more effective is *self*-censorship. Self-censorship keeps unacceptable views from ever reaching the marketplace of ideas; no words need be suppressed because no words are written or spoken. It therefore leads

³⁸ U.S. Dep't of Homeland Sec., *supra* note 34.

³⁹ See *infra* text accompanying notes 322–327 and 361–388.

⁴⁰ Katherine Fung, *Elon Musk Calls Trudeau Government the Real 'Fringe Minority' in Trucker Protest*, NEWSWEEK (Jan. 31, 2022), <https://www.newsweek.com/elon-musk-calls-trudeau-government-real-fringe-minority-trucker-protest-1674524> [<https://perma.cc/NTH3-BK4W>].

⁴¹ Other tactics include “exclusion, derogatory labelling, hostile comments and threatening statements by the media, both mainstream and social; dismissal by the respondents' employers; official inquiries; revocation of medical licenses; lawsuits; and retraction of scientific papers after publication.” Yaffa Shir-Razl, Ety Elisha, Brian Martin, Natti Ronel & Josh Guetzkow, *Censorship and Suppression of Covid-19 Heterodoxy: Tactics and Counter-Tactics*, MINERVA, Sept. 28, 2022, <https://doi.org/10.1007/s11024-022-09479-4> [<https://perma.cc/5X9K-S8J6>].

⁴² See Damon Linker, Opinion, *The Plausible Dystopia of a Social Credit System*, THE WEEK (Feb. 17, 2022), <https://theweek.com/politics/1010271/the-plausible-dystopia-of-a-social-credit-system> [<https://perma.cc/5K3Z-R3R5>] (arguing that “the core worry is founded in fact. The alignment of pervasive high-tech gatekeeping with an impulse to police ideological and moral conformity is not only possible but already beginning to emerge.”).

⁴³ See generally Shir-Razl et al., *supra* note 41.

to no noisy objections or lawsuits. Potential listeners and readers are unaware of what was never said or written. Nothing finds refuge underground, and nothing requires rebutting. To censors, the silence of self-censorship is golden.

Better still, self-censorship is not hard to induce. Dissenting speakers and disliked news outlets can be stigmatized so that they are not read or listened to. Potential dissidents can be made to feel they will stand isolated and embarrassed for speaking up. Rather than being persecuted for their views, they can be given the option of comfortable silence that leaves them bereft and exasperated, perhaps, but not alone.

The skillful censor, therefore, must know how to suppress speech covertly, without even the speaker able to detect a censorial hand on the mute button. Effective modern-day censorship is thus clandestine. As Senator Daniel Patrick Moynihan put it, “secrecy is the ultimate form of regulation because people do not even know they’re being regulated.”⁴⁴ Undetectable “friction” can be applied: disliked social media content can be hidden and users can experience unexplained posting or searching problems. As Joan Donovan has observed, “[o]ver the years, crude mechanisms like blocking content and banning accounts have morphed into a more complex set of tools, including quarantining topics, removing posts from search, barring recommendations, and down-ranking posts in priority.”⁴⁵ Silencing critics without their knowing it minimizes the likelihood of backlash, and if backlash does occur, the bureaucracy has no difficulty masking accountability. Moreover, the airwaves and social media can be deluged with approved messaging, making it hard to find unapproved speech. The net result is a public that is, to borrow a phrase from Pink Floyd, “comfortably numb.” Its thinking and behavior will have been modified without its consent or even its knowledge. Mark Zuckerberg gave an example of this more sophisticated form of censorship in an interview with Joe Rogan, pointing to Facebook’s superior methods as compared with Twitter’s. Twitter, Zuckerberg pointed out, had banned President Trump outright, whereas Facebook deftly applied friction, leaving Trump’s posts online but limiting their distribution to make them harder to find.⁴⁶

⁴⁴ John Podesta, *Need to Know: Governing in Secret, in THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM* 227 (Richard C. Leone & Greg Anrig Jr. eds., PublicAffairs 2003). “[I]f people are not aware of censorship, they’re not upset about it.” Shir-Razl et al., *supra* note 41 (detailing use of cover-up tactics such as third-party “fact-checkers” to discredit reputable sources, publishing disparaging claims about them, and dismissing them from positions of influence).

⁴⁵ Joan Donovan, *Why Social Media Can’t Keep Moderating Content in the Shadows*, MIT TECH. REV. (Nov. 6, 2020), <https://www.technologyreview.com/2020/11/06/1011769/social-media-moderation-transparency-censorship/> [<https://perma.cc/D7ZW-W2QH>].

⁴⁶ Thomas Barrabi, *Mark Zuckerberg Tells Joe Rogan Facebook Was Wrong to Ban the Post’s Hunter Biden Laptop Story*, N.Y. POST (Aug. 25, 2022), <https://nypost.com/2022/08/25/mark-zuckerberg-criticizes-twitters-handling-of-the-posts-hunter-biden-laptop-story/>

Concealed censorship does not always remain concealed, however, which leads modern information warriors to appreciate the utility of one last weapon: the threat of direct, coordinated sanctions. Censors are not yet able to deploy the entire range of economic weapons governments use against foreign enemies, but enough weapons are now available to the private sector to lessen the need for explicit government directives. As Tom Friedman has written, as “the world is now so wired, superempowered individuals, companies and social activist groups can pile on their own sanctions and boycotts, without any government orders, amplifying the isolation and economic strangulation”⁴⁷ The public or private character of digitized economic sanctions directed at commentators normally does not matter because the effect is the same;⁴⁸ a social media “influencer” or an aspiring public intellectual will likely think twice if an impetuous tweet means not only no social media accounts,⁴⁹ but also dried up Amazon book sales,⁵⁰ frozen bank accounts,⁵¹ demonetization of

[<https://perma.cc/CCF5-VYHS>]. Jack Dorsey, Twitter’s CEO, later said “Straight blocking of URLs was wrong.” Avery Hartmans, *Jack Dorsey Responded to Outrage Surrounding Twitter’s Handling of the New York Post’s Hunter Biden Story, Saying ‘Straight Blocking of URLs Was Wrong’*, BUS. INSIDER (Oct. 16, 2020), https://www.businessinsider.com/twitter-jack-dorsey-blocking-ny-post-hunter-biden-story-wrong-2020-10?utm_medium=referral&utm_source=yahoo.com [<https://perma.cc/Z36B-NF7D>].

⁴⁷ Thomas Friedman, Opinion, *The Cancellation of Mother Russia Is Underway*, N. Y. TIMES (Mar. 6, 2022), <https://www.nytimes.com/2022/03/06/opinion/putin-ukraine-china.html> [<https://perma.cc/4KPK-2BFH>].

⁴⁸ “If these trends continue, citizens could find themselves effectively exiled by order of corporate governors—unable to travel or go to school while also barred from espousing dissenting views on social media. They would, effectively, be ‘disappeared’ within a shadow state that lacks any electoral or appellate process, a dystopian brave new world that could become all too real if we allow elected officials to use corporate surrogates to control the essential aspects of our lives.” Jonathan Turley, Opinion, *‘Shadow State’: Embracing Corporate Governance to Escape Constitutional Limits*, THE HILL (July 17, 2021), <https://thehill.com/opinion/judiciary/563520-shadow-state-embracing-corporate-governance-to-escape-constitutional-limits/> [<https://perma.cc/4WSJ-73Y6>].

⁴⁹ See, e.g., Amanda Holpuch, *Why Social Media Sites Are Removing Andrew Tate’s Accounts*, N. Y. TIMES (Aug. 24, 2022), <https://www.nytimes.com/2022/08/24/technology/andrew-tate-banned-tiktok-instagram.html> [<https://perma.cc/BQ9V-QNNZ>].

⁵⁰ See Siladitya Ray, *Amazon Responds to Republican Sens. on Book Ban, Says Won’t Sell Books That Frame LGBTQ+ Identities as Mental Illness*, FORBES (May 12, 2021), <https://www.forbes.com/sites/siladityaray/2021/03/12/amazon-responds-to-republican-sens-on-book-ban-says-wont-sell-books-that-frame-lgbtq-identities-as-mental-illness/?sh=62b7e974006e> [<https://perma.cc/P2M4-2BE3>].

⁵¹ See Matthew Loh, *Canada Says It Will Freeze the Bank Accounts of ‘Freedom Convoy’ Truckers Who Continue Their Anti-Vaccine Mandate Blockades*, BUS. INSIDER (Feb. 14, 2022), <https://www.businessinsider.com/trudeau-canada-freeze-bank-accounts-freedom-convoy-truckers-2022-2> [<https://perma.cc/RZH5-UK2Y>]. De-banking—the politicization of lines of credit and the severing of basic financial services to “controversial” conservatives—is already very much here to stay. Just ask (recent congressional candidate) Laura Loomer about

a YouTube business,⁵² or a fine by PayPal for promoting “intolerance that is discriminatory.”⁵³

Why might those who wield these weapons use them to curb free speech? The answer is complex. The story does not begin, as one might expect it to, with the deadly domestic security crisis posed by Covid; unlike the use of passenger jets as missiles, the pandemic was neither novel nor unanticipated. Rather, the story begins two decades earlier, when the government’s security managers encountered a pressing need to control public discussion of sensitive bioweapons research.

C. The Utility of Deflection: Covid-19

In 2001, the United States was subject to a terrifying bio-weapons attack with anthrax, which killed five people and sickened seventeen others.⁵⁴ By that point, it was widely understood to be all but impossible to distinguish an artificially engineered pathogen introduced by a hostile power from one occurring in nature without human intervention; “the epidemiological techniques needed to investigate deliberate and natural outbreaks are the

PayPal. Avery Anapol, *Far-Right Activist Laura Loomer Banned from PayPal*, THE HILL (Feb. 5, 2019), <https://thehill.com/policy/technology/428600-far-right-activist-laura-loomer-banned-from-paypal/> [https://perma.cc/9Q6F-KUVN]. Or ask the Canadian truckers about GoFundMe. *Freedom Convoy: GoFundMe Seizes Funds of Canada ‘Occupation’*, BBC NEWS (Feb. 5, 2022), <https://www.bbc.com/news/world-us-canada-60267840> [https://perma.cc/7HJP-7Y8T]. In recent years, moreover, conglomerates such as Bank of America have stopped lending to certain firearms manufacturers—the very defenders, in this case, of the Second Amendment. Tiffany Hsu, *Bank of America to Stop Financing Makers of Military-Style Guns*, N.Y. TIMES (Apr. 10, 2018), <https://nytimes.com/2018/04/10/business/bank-of-america-guns.html> [https://perma.cc/56QW-W8R6]. Other examples abound.

⁵² See, e.g., Anna Merlan, *The Ivermectin Advocates’ War Has Just Begun*, VICE (July 1, 2021), <https://www.vice.com/en/article/y3d5gv/ivermectin-covid-treatment-advocates-rogan-weinstein-hecker> [https://perma.cc/G67U-5EJJ].

⁵³ Eugene Volokh, *PayPal Still Threatens \$2500 Fines for Promoting “Discriminatory” “Intolerance” (Even if Not “Misinformation”)*, REASON (Oct. 9, 2022), <https://reason.com/volokh/2022/10/09/paypal-still-threatens-2500-fines-for-promoting-discriminatory-intolerance-even-if-not-misinformation/> [https://perma.cc/EJ4W-LX57]. See also Glenn Greenwald, *The Consortium Imposing the Growing Censorship Regime*, SUBSTACK (Oct. 28, 2022), <https://greenwald.substack.com/p/the-consortium-imposing-the-growing> (describing various examples of PayPal shutting down the ability for organizations to receive a donation based on dissenting causes or views ranging from WikiLeaks, “Gays Against Groomers,” and left-wing anti-war news organizations Mint Press and Consortium News) [https://perma.cc/3KWP-5US].

⁵⁴ *Amerithrax or Anthrax Investigation*, FED. BUREAU OF INVESTIGATION, <https://archives.fbi.gov/archives/about-us/history/famous-cases/anthrax-amerithrax/amerithrax-investigation> (last visited Oct. 4, 2022) [https://perma.cc/W2AN-CJVZ].

same,”⁵⁵ and the devastating consequences can be the same. Security planners knew what was required to meet such a threat, and the requirements were the same as in 2020 when Covid-19 hit: a national early warning system was needed to sound the alarm before disease hit and adequate public health infrastructure was needed to deal with the aftershocks. The most recent National Security Strategy Statement issued before the emergence of Covid-19, from 2017, explicitly recognized the “threats on national security” posed by biological agents and the urgent needs those threats generated. It said:

Biological incidents have the potential to cause catastrophic loss of life. Biological threats to the U.S. homeland—whether as the result of deliberate attack, accident, or a natural outbreak—are growing and require actions to address them at their source. Naturally emerging outbreaks of viruses such as Ebola and SARS, as well as the deliberate 2001 anthrax attacks in the United States, demonstrated the impact of biological threats on national security by taking lives, generating economic losses, and contributing to a loss of confidence in government institutions.⁵⁶

The security managers therefore committed to “detect and contain biothreats at their source.”⁵⁷ This was a “priority action”:

We will work with other countries to detect and mitigate outbreaks early to prevent the spread of disease. We will encourage other countries to invest in basic health care systems and to strengthen global health security across the intersection of human and animal health to prevent infectious disease outbreaks. And we will work with partners to ensure that laboratories that handle dangerous pathogens have in place safety and security measures.⁵⁸

Given the strength and clarity of this commitment, when Covid began crippling health care systems overseas, one would have expected security officials to have been standing on the rooftops shouting at the tops of their lungs, *Emergency!*—and to have arranged for hospital capacity, PPE, respirators,

⁵⁵ *The Threat of Bioterrorism and the Spread of Infectious Diseases, Hearing Before the S. Comm. on Foreign Rels.*, 107th Cong. 78 (2001) (statement of Dr. David L. Heymann, Exec. Dir., Communicable Diseases, World Health Org.).

⁵⁶ WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 9 (2017), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf> [<https://perma.cc/38NZ-NRKG>].

⁵⁷ *Id.*

⁵⁸ *Id.*

trained doctors and staff, contact tracing, a testing regime, dignified treatment of the dead and all the rest. But they had not. The security planners failed abysmally to fulfill the commitments they had laid out in 2017.⁵⁹

The importance of this breakdown in detection and containment ought not be misunderstood as merely a public health collapse. If the security managers had earlier been correct that health security is a component of national security, Covid was a *security* failure—as monumental as any the nation had ever experienced. *Over a million Americans died*. The ensuing public trauma of course generated insistent questions: Where had the pathogen originated? How could it best be remedied? What had gone wrong? With a broader security portfolio comes broader accountability—who was responsible?

Rather than addressing such concerns in an open and robust marketplace of ideas, however, government officials and private actors, joining together to fight Covid, settled upon a new enemy: speech—specifically, speech labeled “mis-, dis-, and mal-information”⁶⁰ in the words of the Department of Homeland Security. The Covid warriors appeared to believe they could exclude that speech from that marketplace with the same tactics of information warfare that the security apparatus had perfected for use abroad. Now, however, those techniques could also be directed internally, at the American people.⁶¹

The improvisation and confusion surrounding Covid’s arrival and the security managers’ immediate concerns about information control were distressingly familiar to the few who lived through their scrambled reaction

⁵⁹ See Editorial, Opinion, *The Coming Storm: America Is Not Ready for a Future Pandemic*, WASH. POST (Aug. 27, 2022), <https://www.washingtonpost.com/opinions/2022/08/27/covid-pandemic-lessons-prepare/> [<https://perma.cc/2ZFL-FDRC>] (“The pandemic response was badly fragmented among states and localities. The nation broke into warring camps about whether to be open or to adopt restrictions and whether to mandate masks or vaccines, and a checkerboard of jurisdictions fought against each other for diagnostic tests, supplies and therapeutics.”); see generally, ERIK J. DAHL, *THE COVID-19 INTELLIGENCE FAILURE: WHY WARNING WAS NOT ENOUGH* (2022).

⁶⁰ U.S. Dep’t of Homeland Sec., *supra* note 34.

⁶¹ See Ken Dilanian et al., *In a Break with the Past, U.S. Is Using Intel to Fight an Info War with Russia, Even When the Intel Isn’t Rock Solid*, NBC NEWS (Apr. 6, 2022), <https://www.nbcnews.com/politics/national-security/us-using-declassified-intel-fight-info-war-russia-even-intel-isnt-rock-rcna23014> [<https://perma.cc/F8SN-2C9Q>]. NBC has reported that the government has intentionally made false or low-confidence assertions concerning Russian requests for arms from China, plans for false flag and chemical weapons attacks, and a variety of other subjects. Ken Klippenstein & Lee Fang, *Leaked Documents Outline DHS’s Plans to Police Disinformation*, THE INTERCEPT (October 31, 2022), <https://theintercept.com/2022/10/31/social-media-disinformation-dhs/> [<https://perma.cc/UD78-NE6F> (noting that censorship of dissident voices was carried out with explicit encouragement from government actors).

and awkward silences during the 2001 anthrax attack. The origins of that threat and the response to it are worth recalling. The story begins with a sensitive matter that came to light a week before September 11 and two weeks before the anthrax attack.

On September 4, 2001, the *New York Times* published an extraordinary (and now all but forgotten) account of secret U.S. research on biological weapons.⁶² Among other things, the authors reported that the CIA and Pentagon drew up plans to engineer a new, genetically-altered, more potent variant of anthrax.⁶³ President Bill Clinton, they reported, was intensely interested in germ weapons but had never been briefed on this or various other programs that were under way or contemplated.⁶⁴ Moreover, some administration officials reportedly believed that some of those programs violated the Biological Weapons Convention.⁶⁵ In addition to unawareness by the White House of the full scope of the research, the authors highlighted three indelicate aspects of the programs that, then as now, the security managers did not regard as productive topics for public debate.⁶⁶

First, lab leaks and accidents occur with alarming frequency.⁶⁷ In all, the *Times* reporters noted that leading up to 2001, “the scientists made enough mistakes to become victims of their own pathogens 456 times.”⁶⁸ The record afterwards improved little. From 2002 to 2007 more than seventy accidents occurred relating to work with dangerous pathogens, according to Lyn Klotz and Edward Sylvester in their study, *Breeding Bio Insecurity*.⁶⁹ “Three plague-infested rats were unaccounted for in a big BSL-3 laboratory in the heart of a Newark, New Jersey, residential area[,]” they recounted.⁷⁰ “A leaky foolproof aerosol chamber infected three lab workers with tuberculosis. Tularemia sickened three researchers who thought they were working with a benign strain of the rabbit fever agent.”⁷¹

⁶² Judith Miller, Stephen Engelberg & William J. Broad, *U.S. Germ Warfare Research Pushes Treaty Limits*, N.Y. TIMES (Sept. 4, 2001), <https://www.nytimes.com/2001/09/04/world/us-germ-warfare-research-pushes-treaty-limits.html> [<https://perma.cc/S27D-VN5S>].

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *See* Alison Young & Nick Penzenstadler, *Universities, Feds Fight to Keep Lab Failings Secret*, USA TODAY (May 28, 2015), <https://www.usatoday.com/story/news/2015/05/28/labs-fight-for-secrecy/26530719/> [<https://perma.cc/QPD4-ABKW>].

⁶⁷ *See infra* notes 107, 111.

⁶⁸ JUDITH MILLER, STEPHEN ENGELBERG & WILLIAM J. BROAD, *GERMS: BIOLOGICAL WEAPONS AND AMERICA’S SECRET WAR* 35 (2001).

⁶⁹ LYN KLOTZ & EDWARD SYLVESTER, *BREEDING BIO INSECURITY: HOW U.S. BIODEFENSE IS EXPORTING FEAR, GLOBALIZING RISKS, AND MAKING US ALL LESS SECURE* 113 (2009).

⁷⁰ *Id.*

⁷¹ *Id.*

Second, the research was highly dangerous. Gene splicing—bioengineering—that began in the 1970s held the promise of saving lives, curing illness, and improving human health. But it also could produce deadly new diseases for which there were no known cures. Some of the scientists who had pioneered the research warned of its destructive potential. Joshua Lederberg, for example, the Nobel Prize winner whose discoveries were central to the new science, understood the risk. “To be enhancing that technology,” he said, “I thought was in the long run suicidal.”⁷² Research on synthetic genes, he wrote, constituted “the most perilous genocidal experimentation.”⁷³ Breakthroughs in germ warfare were “akin to our arranging to make hydrogen bombs available at the supermarket.”⁷⁴ Advances in the field, Lederberg said, “could well become the most efficient means for removing man from the planet.”⁷⁵ Lederberg was far from alone in his fears. Donald Henderson, for example, who spearheaded smallpox eradication efforts for the World Health Organization, warned that the “potential implications of an infected lab worker—and [of] spread beyond the lab—are terrifying.”⁷⁶

Third, the *Times*’s investigation confirmed that the Biological Weapons Convention is feckless. The 1972 treaty is the international instrument that purports to ban biological weapons. But it prohibits the development of biological agents only if those agents have “no justification for prophylactic, protective or other peaceful purposes,”⁷⁷ and it prohibits the development of weapons designed to use such agents only “for hostile purposes or in armed conflict.”⁷⁸ If a genetically modified superbug is developed for “peaceful” or protective purposes—for the supposed purpose of developing an antidote or vaccine, for example—that development is permitted. Similarly, if a bioweapon is developed for the purpose of developing a defense to that weapon rather than for a hostile purpose or for use in armed conflict, development of that weapon is permitted. The “purpose,” of course, lies in the mind of the developer, so that merely by labelling the purpose peaceful, a nation can easily claim not to be engaged in prohibited research and to possess no bioweapons. One authority summed up what all government experts likely knew: that “permitted uses and undefined limits offer clear opportunities to circumvent

⁷² MILLER, ENGELBERG & BROAD, *supra* note 68, at 67.

⁷³ *Id.* at 68.

⁷⁴ *Id.* at 69.

⁷⁵ *See id.*

⁷⁶ KLOTZ & SYLVESTER, *supra* note 69, at 120 (defining BSL-3 and BSL-4 labs).

⁷⁷ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction art. I(1), Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

⁷⁸ *Id.* art. I(2).

the prohibitions, so the convention is widely seen as porous, at best.”⁷⁹ The result is that the Convention’s looseness can legitimate the most malign programs. The Soviet Union, for example, having ratified the Convention, went on to employ tens of thousands of people to turn anthrax, smallpox, and bubonic plague into “weapons of war”—all while claiming that the programs were for purely defensive purposes.⁸⁰

The *Times*’s 2001 reporting and the threat of public disclosure of the full scope of U.S. bio-research thus risked not only worldwide condemnation of the activities themselves, it also risked revealing that the Convention was toothless, which could energize efforts at regulation that security officials opposed. The experiments and programs underway in the United States, officials told the *Times*, “would draw vociferous protests from Washington if conducted by a country the United States viewed as suspect.”⁸¹ A draft protocol (later abandoned) was then being considered that would have strengthened enforcement of the Convention, but it was opposed by the Bush administration largely because of the perceived need to maintain the secrecy of projects that involved gene-splicing or germs likely to be used in weapons.⁸² Even accounts of experimentation by other countries created a danger of emulation or the release of information that could aid in the creation of more deadly bioweapons. Pentagon officials were alarmed when a scientific journal in late 1997 published an article describing Russian scientists’ preparation of a new strain of anthrax.⁸³ The question arose whether the new strain could defeat the vaccine that the Pentagon had decided to require for U.S. soldiers; when efforts to obtain a sample of the new strain failed, the CIA and Pentagon secretly drew up plans to replicate it.⁸⁴ From the security managers’ perspective, it was easy to conclude that public discussion of even the general topic of bio-weapons research could serve no useful purpose; it could lead only to awkward and partial explanations, further questions, tighter regulation of bio-research, and less authority for those directly overseeing it.

That belief could only have been reinforced when the source of the anthrax used in the 2001 attacks was finally identified: the U.S. “government’s own laboratories, most likely those at Ft. Detrick, Maryland.”⁸⁵ The victims

⁷⁹ GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 766 (2d ed. 2016).

⁸⁰ Miller et al., *supra* note 62.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ KLOTZ & SYLVESTER, *supra* note 69, at 111. “We were surprised it was the Ames strain,” said the microbiologist who identified that the anthrax used in the attack letters, Dr. Paul Keim.

who were infected had been exposed to the so-called “Ames” strain of anthrax. The strain had been isolated two decades earlier and sent out to nearly a dozen other laboratories, most of them military.⁸⁶ Who, precisely, was responsible for the 2001 anthrax letters was impossible to say, given that hundreds⁸⁷ if not thousands⁸⁸ of people eventually had access to the Ames strain at the time of the attack. “That is why the mystery is not likely to be solved[,]” write Klotz and Sylvester. “What it clearly does show is that, *even ordinarily*, hundreds of lab workers do have access to potential bioweapons agents, such as the Ames strain of anthrax. We clearly are not safe from our own laboratories.”⁸⁹ One lesson that “emerges with crystal clarity,” they conclude, is that “the proliferation of high-level BSL-3 and BSL-4 laboratories radically increases our risk of a deadly bioweapons attack”⁹⁰

Perhaps the most disturbing realization, the *Times* reporters revealed, was that the scale of the anthrax attacks was remarkably small compared with the cataclysmic outbreaks experts had discussed only three years earlier with President Clinton.⁹¹ In 1998, a group of experts convened by the White House had warned that “a recombinant virus that would express itself in distinct phases” would wreak havoc on the nation, as revealed by a role-playing simulation:

[S]tate and local officials were overwhelmed by the demands of thousands of hypothetically sick and dying people. Local medical offices rapidly exhausted their stocks of antibiotics and vaccines. Federal quarantine laws turned out to be too antiquated to deal with the rapidly spreading epidemic, and no state had adequate plans to take care of the people it had isolated. Officials did not know where to store and bury the still-contaminated dead [O]fficials began quarreling among themselves and with Washington over how to stem the epidemic. No one seemed to be in charge.⁹²

“And it was chilling at the same time, because the Ames strain is a laboratory strain that had been developed by the U.S. Army as a vaccine-challenge strain.” Sarah Moughty, *Paul Keim: “We Were Surprised It Was the Ames Strain”*, FRONTLINE, October 10, 2010, <https://www.pbs.org/wgbh/frontline/article/paul-keim-we-were-surprised-it-was-the-ames-strain/> [<https://perma.cc/K83E-3DZA>].

⁸⁶ See MILLER, ENGELBERG, & BROAD, *supra* note 68, at 331.

⁸⁷ See KLOTZ & SYLVESTER, *supra* note 69, at 111.

⁸⁸ MILLER, ENGELBERG, & BROAD, *supra* note 68, at 335.

⁸⁹ KLOTZ & SYLVESTER, *supra* note 69, at 111.

⁹⁰ *Id.* at 112.

⁹¹ See MILLER, ENGELBERG, & BROAD, *supra* note 68, at 334.

⁹² *Id.* at 233.

Those who were ostensibly in charge managed a “maze of federal agencies that handle public health, security, intelligence, and scientific research.”⁹³ That maze was the subject of Klotz and Sylvester’s study.⁹⁴ After the anthrax attack, they reported, elements within that maze became increasingly militarized and secretive.⁹⁵ The National Institute of Allergy and Infectious Diseases (NIAID), for example, took on new responsibilities in treating and preventing diseases that emerge naturally or are deliberately introduced as an act of bioterrorism. NIAID does so by, among other things, supporting and conducting research aimed at developing vaccines for specific pathogens.⁹⁶ Public health authorities, long under the control of the medical profession, came “‘under the thumb of public safety,’ whose military-like organization often demanded secrecy.”⁹⁷ In 2004 and 2005, after the CDC was reorganized⁹⁸ to make fighting terrorism a primary mission,⁹⁹ one of its two “overarching goals” would be to protect “people in all communities” from terrorist threats (recognizing the difficulty of “distinguishing deliberate use from a naturally occurring threat”).¹⁰⁰ Scientists chafed under “the catastrophic reorganization” and bridled at leadership’s new conviction that “there are things that are too important or dangerous to tell people about....” Many professionals “tramp[led] each other at the exits to get out.”¹⁰¹

In 2020, that tangle of agencies, depleted and re-purposed though some were, was activated when Covid turned much of the 1998 simulation into reality. Attention within it, as within the public generally, turned immediately to the source of the virus: had it originated in a Wuhan open air wildlife market, or from a nearby bio-research facility?

In one way the answer made little difference, for again, the *effects* of the virus would have been the same had it come from nature or a lab, or had it

⁹³ *Id.* at 334.

⁹⁴ See generally KLOTZ & SYLVESTER, *supra* note 69.

⁹⁵ See *id.* at 172–73 (describing CDC’s post-9/11 emphasis on bioterrorism and increased secrecy).

⁹⁶ Nat’l Inst. of Allergy and Infectious Diseases, *NIAID Role in Biodefense and Emerging Infectious Diseases Research* (Oct. 26, 2011), <https://www.niaid.nih.gov/research/biodefense-emerging-infectious-diseases-research> [<https://perma.cc/ZM63-H8YG>].

⁹⁷ KLOTZ & SYLVESTER, *supra* note 69, at 172. Cf. Ashley Rindsberg, *How Dick Cheney Created Anthony Fauci*, UNHERD (Aug. 29, 2022), <https://unherd.com/2022/08/how-dick-cheney-created-anthony-fauci/> [<https://perma.cc/7CDA-FXCC>] (“Far from being a public health expert, Fauci sits at the very top of America’s biodefense infrastructure.”).

⁹⁸ See Press Release, Ctrs. for Disease Control and Prevention, Dr. Gerberding’s Remarks at the National Press Club Conference (Feb. 22, 2005), <https://www.cdc.gov/media/pressrel/r050222b.htm> [<https://perma.cc/BGV7-SHFQ>].

⁹⁹ KLOTZ & SYLVESTER, *supra* note 69, at 173.

¹⁰⁰ CTRS. FOR DISEASE CONTROL AND PREVENTION, *THE STATE OF THE CDC, FISCAL YEAR 2004* 4, 36 (2005), <https://stacks.cdc.gov/view/cdc/6496> [<https://perma.cc/JH9D-Z3EL>].

¹⁰¹ KLOTZ & SYLVESTER, *supra* note 69, at 173.

been intentionally released. Each such event would create the chaos and devastation that the Clinton administration's simulation had predicted, and each would represent a colossal breach of security on the security managers' part. "Many of the very worst-case characteristics of an intentional event are also being seen in this naturally occurring pandemic," said Dr. Robert Kadlec, the assistant secretary for preparedness and response at the U.S. Department of Health and Human Services, in May 2020.¹⁰² Bill Gates had warned in 2017 that it made little sense to distinguish between the two. "Whether it occurs by a quirk of nature or at the hand of a terrorist," he told the Munich Security Conference, the number of deaths from a fast-moving airborne pathogen would still be catastrophic; the defensive measures would be the same.¹⁰³ "Most of the things we need to do to protect against a naturally occurring pandemic," he said, "are the same things we must prepare for an intentional biological attack."¹⁰⁴ Security planners knew this—and regarded both as a security threat. That conviction was not limited to career security officials. One of the "major threats to our national security," wrote Senators Barack Obama and Richard Lugar in 2005, comes "from nature, not humans—an avian flu pandemic."¹⁰⁵

Yet when the crisis suddenly hit in March 2020, the nation was unprepared. Masks and tests were in short supply. Retirement homes were decimated. Exhausted health care workers collapsed. Intubated patients died alone. Covid victims in New York were buried in mass graves. Schools closed. All the warnings, all the simulations, all the strategy statements had been for naught.

In another way, however, Covid's origin mattered a great deal: it could underscore the porosity of the legal regime that supposedly regulated that research,¹⁰⁶ potentially creating pressures for meaningful regulation and

¹⁰² Willem Marx, *COVID-19 Has Shown U.S., U.K. are Vulnerable to Biological Terrorism, Experts Say*, NBC NEWS (May 18, 2020), <https://www.nbcnews.com/politics/national-security/experts-covid-19-has-shown-u-s-u-k-are-n1207776> [<https://perma.cc/ZW3P-HGFQ>].

¹⁰³ Ewen MacAskill, *Bill Gates Warns Tens of Millions Could be Killed by Bio-Terrorism*, THE GUARDIAN (Feb. 18, 2017), <https://www.theguardian.com/technology/2017/feb/18/bill-gates-warns-tens-of-millions-could-be-killed-by-bio-terrorism> [<https://perma.cc/R7K2-XLY3>].

¹⁰⁴ *Id.*

¹⁰⁵ Barack Obama & Richard Lugar, Opinion, *Grounding a Pandemic*, N.Y. TIMES (June 6, 2005), <https://www.nytimes.com/2005/06/06/opinion/grounding-a-pandemic.html> [<https://perma.cc/L2SB-EVSY>].

¹⁰⁶ "There is currently no system for the global monitoring and regulation of gain-of-function research of concern," the Lancet Covid-19 Commission stated. Jeffrey D. Sachs et al., *The Lancet Commission on Lessons for the Future from the COVID-19 Pandemic*, 400 THE LANCET 1224, 1233 (Sept. 14, 2022), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2822%2901585-9> [<https://perma.cc/4YWU-3NMG>]. Restrictions on "gain of function" research had actually been loosened in recent years. See David Willman & Madison Muller, *A Science in the Shadows: Controls on 'Gain of Function' Experiments with Supercharged Pathogens Have Been Undercut Despite Concerns About Lab Leaks*, WASH. POST (Aug. 26,

greater transparency, and the mere *inquiry into the question* could call attention to the dangerous bioresearch the United States was conducting or supporting and the risk of leaks. Whether or not the virus had actually escaped accidentally from the Wuhan lab, *it could have* escaped from a lab.¹⁰⁷ This was the September 2022 finding of the Lancet COVID-19 Commission, a panel of independent experts convened by the respected British medical journal that drew on two years' work by more than 170 other experts.¹⁰⁸ The Commission

2021), <https://www.washingtonpost.com/nation/interactive/2021/a-science-in-the-shadows/> [<https://perma.cc/9QBE-2XGS>].

¹⁰⁷ See ALINA CHAN & MATT RIDLEY, *VIRAL: THE SEARCH FOR THE ORIGIN OF COVID-19* 133-148 (2021) (describing accidents risking the escape of dangerous pathogens even in high-security laboratories); Mara Hvistendahl, *Experimenting With Disaster*, *THE INTERCEPT* (Nov. 1, 2022), <https://theintercept.com/series/experimenting-with-disaster/> [<https://perma.cc/L9NY-BJEX>]; Alison Young, *Could an Accident Have Caused COVID-19? Why the Wuhan Lab-Leak Theory Shouldn't Be Dismissed*, *USA TODAY* (Mar. 22, 2021), <https://www.usatoday.com/in-depth/opinion/2021/03/22/why-covid-lab-leak-theory-wuhan-shouldnt-dismissed-column/4765985001/> (there is “no reason to believe” that safety lapses are not occurring at elite U.S. labs and in other countries as well) [<https://perma.cc/Y2XR-MUVY>]. There is “enormous reason to believe,” said Dr. Jeffrey Sachs, chair of the *Lancet* Covid-19 Commission, that extremely dangerous research was going on involving the modification of viruses to make them more lethal; that the scientists who are involved in that research keep the public in the dark through misdirection (“It’s like sleight of hand art. Don’t look over there. Look over here.”); that “they don’t want any regulations on it”; that “a very extensive research program” along these lines was funded by the National Institutes of Health and the National Institute of Allergy and Infectious Diseases; that Dr. Anthony Fauci believed the scope of this research was better swept “under the rug”; that scientists at the Wuhan Institute of Virology “were trained by American scientists to use advanced bioengineering methodologies”; and that NIH is “not telling us the truth, that they had reason to fear from the start that this came out of a lab. And that to this day, they have reason to suspect it, but they’re not talking.” It is likely, Sachs said, that Covid “came out of U.S. lab biotechnology, not out of nature.” Why is all this being kept from the public? Not simply, Sachs indicated, merely because of the enormous ethical, moral, and geopolitical implications—about 18 million people have died worldwide from Covid—but because “there is so much dangerous research underway right now under the umbrella of biodefense or other things that we don’t know about, that is not being properly controlled.” The “technological capacity to do dangerous things using this biotechnology is extraordinary right now I want some global control over this stuff [T]his is a clear and present risk.” Nathan Robinson, *Why the Chair of the Lancet’s COVID-19 Commission Thinks the US Government Is Preventing a Real Investigation Into the Pandemic*, *CURRENT AFFAIRS* (Aug. 2, 2022), <https://www.currentaffairs.org/2022/08/why-the-chair-of-the-lancets-covid-19-commission-thinks-the-us-government-is-preventing-a-real-investigation-into-the-pandemic> [<https://perma.cc/QK94-99FT>] (interview with Jeffrey Sachs). In response to such comments, Sachs has been accused of dangerous “meddling and conspiratorialism.” Angela Rasmussen & Michael Worobey, *Conspiracy Theories About COVID-19 Help Nobody*, *FOREIGN POLICY* (Sept. 15, 2022), <https://foreignpolicy.com/2022/09/15/conspiracy-theories-covid-19-commission/> [<https://perma.cc/6Q36-48HY>].

¹⁰⁸ Dan Diamond, *‘Untrustworthy and Ineffective’: Panel Blasts Governments’ Covid Response*, *WASH. POST* (Sept. 14, 2022), <https://www.washingtonpost.com/health/2022/09/14/lancet-covid-commission-report-who/> [<https://perma.cc/KC5S-ESUT>].

concluded that “the infection of a researcher in the laboratory while studying viruses that have been genetically manipulated” was one possible pathway of Covid’s emergence.¹⁰⁹ According to the Commission, the risks of such research are plain: “Advances in biotechnology in the past two decades have made it possible to create new and highly dangerous pathogens through genetic manipulation.”¹¹⁰ Experts, as noted above,¹¹¹ earlier warned that leaks of equally or even more dangerous pathogens could escape from such labs. Yet no independent investigation has thus far been carried out regarding the bioengineering of such viruses; according to the Commission, this is because the American laboratories engaged in such research have refused to give access to relevant materials and the “National Institutes of Health (NIH) has resisted disclosing details of the research on SARS-CoV-related viruses that it had been supporting.”¹¹²

There were therefore obvious reasons for an investigation *at the outset*—but also, as various commentators have pointed out, obvious reasons for a cover-up, including:

the odd coincidence of a pandemic originating in the same city where a Chinese lab was conducting high-end experiments on bat viruses; the troubling report that some of the original Covid patients had no contact with the food markets where the pandemic supposedly originated; the fact that the Chinese government lied and stonewalled its way through the crisis.¹¹³

Nicholas Wade, writing in the *Bulletin of the Atomic Scientists*, highlighted the issue’s clear importance:

¹⁰⁹ Sachs et al., *supra* note 106, at 1232.

¹¹⁰ *Id.* at 1233.

¹¹¹ See *supra* text accompanying notes 67–76 and 85–89. See also Carl Zimmer, *Bat Virus Studies Raise Questions About Laboratory Tinkering*, N.Y. TIMES (July 15, 2022), <https://www.nytimes.com/2022/07/15/science/bat-coronavirus-laboratory-experiments.html/> [<https://perma.cc/7652-YY3M>]. “We clearly are not safe from our own labs,” Klotz and Sylvester conclude. KLOTZ & SYLVESTER, *supra* note 69, at 111 (2009); Alison Young, *Newly Disclosed CDC Biolab Failures ‘Like a Screenplay For a Disaster Movie’*, USA TODAY (June 2, 2016), <https://www.usatoday.com/story/news/2016/06/02/newly-disclosed-cdc-lab-incidents-fuel-concerns-safety-transparency/84978860/> [<https://perma.cc/H4YF-G3VS>]; Alison Young, *Power, Airflow, Safety Issues Plague High-Tech CDC Labs*, USA TODAY (July 9, 2015), <https://www.usatoday.com/story/news/2015/07/09/new-cdc-lab-incidents-airflow/29920917/>; Alison Young, *Reports Reveal Safety Violations at Many Bioterror Labs*, USA TODAY (July 16, 2014), <https://www.usatoday.com/story/news/nation/2014/07/15/inspector-general-reports-violations-bioterror-labs/12664213/> [<https://perma.cc/BZ2E-8LLY>].

¹¹² Sachs et al., *supra* note 106, at 1233.

¹¹³ See, e.g., Bret Stephens, *Opinion, Media Groupthink and the Lab-Leak Theory*, N.Y. TIMES (May 31, 2021), <https://www.nytimes.com/2021/05/31/opinion/media-lab-leak-theory.html/> [<https://perma.cc/H52V-S2WT>].

One might think that any plausible origin of a virus that has killed three million people would merit a serious investigation. Or that the wisdom of continuing gain-of-function research, regardless of the virus's origin, would be worth some probing. Or that the funding of gain-of-function research by the NIH and NIAID during a moratorium on such funding would bear investigation.¹¹⁴

In fact, in response to a request by President Biden, the intelligence community later reported, on May 26, 2021, that it could not rule out the possibility that the virus had originated in a lab.¹¹⁵ A year later, a team of scientists convened by the World Health Organization also acknowledged that the possibility that the virus escaped from a lab needs ““further investigations.””¹¹⁶

Yet as the virus spread across the United States in 2020, the immediate and continuing reaction of the security managers and their allies within social and corporate media was to try to quash the story.¹¹⁷ The lab-leak possibility

¹¹⁴ Nicholas Wade, *The Origin of COVID: Did People or Nature Open Pandora's Box at Wuhan?*, BULLETIN OF THE ATOMIC SCIENTISTS (May 5, 2021), <https://thebulletin.org/2021/05/the-origin-of-covid-did-people-or-nature-open-pandoras-box-at-wuhan/> [<https://perma.cc/3243-LPPM>]. Under the moratorium statute, gain-of-function research is defined as ““any research that improves the ability of a pathogen to cause disease.”” *Id.*

¹¹⁵ See *Statement by President Joe Biden on the Investigation into the Origins of COVID-19*, WHITE HOUSE (Aug. 27, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/27/statement-by-president-joe-biden-on-the-investigation-into-the-origins-of-covid-%E2%81%A019/> [<https://perma.cc/Z9H9-SXEM>].

¹¹⁶ Adam Taylor, *WHO Covid Origins Report Says 'Lab Leak' Theory Needs Further Investigation*, WASH. POST (June 9, 2022), <https://www.washingtonpost.com/world/2022/06/09/who-sago-covid-origins/> [<https://perma.cc/UMM9-GTKB>]; Alexander Smith, *China Slams New WHO Report Suggesting Further Investigation Into Covid 'Lab Leak' Theory*, NBC NEWS (June 10, 2022), <https://www.nbcnews.com/news/world/covid-19-urges-investigation-chinese-wuhan-lab-leak-theory-rcna32910> [<https://perma.cc/EQ2E-KNCU>].

¹¹⁷ For examples from the *New York Times*, *Washington Post*, and *National Public Radio* see CHAN & RIDLEY, *supra* note 107, at 304 (2021). Facebook censored or labelled as misinformation posts that discussed a laboratory origin of the virus. *Id.* at 307. “[C]ensorship,” they conclude, “marked the coverage.” *Id.* at 307. See generally Matt Ridley & Alina Chan, *What Happened to the Lab-Leak Hypothesis?*, UNHERD (June 23, 2022), <https://unherd.com/2022/06/what-happened-to-the-lab-leak-hypothesis> [<https://perma.cc/Q69P-HZ3B>] (“[B]y taking down credible moderate voices, our critics within the scientific establishment are polarising the issue and casting the lab origin-hypothesis as one that is only championed by anti-science or uninformed groups.”); Thomas Fazi, *The Lab-Leak Theory Isn't Dead*, UNHERD (Aug. 30, 2022), <https://unherd.com/2022/08/the-lab-leak-theory-isnt-dead/> [<https://perma.cc/2XTJ-Q7ET>] (“[F]rom the beginning the very notion that the virus might have a laboratory-based origin was

was characterized as a conspiracy theory, not a more probable national security failure. Anthony Fauci, a *New York Times* opinion piece observed, “aggressively cast the lab leak theory as fringe”¹¹⁸ *Vanity Fair* reported that State Department officials discouraged investigation of the possibility of a lab leakage.¹¹⁹ The magazine reported in June 2021 that State Department officials had been studying the Wuhan Institute of Virology for months and had recently become aware that “three WIV researchers conducting gain-of-function experiments on coronavirus samples had fallen ill in the autumn of 2019, before the COVID-19 outbreak was known to have started.”¹²⁰ When they discussed whether to share this with the public, their superior apparently told them “not to say anything that would point to the U.S. government’s own role in gain-of-function research.”¹²¹ They were, in fact, “repeatedly advised not to open a ‘Pandora’s box,’” according to former State Department officials.¹²² Some officials even stated that they were “‘absolutely floored’” afterwards and that it “‘smelled like a cover-up.’”¹²³ The *Washington Post* also referred to the lab leak possibility as a “‘fringe theory.’”¹²⁴ “[N]umerous experts,” the *Post* told its readers, have “‘dismissed the possibility the coronavirus may be man-made.’”¹²⁵ Other media sources were equally dismissive, with the *New York Times* also referring to it as a “‘fringe theory’” and NPR reporting that scientists had “‘debunk[ed]’” the lab accident theory.¹²⁶ Facebook banned discussion of the lab escape theory from its

stifled. The hot denials came not only from the Chinese authorities and the Wuhan Institute of Virology itself, but also from the WHO and leading Western scientists, institutions and media organisations.”). See Katherine Eban, *The Lab-Leak Theory: Inside the Fight to Uncover COVID-19’s Origins*, VANITY FAIR (June 3, 2021), <https://www.vanityfair.com/news/2021/06/the-lab-leak-theory-inside-the-fight-to-uncover-covid-19s-origins/> [https://perma.cc/52XK-L59X] (“In one State Department meeting, officials seeking to demand transparency from the Chinese government say they were explicitly told by colleagues not to explore the Wuhan Institute of Virology’s gain-of-function research, because it would bring unwelcome attention to U.S. government funding of it.”). See Shir-Razl et al., *supra* note 41.

¹¹⁸ Ari Schulman, Opinion, *Why Many Americans Turned on Anthony Fauci*, N.Y. TIMES (Aug. 30, 2022), <https://www.nytimes.com/2022/08/30/opinion/why-anthony-faucis-covid-legacy-is-a-failure.html> [https://perma.cc/A893-84SM].

¹¹⁹ See Eban, *supra* note 117.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Paulina Firozi, *Tom Cotton Keeps Repeating a Coronavirus Fringe Theory That Scientists Have Disputed*, WASH. POST (Feb. 17, 2020), <https://www.washingtonpost.com/politics/2020/02/16/tom-cotton-coronavirus-conspiracy/> [https://perma.cc/MTV4-AKAY].

¹²⁵ *Id.*

¹²⁶ See Rowan Jacobsen, *Exclusive: How Amateur Sleuths Broke the Wuhan Lab Story and Embarrassed the Media*, NEWSWEEK (June 2, 2021), <https://www.newsweek.com/exclusive-how-amateur-sleuths-broke-wuhan-lab-story-embarrassed-media-1596958/> [https://perma.cc/5Y3G-PC4Z].

platform¹²⁷—until Biden’s announcement that the lab leak theory could not be ruled out,¹²⁸ whereupon Facebook, acting “in lockstep with the government,” promptly unbanned it.¹²⁹ Prominent outlets such as PolitiFact¹³⁰ and FactCheck.org¹³¹ debunked the idea. Widely relied upon¹³² was a letter published in *The Lancet* by 27 scientists proclaiming that they “stand together to strongly condemn conspiracy theories suggesting that COVID-19 does not have a natural origin Conspiracy theories do nothing but create fear, rumours, and prejudice that jeopardise our global collaboration in the fight against this virus.”¹³³

Had the press looked into it—and it would have taken scant investigation, since this was a matter of public record—it could quickly have been discovered that the letter’s lead author had direct ties to the Wuhan lab,¹³⁴ where researchers were led by Shi Zheng-li, China’s leading expert on bat viruses.¹³⁵ Indeed, a minimally curious press would have found, as did *Bulletin of the Atomic Scientists*’ Nicholas Wade, that US and Chinese government officials shared “a strange common interest”:

¹²⁷ Editorial, Opinion, *Facebook’s Lab-Leak About-Face*, WALL ST. J. (May 27, 2021), <https://www.wsj.com/articles/facebooks-lab-leak-about-face-11622154198> [https://perma.cc/2DEY-T3BS]; Cristiano Lima, *Facebook No Longer Treating ‘Man-Made’ COVID as a Crackpot Idea*, POLITICO (May 27, 2021), <https://www.politico.com/news/2021/05/26/facebook-ban-covid-man-made-491053> [https://perma.cc/8E8N-RCD3].

¹²⁸ See Martin Robinson, James Tapsfield & Rory Tingle, *Twitter REFUSES to Say if It Will Censor Coronavirus Lab Leak Theory or Considers It ‘Misleading’*, DAILY MAIL (May 28, 2021), <https://www.dailymail.co.uk/news/article-9629057/Twitter-REFUSES-say-censor-Coronavirus-lab-leak-theory.html> [https://perma.cc/K8KP-NDP7].

¹²⁹ Editorial, Opinion, *Facebook’s Lab-Leak About-Face*, WALL ST. J. (May 27, 2021), <https://www.wsj.com/articles/facebooks-lab-leak-about-face-11622154198> [https://perma.cc/2DEY-T3BS].

¹³⁰ Daniel Funke, *Li-Meng Yan Stated On September 15, 2020 in an Interview on ‘Tucker Carlson Tonight’*: “This Virus, COVID-19 SARS-CoV-2 Virus, Actually is Not from Nature. It is a Man-Made Virus Created in the Lab”, POLITIFACT (Sept. 16, 2020), <https://www.politifact.com/li-meng-yan-fact-check/> [https://perma.cc/GQ66-WU29].

¹³¹ Angelo Fichera, *Report Resurrects Baseless Claim that Coronavirus Was Bioengineered*, FACTCHECK.ORG (Sept. 17, 2020), <https://www.factcheck.org/2020/09/report-resurrects-baseless-claim-that-coronavirus-was-bioengineered/> [https://perma.cc/7YQQ-DCMX].

¹³² See CHAN & RIDLEY, *supra* note 107, at 304 (“[M]any public figures of influence” in the West “[took] their cue” from the *Lancet* letter.).

¹³³ Charles Calisher et al., *Statement in Support of the Scientists, Public Health Professionals, and Medical Professionals of China Combatting COVID-19*, 395 THE LANCET e42, e42 (2020). The question of course had been whether a leak had occurred as the result of an accident, not as part of a conspiracy.

¹³⁴ See Wade, *supra* note 114; Sharon Lerner & Mara Hvistendahl, *Peter Daszak Answers Critics and Defends Coronavirus Research*, THE INTERCEPT (March 11, 2022), <https://theintercept.com/2022/03/11/covid-nih-ecohealth-peter-daszak-interview/> [https://perma.cc/EKW6-QCX3].

¹³⁵ *Id.*

Neither is keen on drawing attention to the fact that Shi's coronavirus work was funded by the US National Institutes of Health. One can imagine the behind-the-scenes conversation in which the Chinese government says, "If this research was so dangerous, why did you fund it, and on our territory too?" To which the US side might reply, "Looks like it was you who let it escape. But do we really need to have this discussion in public?"¹³⁶

Instead, the press went mute. It erected, in Wade's phrase, "serried walls of silence"¹³⁷—and then, when Biden on May 26, 2021 finally gave the intelligence community the effective go-ahead to get to the bottom of the matter, the press did an about-face. Vox, which is used for fact-checking by Facebook to identify misinformation, reportedly stealth-edited earlier stories to align them with the government's current agnosticism on the issue,¹³⁸ while Facebook announced that it would cease to remove content that suggested the virus came from a lab rather than through human-animal transmission.¹³⁹ But a formidable new alliance had emerged of public and private partners intent on keeping the wrong information and opinions out of the marketplace of ideas. Despite the urging of prominent, non-partisan investigators,¹⁴⁰ as of this date no independent inquiry has been undertaken as to the origin of Covid-19.

By the time of the 2020 presidential election, techniques of information control had become so effective that the security managers seemingly had little awareness of when a dangerous line was crossed. With the aid of friendly social and corporate media, they helped keep the lid on news reports that could have led to the re-election of their great antagonist, Donald Trump.

¹³⁶ See Wade, *supra* note 114.

¹³⁷ *Id.*

¹³⁸ See Nickie Louise, *Vox Caught Stealth Editing an Old Article from March 2020 'Debunking' the Lab Origin of COVID-19*, TECH STARTUPS (May 24, 2021), <https://techstartups.com/2021/05/24/vox-caught-stealth-editing-old-article-march-2020-debunking-lab-origin-covid-19/> [<https://perma.cc/YL4L-C6VK>]. PolitiFact quietly retracted its earlier criticisms of a Chinese whistleblower who claimed that her supervisors covered up evidence of Covid's human-to-human transmissibility. CHAN & RIDLEY, *supra* note 107, at 197-198, 307 (2021). The *Washington Post's* headline, *Tom Cotton Keeps Repeating a Coronavirus Conspiracy Theory That Was Already Debunked*, quietly became *Tom Cotton Keeps Repeating a Coronavirus Fringe Theory That Scientists Have Disputed*. *Id.*

¹³⁹ Press Release, Meta, An Update on Our Work to Keep People Informed and Limit Misinformation About COVID-19 (May 26, 2021, 3:30 PM), <https://about.fb.com/news/2020/04/covid-19-misinfo-update/> [<https://perma.cc/Q48D-J57B>].

¹⁴⁰ See Neil L. Harrison & Jeffrey D. Sachs, *A Call for an Independent Inquiry into the Origin of the SARS-CoV-2 Virus*, PNAS (May 19, 2022), <https://www.pnas.org/doi/10.1073/pnas.2202769119/> [<https://perma.cc/UYQ4-WBXY>].

D. *The Power of Authoritative Opinion: Hunter Biden*

The information in question was potentially devastating. Beginning on October 14, 2020, the *New York Post* reported in a series of articles that, among other things, Hunter Biden had discussed using his connection with his father, while his father was vice president, to boost his pay from a Ukrainian natural gas company¹⁴¹ and that he had introduced his father to an executive in the firm before his father pressured government officials in Ukraine into firing a prosecutor who was investigating the company.¹⁴² The *New York Post's* reporting was, it said, based on emails contained in a laptop and hard drive (eventually seized by the FBI¹⁴³) that had been left for repair in a Delaware computer repair shop but never picked up.¹⁴⁴

¹⁴¹ See Emma-Jo Morris & Gabrielle Fonrouge, *Hunter Biden Emails Show Leveraging Connections with His Father to Boost Burisma Pay*, N.Y. POST (Oct. 14, 2020), <https://nypost.com/2020/10/14/hunter-biden-emails-show-leveraging-connections-with-dad-to-boost-burisma-pay/> [<https://perma.cc/S9JN-ZVLK>].

¹⁴² See Emma-Jo Morris & Gabrielle Fonrouge, *Smoking-gun Email Reveals How Hunter Biden Introduced Ukrainian Businessman to VP Dad*, N.Y. POST (Oct. 14, 2020), <https://nypost.com/2020/10/14/email-reveals-how-hunter-biden-introduced-ukrainian-biz-man-to-dad/> [<https://perma.cc/KZJ5-GXX5>].

¹⁴³ See *id.* (“Photos of a Delaware federal subpoena given to The Post show that both the computer and hard drive were seized by the FBI in December, after the shop’s owner says he alerted the feds to their existence.”).

¹⁴⁴ See Morris & Fonrouge, *supra* note 142 (“The customer who brought in the water-damaged MacBook Pro for repair never paid for the service or retrieved it or a hard drive on which its contents were stored, according to the shop owner, who said he tried repeatedly to contact the client.”). It was conceivable at the time that the *New York Post* had been misled. The paper had, it acknowledged, been given a copy of the hard drive by President Trump’s lawyer, Rudy Giuliani, who had earlier been given a copy by the shop owner before turning it over to the FBI. *Id.* (“But before turning over the gear, the shop owner says, he made a copy of the hard drive and later gave it to former Mayor Rudy Giuliani’s lawyer, Robert Costello. Steve Bannon, former adviser to President Trump, told The Post about the existence of the hard drive in late September and Giuliani provided The Post with a copy of it on Sunday.”). Nonetheless, considerable evidence existed to believe the claim was authentic, some of which has been compiled by the journalist who had won a Pulitzer Prize for reporting on a similar trove of documents at the heart of the Snowden surveillance revelations, Glenn Greenwald. See Glenn Greenwald, *Article on Joe and Hunter Biden Censored by the Intercept*, SUBSTACK (Oct. 29, 2020), <https://greenwald.substack.com/p/article-on-joe-and-hunter-biden-censored/> [<https://perma.cc/5ADZ-V5J6>] (giving evidence proving the authenticity of the relevant emails). Persons who were included in some of the emails have also confirmed their authenticity. See *id.* (“One of Hunter’s former business partners, Tony Bubolinski, has stepped forward on the record to confirm the authenticity of many of the emails and to insist that Hunter along with Joe Biden’s brother Jim were planning on including the former Vice President in at least one deal in China. And GOP pollster Frank Luntz, who appeared in one of the published email chains, appeared to confirm the authenticity as well, though he refused to answer follow-up questions about it.”). The emails’ authenticity was not denied by either of the Bidens, even though the former vice president had claimed in 2019 that he had “never spoken to [his] son about his overseas business dealings.” Amer Madhani, *Biden: I Never Talked to Son Hunter*

The emails were genuine. On March 16, 2022, the *New York Times* reported that it had “authenticated” emails that appeared to come from Hunter Biden’s abandoned laptop, which federal prosecutors were in the process of examining¹⁴⁵—though *Politico* Reporter Ben Schreckinger’s 2021 book, *The Bidens: Inside the First Family’s Fifty-Year Rise to Power* had already established the authenticity of the emails on which the *New York Post* relied.¹⁴⁶

Five days after the initial *New York Post* story appeared, however, on October 19, 2020, fifty-one former intelligence officials, the vast majority from the CIA, signed an open letter responding to the *New York Post*’s report.¹⁴⁷ These included Jim Clapper, Mike Hayden, Leon Panetta, John Brennan, and Michael Morell. They noted that “nine additional former IC officers who cannot be named publicly also support the arguments in this letter.”¹⁴⁸ They emphasized their ties to the intelligence community. They were known to have held high-level security clearances. They identified the governmental positions they had held and emphasized their understanding of “overt and covert activities that undermine United States national security.”¹⁴⁹ Based on their expertise, the signers assured readers that the unveiling of the emails “purportedly belonging to” Hunter Biden “has all the classic earmarks of a Russian information operation”¹⁵⁰—though the letter provided no evidence of

About Overseas Business Dealings, USA TODAY (Sept. 21, 2019), <https://www.usatoday.com/story/news/politics/elections/2019/09/21/joe-biden-never-talked-ukraine-son-trump-needs-investigated/2401830001/> [<https://perma.cc/26T6-ENJB>]. The story was, moreover, clearly relevant to Biden’s candidacy for the presidency, since it raised questions, as Greenwald pointed out, about whether Biden knew about his son’s influence-peddling and whether Biden had taken any actions in his official capacity to benefit his son’s business interests. Greenwald, *supra*.

¹⁴⁵ Katie Brenner, Kenneth P. Vogel, and Michael S. Schmidt, *Hunter Biden Paid Tax Bill, but Broad Federal Investigation Continues*, N.Y. TIMES (Mar. 16, 2022), <https://www.nytimes.com/2022/03/16/us/politics/hunter-biden-tax-bill-investigation.html> [<https://perma.cc/3MAD-YBE2>].

¹⁴⁶ See, e.g., Ryan Lizza et al., *Double Trouble for Biden*, POLITICO (Sept. 21, 2021), <https://www.politico.com/newsletters/playbook/2021/09/21/double-trouble-for-biden-494411> [<https://perma.cc/SN49-77QF>] (discussing Schreckinger’s book, asserting that the book “finds evidence that some of the purported Hunter Biden laptop material is genuine, including two emails at the center of last October’s controversy”).

¹⁴⁷ Jim Clapper et al., Public Statement on the Hunter Biden Emails, (Oct. 19, 2020), <https://www.politico.com/f/?id=00000175-4393-d7aa-af77-579f9b330000> [<https://perma.cc/QQE8-4P7W>]. See also Shannon Larson, *Dozens of Former Intelligence Officials Sign Letter Warning Hunter Biden Story Could be Russian Disinformation*, BOSTON GLOBE (Oct. 20, 2020), <https://www.bostonglobe.com/2020/10/20/nation/dozens-former-intelligence-officials-sign-letter-warning-hunter-biden-story-could-be-russian-disinformation/> [<https://perma.cc/QN25-4652>] (providing press coverage of the public statement).

¹⁴⁸ Clapper et al., *supra* note 147.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

any Russian involvement. “We want to emphasize that we do not know if the emails...are genuine or not and that we do not have evidence of Russian involvement,”¹⁵¹ they wrote. But “our experience makes us deeply suspicious that the Russian government played a significant role in this case.”¹⁵² Such an operation “would be consistent with Russian objectives” and methods.¹⁵³ There were press reports that Russia had been involved in influence operations. “We do not know whether these press reports are accurate,” they wrote. But “it is high time that Russia stops interfering in our democracy.”¹⁵⁴ The same day it appeared, Biden’s spokesperson Jen Psaki tweeted that the “Hunter Biden story is Russian disinfo, dozens of former intel officials say.”¹⁵⁵ She did not, however, deny the authenticity of the emails.¹⁵⁶

The letter did the trick. Press coverage of the matter all but disappeared. The mainstream corporate press instituted a *de facto* blackout. “[V]irtually every media outlet...,” Glen Greenwald wrote, “began completely ignoring the substance of the reporting and instead spread the lie over and over that these documents were the by-product of Russian disinformation.”¹⁵⁷ Explaining NPR’s silence, its managing editor wrote on October 22, 2020 that “[w]e don’t want to waste our time on stories that are not really stories, and we don’t want

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Jen Psaki (@jrpaski), TWITTER (Oct. 19, 2020, 10:45 PM), <https://twitter.com/jrpsaki/status/1318382779659411458> [<https://perma.cc/6MUZ-FMLA>]. In fact, the principal source of disinformation may have been the government. Senator Charles Grassley has advised Attorney General Merrick Garland and FBI Director Christopher Wray of “highly credible whistleblowers” who have reported “a scheme in place among certain FBI officials to undermine derogatory information connected to Hunter Biden by falsely suggesting it was disinformation.” Letter from U.S. Senator Charles Grassley to Attorney General Merrick Garland and FBI Director Christopher Wray (July 25, 2022) (on file with author).

¹⁵⁶ A basic axiom of effective information control is not to respond to unwanted speech with counter-speech, but rather to ignore it. This was the tactic of the “conspiracy unfolding behind the scenes” of the 2020 presidential campaign, reported in a widely-read *Time* magazine article by Molly Ball. The article describes “a well-funded cabal of powerful people, ranging across industries and ideologies, working together behind the scenes to influence perceptions, change rules and laws, steer media coverage and control the flow of information.” Not swinging at most pitches is hard, one of the group’s strategists said, but it wins games. “[T]he more engagement something gets,” another said, “the more the platforms boost it. The algorithm reads that as, ‘Oh, this is popular; people want more of it.’” The solution was to pressure platforms to remove unwanted content or accounts. Molly Ball, *The Secret History of the Shadow Campaign That Saved the 2020 Election*, TIME (Feb. 4, 2021), <https://time.com/5936036/secret-2020-election-campaign/> [<https://perma.cc/99GM-V7D4>].

¹⁵⁷ Glenn Greenwald, *The NYT Now Admits the Biden Laptop—Falsely Called ‘Russian Disinformation’—is Authentic*, SUBSTACK (Mar. 17, 2022), <https://greenwald.substack.com/p/the-nyt-now-admits-the-biden-laptop?s=r> [<https://perma.cc/2MUB-9CJV>].

to waste the listeners' and readers' time on stories that are just pure distractions."¹⁵⁸ Social media companies followed suit. Facebook, in response to an FBI communication,¹⁵⁹ announced that it was “reducing its distribution” pending a fact-check that apparently never materialized.¹⁶⁰ Twitter locked the *New York Post*'s Twitter account for nearly two weeks,¹⁶¹ labeled the link to the story as “potentially unsafe,”¹⁶² and blocked references to it in communications among users.¹⁶³ Over two years after the original *New York Post* report appeared, Matt Taibbi reported, YouTube has continued to post materials—unmarked as disinformation or misinformation—falsely indicating that the laptop story is untrue or the work of Russian intelligence.¹⁶⁴

¹⁵⁸ NPR Public Editor (@NPRpubliceditor), TWITTER (Oct. 22, 2020, 10:15 AM), <https://twitter.com/nprpubliceditor/status/1319281101223940096?lang=en> [<https://perma.cc/NF73-V5BY>].

¹⁵⁹ Jared Gans, *FBI Says It 'Routinely Notifies' Social Media Companies of Potential Threats Following Zuckerberg-Rogan Podcast*, THE HILL (Aug. 27, 2022), <https://thehill.com/policy/national-security/3618137-fbi-says-it-routinely-notifies-social-media-companies-of-potential-threats-following-zuckerberg-rogan-podcast/> [<https://perma.cc/28EB-CHXN>].

¹⁶⁰ Andy Stone (@andymstone), TWITTER (Oct. 14, 2020, 11:10 AM), <https://twitter.com/andymstone/status/1316395902479872000> [<https://perma.cc/EC6F-BS7A>]. See also Katie Glueck, Michael S. Schmidt, and Mike Isaac, *Allegation on Biden Prompts Pushback From Social Media Companies*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/10/14/us/politics/hunter-biden-ukraine-facebook-twitter.html> [<https://perma.cc/K8PA-HAWK>] (stating that “Facebook said that soon after the story was posted it noticed the controversy around the veracity of its claims and over how The Post had obtained the evidence. As the story circulated, the company said it had moved to tamp down its potential for virality. In essence, it meant that Facebook would show fewer instances of shared posts featuring the story in users' News Feeds, the main way people view and share links and other stories across Facebook.”). Facebook's CEO Mark Zuckerberg later seemed to indicate that he regretted the decision to slow distribution of the story. Ryan King, *Mark Zuckerberg Says He Regrets Facebook Throttling Hunter Biden Laptop Story*, WASH. EXAMINER (Aug. 26, 2022) <https://www.washingtonexaminer.com/policy/technology/mark-zuckerberg-regrets-facebook-throttling-hunter-biden-laptop> [<https://perma.cc/82CM-EP8M>].

¹⁶¹ See Greenwald, *supra* note 157 (discussing Twitter locking the *New York Post*'s Twitter account).

¹⁶² Elizabeth Dwoskin, *Facebook and Twitter Take Unusual Steps to Limit Spread of New York Post Story*, WASH. POST. (Oct. 15, 2020), <https://www.washingtonpost.com/technology/2020/10/15/facebook-twitter-hunter-biden/> [<https://perma.cc/APS8-FFFQ>].

¹⁶³ See Greenwald, *supra* note 157 (reporting that “[t]he social media site also blocked any and all references to the reporting by all users; Twitter users were barred even from linking to the story in private chats with one another”).

¹⁶⁴ Matt Taibbi, *YouTube Censors Reality, Boosts Disinformation: Part 1*, SUBSTACK (Nov. 21, 2022), https://taibbi.substack.com/p/youtube-censors-reality-boosts-disinformation?utm_source=post-email-title&publication_id=1042&post_id=85912473&isFreemail=false&utm_medium=email [<https://perma.cc/45G9-8VDD>]. “YouTube,” he writes, “has become a place that censors true content but traffics in official and quasi-official deceptions. It's become indistinguishable from a state censorship bureau.” *Id.*

The letter proved to be critical in the October 23, 2020 presidential debate. Biden neglected to include the intelligence officials' disclaimer—that they had no evidence of Russian involvement—when he flatly claimed that 50 former intelligence officials and CIA heads had said the emails were “a bunch of garbage.”¹⁶⁵ “Look, there are 50 former National Intelligence folks who said that what this, he’s accusing me of is a Russian plan,” he said.¹⁶⁶ “They have said that this has all the characteristics—four—five former heads of the CIA, both parties, say what he's saying is a bunch of garbage.”¹⁶⁷ The moderators of the debate did not point out what the intelligence officials had actually said—that they had no evidence of actual Russian involvement. The impression stuck: using all the esoteric tools of their trade, the objective experts in the intelligence community had examined the story, weighed all the evidence, and found it fake. No further discussion was needed; case closed.

It is impossible to know for certain whether this tactic swayed the 2020 presidential election. A week before the election, however, and a week after the letter appeared, 51 percent of likely voters believed the discovery of Hunter Biden's laptop was Russian disinformation.¹⁶⁸ Had 44,000 votes in three swing states—Georgia, Arizona, and Wisconsin—been cast for Trump rather than Biden, the two would have tied in the Electoral College.¹⁶⁹ Nearly a third of Americans viewed the results of the election as illegitimate.¹⁷⁰

¹⁶⁵ *Debate Transcript: Trump, Biden Final Presidential Debate Moderated by Kristen Welker*, USA TODAY (Oct. 23, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/10/23/debate-transcript-trump-biden-final-presidential-debate-nashville/3740152001/> [<https://perma.cc/RR6Q-GDWJ>].

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See, e.g.,* Johnathan Easley, *Poll: Biden Builds Bigger Lead Nationally*, THE HILL (Oct. 29, 2020), <https://thehill.com/homenews/campaign/523462-poll-biden-builds-bigger-lead-nationally/> [<https://perma.cc/AK8Z-PRX6>] (finding that “[a] slim majority, 51 percent, believe the discovery of Hunter Biden's laptop at a pawn shop is Russian disinformation,” and opining that this is despite the fact that “there is no evidence for that”). Nearly two years later, half of Democrats and 47 percent of independents continued to believe that the Hunter Biden laptop is “Russian disinformation.” Harvard CAPS Harris Poll, HARVARD UNIVERSITY CENTER FOR AMERICAN POLITICAL STUDIES 46, Sept. 7–8, 2022, https://harvardharrispoll.com/wp-content/uploads/2022/09/HHP_Sept2022_KeyFindings.pdf (50% of polled Democrats believe that the Hunter Biden laptop is “Russian Disinformation” whereas in aggregate; Tom Bevan (@TomBevanRCP), TWITTER (Sept. 13, 2022, 12:04 PM), <https://twitter.com/tombevanrcp/status/1569718637551828993> [<https://perma.cc/X9XE-HXGC>]).

¹⁶⁹ *See* Domenico Montanato, *President-Elect Joe Biden Hits 80 Million Votes in Year of Record Turnout*, NPR (Nov. 25, 2020), <https://www.npr.org/2020/11/25/937248659/president-elect-biden-hits-80-million-votes-in-year-of-record-turnout> [<https://perma.cc/PGG4-KWJP>].

¹⁷⁰ *See, e.g.,* Univ. Mass. Amherst, *Toplines and Crosstabs December 2021 National Poll: Presidential Election & Jan 6th Insurrection at the US Capitol* (Dec. 28, 2021),

Yet there can be little doubt that the American people were deprived of information on which to make an informed choice in a presidential election. The security managers had achieved the power to shutter the marketplace of ideas, even in the heat of a presidential election campaign, by trading upon their privileged positions of trust to express supposedly neutral professional assessments that were accepted by the media as actual fact. The media then carried the approved narrative, uninvestigated and uncontradicted, as it engulfed additional informational channels. Whether the narrative was true or false was beside the point: It was authoritative.

II. THE SYMBIOTIC SNARL

How had this level of information control become possible? How, indeed, had it suddenly become so easy? The answer lies in good part in the rapid digitization of the marketplace of ideas—specifically, in social media. For millions of Americans as well as for billions of people worldwide, the marketplace of ideas has become the internet, and the internet has become social media.¹⁷¹ Two-thirds of Americans rely upon social media as their prime source for news.¹⁷² The internet companies often proclaim that they are private businesses, but the reality is that in the world of social media, it is all but impossible to separate government actors from private actors in any non-arbitrary way. The categories demarking clear public and private spheres do not work.¹⁷³ Where it counts, voices of the government and social media platforms have become indistinguishable; their interlocking words and actions of have become so entangled as to create, in Daphne Keller’s word, a “snarl.”¹⁷⁴

<https://polsci.umass.edu/toplines-and-crosstabs-december-2021-national-poll-presidential-election-jan-6th-insurrection-us> [<https://perma.cc/B5NW-RXWW>] (poll finding 11% of respondents believe that Joe Biden’s victory was “probably not legitimate,” 22% believe that the victory is “definitely not legitimate” and 9% were unsure.).

¹⁷¹ In 2021, roughly three-fourths of American adults had Facebook accounts. Cato Inst./YouGov Poll, Cato Institute (Aug. 2021), <https://www.cato.org/sites/cato.org/files/2021-12/cato-social-media-survey-report-toplines.pdf> [<https://perma.cc/4PPF-8DCT>].

¹⁷² SUZANNE NOSSEL, *DARE TO SPEAK: DEFENDING FREE SPEECH FOR ALL* 234 (HarperCollins Publishers 2020).

¹⁷³ This is, to be sure, not the first time the lines between the public and private spheres have blurred. See ROBERTO UNGER, *LAW IN MODERN SOCIETY* 202 (1976) (arguing that “the increasing recognition of the power these [corporate] organizations exercise, in a quasi-public manner . . . makes it even harder to maintain the distinction between state action and private conduct.”).

¹⁷⁴ Daphne Keller, *Who Do You Sue?: State and Platform Hybrid Power Over Online Speech* 7 (Hoover Working Grp. on Nat’l Sec., Tech. & Law, Aegis Series Paper No. 1902, 2019), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf [<https://perma.cc/K2NF-69TV>] (describing the “snarl” of “state and private power”).

The intimacy of that partnership came to light most vividly for the public in 2013 with documents leaked from the National Security Agency by Edward Snowden, which revealed, among other things, that the social media platforms were feeding the NSA information about their users.¹⁷⁵ Nearly a decade later, the collaboration continues; Facebook reportedly has “a formalized process for government officials to directly flag content on Facebook or Instagram and request that it be throttled or suppressed through a special Facebook portal that requires a government or law enforcement email to use.”¹⁷⁶ The partnership between big tech and the security apparatus is not new, however. They have, in fact, been enmeshed from the beginning. Two decades ago, the intelligence community worked closely with Silicon Valley to shape research and development efforts on search engines.¹⁷⁷ “The original research by Larry Page and Sergey Brin which led to their founding of Google,” according to the *Washington Post*, “was funded by grants from the NSA, CIA, the Pentagon’s DARPA program and the National Science Foundation.”¹⁷⁸ The companies have since profited from lucrative contracts for

¹⁷⁵ As succinctly summarized by Jack Goldsmith, the NSA “set up a system to collect huge quantities of intelligence information, not just by breaking into foreign networks but also by (among other means) demanding information from Google, Yahoo, Facebook, and other American firms that themselves collected data from abroad, especially communications of individuals.” Jack Goldsmith, *The Failure of Internet Freedom*, in *THE PERILOUS PUBLIC SQUARE: STRUCTURAL THREATS TO FREE EXPRESSION TODAY* 238–47 (David E. Pozen ed., 2020). Contrary to popular belief, mass surveillance has not ended. Between December 2020 and November 2021, “[t]he FBI searched emails, texts and other electronic communications of as many as 3.4 million U.S. residents without a warrant over a year.” Chris Strohm, *FBI Searched Data of Millions of Americans Without Warrants*, *BLOOMBERG* (Apr. 29, 2022), <https://www.bloomberg.com/news/articles/2022-04-29/fbi-searched-the-data-of-millions-of-americans-without-warrants?leadSource=verify%20wall> [<https://perma.cc/WLG7-EHAG>].

¹⁷⁶ See Klippenstein & Fang, *supra* note 61 (reporting on the relationship between government agencies and Facebook that “[t]here is also a formalized process for government officials to directly flag content on Facebook or Instagram and request that it be throttled or suppressed through a special Facebook portal that requires a government or law enforcement email to use. At the time of writing, the “content request system” at facebook.com/xtakedowns/login is still live.”)

¹⁷⁷ See, e.g., Jeff Nesbit, *Google’s True Origin Partly Lies in CIA and NSA Research Grants for Mass Surveillance*, *QUARTZ* (Dec. 8, 2017), <https://qz.com/1145669/googles-true-origin-partly-lies-in-cia-and-nsa-research-grants-for-mass-surveillance/> [<https://perma.cc/ZR4S-U9GS>] (finding that as a graduate student, one of Google’s founders, Sergey Brin, met regularly with two intelligence-community managers while researching how search functions could be used to pull precise information from very large data sets; the CIA was interested in using such data to identify and track individual users who might pose security threats).

¹⁷⁸ Gerrit De Vynck, *Government Has Key Role in Tech Investing, Google Board Member Says*, *WASH. POST* (Aug. 17, 2022), <https://www.washingtonpost.com/politics/2022/08/17/government-has-key-role-tech-investing-google-board-member-says/> [<https://perma.cc/R7YB-VQHN>].

their services.¹⁷⁹ Since their inception, social media companies have been given a bulletproof shield against the slings and arrows suffered by all other publishers (which they claim not to be¹⁸⁰)—by Section 230 of the 1996 Communications Decency Act, which immunizes companies from liability for content posted by their users¹⁸¹ and has financially advantaged the companies over competing media not sheltered from lawsuits by their users and readers. “I don’t think any of the social media companies would exist in their current forms without Section 230,” one authority put it.¹⁸² Many agreed, including the social media companies. “Section 230 made it possible for every major internet service to be built,”¹⁸³ said Facebook CEO Mark Zuckerberg. “If every Facebook post or tweet had to undergo libel vetting,” wrote a member of Facebook’s Oversight Board, Suzanne Nossel, “the Internet as we know it would not exist.”¹⁸⁴ Google (which bought YouTube in 2006) has acknowledged that without Section 230 protection, it would “not be able to filter content at all.”¹⁸⁵ High-ranking Washington officials often remind the tech companies of their reliance on government largesse in the form of Section 230 immunity. As House Speaker Nancy Pelosi told them, Section 230 is a “gift” to tech companies—a gift “that could be removed.”¹⁸⁶

¹⁷⁹ See Aaron Gregg, *CIA Long Relied Exclusively on Amazon for its Cloud Computing*, WASH. POST (Apr. 2, 2019), <https://www.washingtonpost.com/business/2019/04/02/cia-long-relied-exclusively-amazon-its-cloud-computing-now-it-is-seeking-multiple-providers-massive-new-contract/> [<https://perma.cc/BJR6-JGPB>]; Frank Konkel, *The Details About the CIA’s Deal With Amazon*, THE ATLANTIC (Jul. 17, 2004), <https://www.theatlantic.com/technology/archive/2014/07/the-details-about-the-cias-deal-with-amazon/374632/> [<https://perma.cc/B3GX-AKEZ>] (describing how in 2013, the CIA awarded a \$600 million contract to Amazon’s cloud computing division, later announcing its intent to enter into similar contracts with other tech giants).

¹⁸⁰ See *infra* text accompanying note 339.

¹⁸¹ 47 U.S.C. § 230 (c)(1) (“no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

¹⁸² Barbara Ortutay, *AP Explains: The Rule that Made the Modern Internet*, AP NEWS (Oct. 28, 2020), <https://apnews.com/article/what-is-section-230-tech-giants-77bce70089964c1e6fc87228ccdb0618> [<https://perma.cc/3K87-ZZ2Z>].

¹⁸³ *Does Section 230’s Sweeping Immunity Enable Big Tech Bad Behavior?: Hearing Before the S. Comm. on Com., Sci., & Transp.*, 116th Cong. 2 (2020) (statement of Mark Zuckerberg, CEO, Facebook Inc.).

¹⁸⁴ NOSSEL, *supra* note 172, at 240.

¹⁸⁵ *Disinformation Nation: Social Media’s Role in Promoting Extremism and Misinformation: Hearing Before the H. Comm. on Energy & Com.*, 117th Cong. 10 (2021) (statement of Sundar Pichai, CEO, Alphabet Inc.).

¹⁸⁶ Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html> [<https://perma.cc/2LYN-BGER>]. See also Eric Johnson, *Nancy Pelosi Says Trump’s Tweets “Cheapened the Presidency” — and the Media Encourages Him*, VOX (Apr. 12, 2019), <https://www.vox.com/2019/4/12/18307957/nancy-pelosi-donald-trump-twitter-tweet-cheap-freak-presidency-kara-swisher-decode-podcast-interview> [<https://perma.cc/2F3F-39CH>] (podcast transcript for Nancy Pelosi: “I do think that for the

The giving and threatened retraction of governmental gifts proved to be continually useful carrots and sticks. In April 2022, seven former national security officials openly lobbied against tighter regulation of internet companies that would have prohibited discrimination against business users.¹⁸⁷ In September 2021, twelve former and current security officials—all with major ties to the tech companies—warned against enforcing antitrust laws against them on national security grounds¹⁸⁸ (a claim also advanced by Apple’s CEO, Tim Cook¹⁸⁹). The argument is sometimes made that those who do not like big tech’s social media platforms can simply go elsewhere, but comparable alternatives rarely exist¹⁹⁰—and the lessons of Parler loom large for those who might try to create them.¹⁹¹ The same applies to the argument that the censored

privilege of 230, there has to be a bigger sense of responsibility on it. And it is not out of the question that that could be removed.”)

¹⁸⁷ See James Clapper et al., Open Letter from Former Defense, Intelligence, Homeland Security, and Cyber Officials for National Security Review of Congressional Tech Legislation (Apr. 18, 2022), <https://punchbowl.news/open-letter-cyber-intel-defense-hs-1/> [<https://perma.cc/RHP6-2EZT>].

¹⁸⁸ See Emily Birnbaum, *12 Former Security Officials Who Warned Against Antitrust Crackdown Have Tech Ties*, POLITICO (Sept. 22, 2021), <https://www.politico.com/news/2021/09/22/former-security-officials-antitrust-tech-ties-513657> [<https://perma.cc/JX9G-FSGH>]. Several were among the signers of the “Hunter Biden letter” described earlier, suggesting that his emails were Russian disinformation. Compare Letter from Robert Cardillo, et. al, to Nancy P. Pelosi and Kevin O. McCarthy (Sept. 15, 2021), <https://www.documentcloud.org/documents/21062393-national-security-letter-on-antitrust?responsive=1&title=1> [<https://perma.cc/7VLB-7FKV>] with Public Statement from Jim Clapper, et. al (Oct. 19, 2022), <https://www.politico.com/f/?id=00000175-4393-d7aa-af77-579f9b330000> [<https://perma.cc/6Q55-4B73>].

¹⁸⁹ Matt Stoller (@matthewstoller), TWITTER (Apr. 12, 2022, 2:05 PM), <https://twitter.com/matthewstoller/status/1513941334666665986> [<https://perma.cc/RJH4-M58A>].

¹⁹⁰ Donald Trump’s Truth Social platform, for example, founded after Trump was banned from Twitter and patterned after it, had 513,000 active daily users in April 2022, compared to Twitter’s 217 million. Nicole Lyn Pesce, *Two Truth Social Execs Quit as Trump’s Social Media App Struggles to Take Off*, MARKETWATCH (Apr. 4, 2022), <https://www.marketwatch.com/story/two-truth-social-exec-quit-as-trumps-social-media-app-struggles-to-take-off-report-11649090306> [<https://perma.cc/4GNL-78Y9>]. The *Washington Post* reported that the Truth Social “website is facing financial challenges as its traffic remains puny,” and that “Trump, the site’s most popular user, has fewer than 4 million followers, and the site’s most active trending topics, including #DefundTheFBI, have shown only a few thousand people posting to them in recent days, data from the site shows. For comparison, Twitter says it has about 37 million people in the U.S. actively using the site every day.” Drew Harwell, *Truth Social Faces Financial Peril as Worry About Trump’s Future Grows*, WASH. POST (Aug. 27, 2022), <https://www.washingtonpost.com/technology/2022/08/27/trump-truth-social-mar-a-lago-fbi/> [<https://perma.cc/PU8K-7KUG>].

¹⁹¹ See Glenn Greenwald, *How Silicon Valley, in a Show of Monopolistic Force, Destroyed Parler*, SUBSTACK (Jan. 12, 2021), <https://greenwald.substack.com/p/how-silicon-valley-in-a-show-of-monopolistic>. [<https://perma.cc/P3ER-9ZM8>].

can simply post on another platform, as the Fifth Circuit United States Court of Appeals observed in September, 2022 in *Netchoice v. Paxton*: “As Justice Thomas has aptly pointed out, that’s like telling a man kicked off the train that he can still ‘hike the Oregon Trail.’”¹⁹²

Today, the internet companies and the government are woven together in a web of interlocking relationships that make it impossible to tell where one ends and the other begins.¹⁹³ Groups and individuals who are partly in and partly out of government¹⁹⁴ coordinate and cooperate to ensure that unwelcome information and ideas are not expressed.¹⁹⁵ This is not done by legal fiat, such as statutory enactments that close presses, silence television stations, or ban

¹⁹² *NetChoice, LLC v. Paxton*, 49 F.4th 439, 476 (5th Cir. 2022) (quoting *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1225 (2021) (Thomas, J., concurring)).

¹⁹³ See Whizy Kim, *Ex-Google CEO Eric Schmidt’s New Investment Fund Deepens His Ties to National Security Interests*, VOX (June 9, 2022), <https://www.vox.com/recode/2022/6/9/23160588/eric-schmidt-americas-frontier-fund-google-alphabet-tech-government-revolving-door> [https://perma.cc/KZD5-4DKK] (describing a “public-private, deep-tech fund” that would receive government funding alongside private money funded by Michael Schmidt, former Google CEO, “a go-to liaison between the tech industry and the military”).

¹⁹⁴ A 2021 *Newsweek* investigation reported the existence of a “secret army” of 60,000 people created by the Pentagon, working under masked identities and under civilian cover, “who assume false personas online, employing ‘nonattribution’ and ‘misattribution’ techniques to hide the who and the where of their online presence while they . . . engage in campaigns to influence and manipulate social media.” William M Arkin, *Exclusive: Inside the Military’s Secret Undercover Army*, NEWSWEEK (May 17, 2021), <https://www.newsweek.com/exclusive-inside-militarys-secret-undercover-army-1591881> [https://perma.cc/XDU7-ET9X].

¹⁹⁵ For comprehensive analysis see Shir-Razl et al., *supra* note 41. Among their conclusions: “Some governments and tech corporations, such as Facebook, Google, Twitter and LinkedIn, have taken measures to censor contrary viewpoints, arguing that views challenging government policies are dangerous misinformation. . . . This heavy censorship was done with the encouragement of governments, which cooperated with tech companies such as Facebook, Twitter, and Google. . . . [G]overnment officials directly coordinated with tech companies like Twitter and Facebook to censor doctors, scientists and journalists. . . . [I]nformation technology companies such as Google and Facebook play a prominent role in the attempts of governments and authorities to censor dissenting positions on COVID-19.” *Id.* (citations omitted). See also Klippenstein & Fang, *supra* note 61. Glenn Greenwald, *The Consortium Imposing the Growing Censorship Regime*, SUBSTACK, Oct. 28, 2022 <https://greenwald.substack.com/p/the-consortium-imposing-the-growing> (underscoring the collaboration between government and private actors to silence speech and the use of financial services of blacking out dissenters such as WikiLeaks) Contrary to popular impression, cooperation is reportedly not limited to social media. See Tad Galen Carpenter, Opinion, *How the National Security State Manipulates the News Media*, CATO INSTITUTE (March 9, 2021), <https://www.cato.org/commentary/how-national-security-state-manipulates-news-media> [https://perma.cc/SN9F-GS6K] (describing investigative journalism that details continuing ties between mainstream media and the intelligence community).

speeches, but through government “recommendations” and “guidance.”¹⁹⁶ Explicit *quid pro quos* are rare, but conscious parallelism is evident: government actors make their wishes known, and private actors align their conduct accordingly. In this way, speech is silenced with what Keller has called “laundered” state action.¹⁹⁷

Often the government’s wishes do not need to be spelled out. Social media companies know how broadly the government now defines its security mission. For generations, protecting the nation’s security was thought to mean safeguarding its people’s physical safety, defending the population against real or threatened violence. The new security apparatus has taken on responsibility for far more. Combatting infectious diseases, as described above,¹⁹⁸ is one expanded mission. Another is to “advance gender equality, LBGTQI+ rights, and women’s empowerment as part of our broader commitment to inclusive economic growth and social cohesion,” aims set out in the most recent National Security Strategy.¹⁹⁹ Perhaps its most far-reaching new mission involves it in domestic information warfare and an extraordinary objective: combating information that is true but, in its view, harmful.

Fighting misinformation, disinformation, and mal-information that is “introduced and/or amplified by foreign and domestic threat actors” is a paramount goal, the Department of Homeland Security (DHS) said in a national terrorism advisory bulletin on February 7, 2022.²⁰⁰ The Cybersecurity and Infrastructure Security Agency, the agency within DHS responsible for federal cybersecurity, defines “mal-information” as based on fact, but used out

¹⁹⁶ See, e.g., Keller, *supra* note 174 (describing the indirect pressure of government “jawboning,” which “in its subtler forms makes state action much harder to trace.”); Shir-Raz et al., *supra* note 41 (describing the recommendations and guidance provided for censoring Covid information); Editorial, *Climate-Change Censorship: Phase Two*, WALL ST. J. (June 13, 2022) (remarks of the senior White House climate adviser urging “the tech companies to really jump in” to silence criticism of green energy), https://www.wsj.com/articles/climate-censorship-phase-two-gina-mccarthy-social-media-biden-white-house-11655156191?mod=hp_opin_pos_3 [<https://perma.cc/QYT8-GC7P>]. See also Michael Shellenberger, *Why the Biden Admin Wants Censorship of Renewable Energy Critics*, SUBSTACK (June 14, 2022), <https://michaelsellenberger.substack.com/p/why-the-biden-admin-wants-censorship?s=r> [<https://perma.cc/CK3M-YNN9>]. See also Jacob Sullum, *Biden Is Trying to Impose Online Censorship by Proxy*, REASON (July 21, 2021), <https://reason.com/2021/07/21/biden-is-trying-to-impose-online-censorship-by-proxy/> [<https://perma.cc/K7G5-8MVX>].

¹⁹⁷ Keller, *supra* note 174, at 10.

¹⁹⁸ WHITE HOUSE, *supra* note 56.

¹⁹⁹ WHITE HOUSE, INTERIM NATIONAL SECURITY STRATEGIC GUIDANCE 12 (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/03/NSC-1v2.pdf> [<https://perma.cc/RHK6-W8RC>].

²⁰⁰ U.S. Dep’t of Homeland Sec., *supra* note 34.

of context to mislead, harm, or manipulate.²⁰¹ The term “context” is not defined. Presumably, it falls to the government, as each case arises, to determine whether its “context” permits the speech in question. “Threat actors,” the bulletin says, use mis-, dis- and mal-information “to exacerbate societal friction to sow discord and undermine public trust in government institutions to encourage unrest”²⁰² DHS’s announced solution to the problem of mal-information is to stop its “proliferation”—i.e., its publication.²⁰³ It will do this, DHS announced, by working with public and private sector partners, as well as foreign counterparts, to identify and evaluate mis-, dis-, and mal-information, including false or misleading narratives.²⁰⁴ Who these partners will be, what they will do, and whether they will be trained, paid, or rewarded by the government for joining it in preventing the publication of speech is not specified; their aim will be to help the government slow the “introduc[ti]on and amplifi[cat]ion” of mal-information and to prevent its authors from “undermin[ing] public trust in U.S. government institutions.”²⁰⁵

DHS doubled-down on the war against unwanted speech on April 27, 2022 when its head announced to Congress that it would be setting up a “Disinformation Governance Board”;²⁰⁶ its functions were largely unspecified, but the White House press secretary said the next day that “the objective of the board is to prevent disinformation and misinformation from traveling around the country in a range of communities.”²⁰⁷ Scholars pointed out that the new Board brought to mind President Woodrow Wilson’s Committee on Public Information. That board was announced without congressional approval in a

²⁰¹ See *MIS, DIS, MALINFORMATION*, CYBER & INFRASTRUCTURE SEC. AGENCY, <https://www.cisa.gov/mdm> [<https://perma.cc/3B7Z-T5EJ>] (“Misinformation, disinformation, and malinformation make up what CISA defines as ‘information activities’ When this type of content is released by foreign actors, it can be referred to as foreign influence. Definitions for each are below. Misinformation is false, but not created or shared with the intention of causing harm. Disinformation is deliberately created to mislead, harm, or manipulate a person, social group, organization, or country. Malinformation is based on fact, but used out of context to mislead, harm, or manipulate.”).

²⁰² U.S. Dep’t of Homeland Sec., *supra* note 34.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ See Amanda Seitz, *Disinformation Board to Tackle Russia, Migrant Smugglers*, AP NEWS (Apr. 28, 2022), <https://apnews.com/article/russia-ukraine-immigration-media-europe-misinformation-4e873389889bb1d9e2ad8659d9975e9d> [<https://perma.cc/M2J5-TSE8>].

²⁰⁷ Press Briefing, White House, Press Briefing by Secretary Jen Psaki (Apr. 28, 2022), <https://www.whitehouse.gov/briefing-room/press-briefings/2022/04/28/press-briefing-by-press-secretary-jen-psaki-april-28-2022/> [<https://perma.cc/C5P5-YBWS>]. The “disinformation expert” appointed to head the Disinformation Governance Board had earlier proclaimed that the Hunter Biden laptop story was “a Trump campaign product.” See Eric Tucker and Stephen Braun, *AP Explains: Trump Seizes on Dubious Biden-Ukraine Story*, AP NEWS (Oct. 14, 2020), <https://apnews.com/article/election-2020-joe-biden-donald-trump-ukraine-elections-134406f28e826380924bbcf773d2c05a> [<https://perma.cc/37Q2-TD9V>].

vague, three-sentence executive order, headed by a pyrotechnic muckraker, and “grew willy-nilly into a ministry of propaganda.”²⁰⁸ Following an avalanche of public criticism, the launch of the new Board was “paused”²⁰⁹ and then suspended.²¹⁰ Nowhere did DHS indicate concerns about disinformation²¹¹ originating from the government itself.²¹² DHS’s interest lay in curtailing *corrections* to the government’s disinformation.

²⁰⁸ John Hamilton & Kevin Kosar, *Why Biden Is in Danger of Replicating Woodrow Wilson’s Propaganda Machine*, POLITICO MAG. (May 5, 2022), <https://www.politico.com/news/magazine/2022/05/05/disinformation-propaganda-war-board-biden-woodrow-wilson-00030098> [<https://perma.cc/3WB4-T638>].

²⁰⁹ See Rebecca Beitsch, *DHS To Pause Work of Disinformation Board*, THE HILL (May 18, 2022), <https://thehill.com/news/state-watch/3493070-dhs-to-pause-work-of-disinformation-board/> [<https://perma.cc/9V5H-7P2M>].

²¹⁰ Steven Lee Meyers, *A Panel to Combat Disinformation Becomes a Victim of It*, N.Y. TIMES (May 18, 2022), <https://www.nytimes.com/2022/05/18/technology/disinformation-governance-board.html> [<https://perma.cc/3933-FACS>].

²¹¹ For example, a year-old CDC press release remained live on its website throughout the DHS disinformation Board controversy. See Press Release, Ctrs. for Disease Control and Prevention, *CDC COVID-19 Study Shows mRNA Vaccines Reduce Risk of Infection by 91 Percent for Fully Vaccinated People* (June 7, 2021), <https://www.cdc.gov/media/releases/2021/p0607-mrna-reduce-risks.html> [<https://perma.cc/6QKV-NTPV>].

²¹² See *infra* text accompanying notes 258–281. Justin Monticello notes:

The CDC has . . . been a superspreader of COVID misinformation. To justify universal mask mandates, Walensky spent months citing a junk study on their efficacy in schools, exaggerating the risks of breakthrough infections among the vaccinated, and misrepresenting a study on outdoor COVID transmission, according to its author.

The CDC claimed the delta variant was as transmissible as chickenpox, which isn't true—it turns out the agency had used inaccurate data from a New York Times infographic. It also promoted an infographic on cloth masks using data that were not statistically significant. Meanwhile, the CDC has not run a single randomized controlled trial on the efficacy of masking since the beginning of the pandemic.

In the vaccine rollout, the CDC told the elderly they needed to wait in line behind essential workers, including young and healthy school support staff, corporate tax lawyers, and magazine fashion editors. In its noble zeal to convince parents to get their children vaccinated, the CDC used old data that the agency knew were no longer valid to falsely claim hospitalizations were rising among adolescents; it misrepresented a study to exaggerate the dangers faced by unvaccinated children, and it falsely claimed that kids who get COVID are more likely to develop diabetes.

Under both the Trump and Biden administrations, the CDC publicly cast doubt on the value of N95 masks, vaccines, and diagnostic tests at times when there were supply shortages or when it was politically expedient. Both presidents even used the CDC to exert federal control over state-level housing policy, repeatedly extending an unconstitutional ban on evictions based on junk science.

The regulatory sword of Damocles thus hangs constantly over social media companies, which adjust their content policies accordingly. “Platforms’ anticipatory obedience spares governments the need to enact actual laws,”²¹³ as Keller puts it; the subtlest hint from government often gets quick results. Examples abound, many of which are familiar.²¹⁴ Taken together, they reveal a public/private tapestry that is too tightly knit to unweave, government actors who offer guidance that is hard to refuse, and private actors whose conduct aligns with that guidance. “If members of the public were more aware of all the ways that the U.S. government works with and makes ‘requests’ of these companies,” David Pozen has written, “I suspect findings of state action would be more forthcoming.”²¹⁵

A. ‘*Yep, on it!*’

Members of the public were given an unusual window into the ways the government colludes with social media in August 2022 with the release of hundreds of pages of documents turned over in discovery in a lawsuit brought by the attorneys general of Missouri and Louisiana, who alleged that the Biden Administration breached the First Amendment by encouraging social-media platforms to suppress viewpoints at odds with the government’s messaging on Covid-19 and other subjects.²¹⁶ The documents, mostly emails, revealed a network of 45 federal officials in eleven federal departments and agencies, including the White House, who communicated regularly with five major social media companies about disfavored information and its suppression.²¹⁷

Justin Monticello, *COVID-19 Exposed the Truth About the CDC*, REASON (June 28, 2022), <https://reason.com/video/2022/06/28/covid-19-exposed-the-truth-about-the-cdc/> [https://perma.cc/35Y2-7VEX].

²¹³ Keller, *supra* note 174, at 2.

²¹⁴ Complaint at 20–33, *Missouri v. Biden*, No. 3:22-cv-01213 (W.D. La. Jul. 2, 2022) (listing recent examples).

²¹⁵ David E. Pozen, *Straining (Analogies) to Make Sense of the First Amendment in Cyberspace*, in *THE PERILOUS PUBLIC SQUARE: STRUCTURAL THREATS TO FREE EXPRESSION TODAY* 141 (David E. Pozen ed. 2020).

²¹⁶ See Complaint at 1, *Missouri v. Biden*, No. 3:22-cv-01213 (W.D. La. Jul. 2, 2022). The New Civil Liberties Alliance joined the action on behalf of authors of the Great Barrington Declaration, described in *infra* text accompanying notes 282–288. See Press Release, New C. L. All., NCLA Clients Join Missouri and Louisiana Suit Challenging Gov’t-Directed Social Media Censorship (Aug. 2, 2022), <https://nclalegal.org/2022/08/ncla-clients-join-missouri-and-louisiana-suit-challenging-govt-directed-social-media-censorship/> [https://perma.cc/JHA8-H7SR].

²¹⁷ See The Parties’ Joint Statement on Discovery Disputes at 9, *Missouri v. Biden*, No. 3:22-cv-01213 (W.D. La. Aug. 31, 2022) (hereinafter “Joint Statement”); Jacob Sullum, *These Emails Show How the Biden Administration’s Crusade Against ‘Misinformation’ Imposes Censorship by Proxy*, REASON (Sept. 1, 2022), https://reason.com/2022/09/01/these-emails-show-how-the-biden-administrations-crusade-against-misinformation-imposes-censorship-by-proxy/?itm_source=parsely-api [https://perma.cc/8G9Q-8KXG].

These efforts, the plaintiffs said, went beyond what they “could ever have anticipated.”²¹⁸

The companies’ collegial relationship with the government—their “oozing solicitousness,”²¹⁹ as the *Wall Street Journal* Editorial Board described it—is reflected in a July 20, 2021 email exchange between the White House and Facebook.²²⁰ A White House official asks Facebook to deactivate a parody of Anthony Fauci that appeared on Instagram, which Facebook owns. “Hi there,” the official says, “any way we can get this pulled down. It is not actually one of ours.” “Yep, on it!” comes the chipper Facebook reply.²²¹ In another email, written the same day President Biden accused Facebook of “killing people,”²²² a senior Facebook official writes the Surgeon General, stating, “I know our teams met today to better understand the scope of what the White House expects from us on misinformation going forward.”²²³ Another describes a meeting between Twitter and White House officials intended to allow the White House to “partner” with Twitter in suppressing

²¹⁸ Brief for the Petitioner at 3, *Missouri v. Biden*, No. 3:22-cv-01213 (W.D. La. Aug. 31, 2022).

²¹⁹ Editorial, *How the Feds Coordinate with Facebook on Censorship*, WALL ST. J. (Sept. 9, 2022), https://www.wsj.com/articles/how-the-feds-coordinate-with-facebook-twitter-white-house-social-media-emails-covid-instagram-11662761613?mod=hp_opin_pos_1 [https://perma.cc/MCP8-T8NP].

²²⁰ Jeffrey Tucker describes this relationship as an “obsequious friendship.” He writes:

What you see here is not antagonism but obsequious friendship: ongoing, relentless, guileless, as if nothing could be wrong here. They knew what they believed to be the problem voices and were determined to stamp them out . . . Finally we see courts coming around to the view that government needs to be held accountable for its actions. It is happening far too little and far too late but at least it is happening.

Jeffrey A. Tucker, *Judge Orders Fauci to Cough It Up*, BROWNSTONE INST. (Sept. 8, 2022), <https://brownstone.org/articles/judge-orders-fauci-to-cough-it-up/> [https://perma.cc/E63W-EANK].

²²¹ Joint Statement, *supra* note 217, Exhibit 3 at 1. (Emails sent on July 20, 2021).

²²² See Jessica Bursztynsky, *White House Says Social Media Networks Should Be Held Accountable for Spreading Misinformation*, CNBC (Jul. 20, 2021), <https://www.cnbc.com/2021/07/20/white-house-social-networks-should-be-held-accountable-for-spreading-misinfo.html> [https://perma.cc/J7NX-D8HN] (noting that Biden said giants like Facebook were “killing people” on July 16, 2020, before later backtracking on his comments).

²²³ Eric Schmitt, *Missouri and Louisiana Attorneys General Ask Court to Compel Department of Justice to Produce Communications Between Top Officials and Social Media Companies*, MO. ATT’Y GEN. OFF. (Sept. 1, 2022), <https://ago.mo.gov/home/news/2022/09/01/missouri-and-louisiana-attorneys-general-ask-court-to-compel-department-of-justice-to-produce-communications-between-top-officials-and-social-media-companies> [https://perma.cc/7W92-3GLX].

Covid misinformation.²²⁴ In another, the head of the CISA texts another CISA official about “trying to get us in a place where Fed can work with platforms to better understand the mis/dis trends so relevant agencies can try to prebunk/debunk as useful.”²²⁵ The platforms, the email rues, are hesitant to work with the government: “[p]latforms have got to get more comfortable with gov’t. It’s really interesting how hesitant they remain.”²²⁶

The companies apparently managed to overcome that hesitancy. Officials at CISA, the documents show, routinely received reports of perceived “disinformation” and forwarded them to social-media companies; the Department of Health and Human Services provided lists of examples of disfavored posts, fact checked for the platforms, and organized weekly meetings to flag disfavored content.²²⁷ Meanwhile, the companies gave government officials special confidential communication channels to convey what they wanted the companies to suppress. Facebook trained CDC and Census Bureau officials to use a “Facebook misinfo reporting channel.”²²⁸ Twitter provided federal officials a privileged channel for flagging misinformation through a “Partner Support Portal.”²²⁹ YouTube gave “trusted flagger” status to Census Bureau officials.²³⁰

DHS Secretary Mayorkas described these efforts to police speech on social media as occurring “across the federal enterprise.”²³¹ The enterprise is indeed, as the plaintiffs’ summary of the documents indicates, a “massive, sprawling federal”²³² effort to suppress private speech that federal officials disfavor. But no one should have been surprised. The broad contours of the program were visible before formal confirmation occurred, as even the public record suggests.

B. Government ‘Recommendations’

Multiple government officials have publicly pressured social media heads to suppress “misinformation” and other disliked information. Examples are numerous; in a comprehensive study, Will Duffield has identified 62 occasions on which government officials have made demands on social media

²²⁴ Joint Statement, *supra* note 217, Exhibit 8 at 86–87.

²²⁵ Joint Statement, *supra* note 217, Exhibit 5 at 4.

²²⁶ *Id.*

²²⁷ Joint Statement, *supra* note 217, Exhibit 9 at 69–72.

²²⁸ *Id.* at 67–68.

²²⁹ *Id.* at 69.

²³⁰ *Id.* at 10. See also Kristie Cangelo, *How Google and YouTube are Working to Protect the 2020 U.S. Census*, GOOGLE (Dec. 11, 2019), <https://www.blog.google/technology/safety-security/how-google-and-youtube-are-working-protect-2020-us-census/> [<https://perma.cc/F2JJ-X7T5>].

²³¹ Joint Statement, *supra* note 217, at 3.

²³² *Id.*

platforms.²³³ Senator Dianne Feinstein set the tone at a Senate hearing in 2017 when she told tech company executives, “You’ve created these platforms and now they are being misused, and you have to be the ones to do something about it, or we will.”²³⁴ Such demands did not, however, come only from legislators. “[T]he tech companies have to stop allowing specific individuals over and over again to spread disinformation,” said White House climate adviser Gina McCarthy, who also praised Congress for “trying to hold companies accountable.”²³⁵ Biden’s Surgeon General condemned their publication of misinformation: “Misinformation poses an imminent and insidious threat to our nation’s health,” he said during remarks at the White House.²³⁶ “We must confront misinformation as a nation . . . Lives are depending on it.”²³⁷ He asked the social media companies to “step up[.]” arguing, “...we can’t wait longer for them to take aggressive action.”²³⁸ Suppressing what the government regarded as disinformation was later discussed directly with the head of the Department of Homeland Security, who described what he said were “robust” discussions with Silicon Valley leaders who were committed to curbing it.²³⁹ “I think that false narratives present a threat to our security,” he said.²⁴⁰ One false narrative Psaki spotted had been presented by podcast host Joe Rogan; asked about some of Rogan’s comments, she responded that major tech platforms needed to ensure access to accurate information—“and that

²³³ See Will Duffield, *Jawboning against Speech How Government Bullying Shapes the Rules of Social Media*, CATO INSTITUTE (Sept. 20, 2022), https://www.cato.org/policy-analysis/jawboning-against-speech?utm_source=social&utm_medium=email&utm_campaign=Cato%20Social%20Share (the 62 examples are set out in Annex A) [https://perma.cc/GP2Z-H4UP].

²³⁴ Craig Timberg, Hamza Shaban & Elizabeth Dwoskin, *Fiery Exchanges on Capitol Hill as Lawmakers Scold Facebook, Google and Twitter*, WASH. POST (Nov. 1, 2022), <https://www.washingtonpost.com/news/the-switch/wp/2017/11/01/fiery-exchanges-on-capitol-hill-as-lawmakers-scold-facebook-google-and-twitter/> [https://perma.cc/DY75-2UQQ].

²³⁵ Alexander Hall, *Biden Climate Adviser Demands Tech Companies Censor ‘Disinformation’ to Promote ‘Benefits of Clean Energy’*, FOX NEWS (June 14, 2022), <https://www.foxnews.com/media/biden-climate-advisor-tech-companies-censor-disinformation-promote-benefits-clean-energy> [https://perma.cc/7JHT-C4JP].

²³⁶ See Press Briefing, White House, Press Briefing by Press Secretary Jen Psaki and Surgeon General Dr. Vivek H. Murthy (Jul. 15, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/07/15/press-briefing-by-press-secretary-jen-psaki-and-surgeon-general-dr-vivek-h-murthy-july-15-2021/> [https://perma.cc/VQ5W-49XZ].

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Bloomberg Live, *Bloomberg Tech Summit*, YOUTUBE (Dec. 14, 2021, 01:19:08), <https://youtu.be/ke6YAOFi6HE> [https://perma.cc/X6SG-AKQ2].

²⁴⁰ *Event Highlights: Bloomberg Technology Summit—December 14-15, 2022—Day 1*, BLOOMBERG LIVE (Dec. 14, 2021), <https://www.bloomberglive.com/blog/event-highlights-bloomberg-technology-summit-dec14-15-day1/> [https://perma.cc/XD6E-GDWE].

certainly includes Spotify,” where Rogan’s podcasts appeared.²⁴¹ “[W]e want every platform to continue doing more to call out [] mis- and disinformation while also uplifting accurate information,” Psaki said.²⁴² The administration and leading Democrats in Congress continued to point out these “false narratives” and pushed social media to take action.²⁴³

²⁴¹ Press Briefing, White House, Press Briefing by Press Secretary Jen Psaki (Feb. 1, 2022), <https://www.whitehouse.gov/briefing-room/press-briefings/2022/02/01/press-briefing-by-press-secretary-jen-psaki-february-1-2022/> [<https://perma.cc/A6JD-TGYM>].

²⁴² *Id.* See also Eugene Scott & Adela Suliman, *White House Wades Into Spotify Controversy as India.Arie, David Crosby, Stephen Stills and More Artists Pull Music*, WASH. POST (Feb. 2, 2022), <https://www.washingtonpost.com/arts-entertainment/2022/02/02/spotify-rogan-white-house-covid-misinformation/> [<https://perma.cc/XJ6B-B7XX>].

²⁴³ See Vivek Ramaswamy & Jed Rubenfeld, *Save the Constitution from Big Tech*, WALL ST. J. (Jan. 11, 2021), <https://www.wsj.com/articles/save-the-constitution-from-big-tech-11610387105> [<https://perma.cc/XUA3-4JKT>] (reporting that “in April 2019, Louisiana Rep. Cedric Richmond warned Facebook and Google that they had ‘better’ restrict what he and his colleagues saw as harmful content or face regulation: ‘We’re going to make it swift, we’re going to make it strong, and we’re going to hold them very accountable.’ New York Rep. Jerrold Nadler added: ‘Let’s see what happens by just pressuring them.’”); Tony Romm, *House to Grill Facebook, Google, Twitter CEOs as Washington Seeks to Crack Down on Disinformation, Antitrust*, WASH. POST (Feb. 18, 2021), <https://www.washingtonpost.com/technology/2021/02/18/house-antitrust-amazon-apple-facebook-google/> [<https://perma.cc/M4QJ-PS57>] (reporting that the House Energy and Commerce Committee, which had scheduled testimony from social media CEOs, intended to “take fresh aim at the tech giants for failing to crack down on dangerous political falsehoods and disinformation about the coronavirus.”); Press Release, House Comm. on Energy and Com., E&C Comm. Announces Hearing With Tech CEOs on the Misinformation and Disinformation Plaguing Online Platforms (Feb. 18, 2021), <https://energycommerce.house.gov/newsroom/press-releases/ec-committee-announces-hearing-with-tech-ceos-on-the-misinformation-and> [<https://perma.cc/ZE9B-RC4J>] (the leaders of the Committee promised to “continue the Committee’s work of holding online platforms accountable for the growing rise of misinformation and disinformation.”); Letter from Anna G. Eshoo and Jerry McNerney, Members of Congress to John T. Stankey, CEO, AT&T (Feb. 22, 2021), <https://mcnerney.house.gov/sites/mcnerney.house.gov/files/McNerney-Eshoo%20TV%20Misinfo%20Letters%20-%202.22.21.pdf> [<https://perma.cc/M43C-NAYV>] (asking cable companies if they plan to continue carrying Fox News, which they claimed was a “hotbed” of disinformation); Abby Ohlheiser, *Kamala Harris Wants Trump Suspended from Twitter for ‘Harassment’*, WASH. POST (Oct. 2, 2019), <https://www.washingtonpost.com/technology/2019/10/02/kamala-harris-wants-trump-suspended-twitter-harassment-these-loopholes-protect-him/> [<https://perma.cc/S38L-4CJM>] (Kamala Harris, as a Senator, called on Twitter to suspend President Donald Trump’s account.); Rep. Frank Pallone (@FrankPallone), TWITTER (Jan. 8, 2021, 7:21 PM), <https://twitter.com/frankpallone/status/1347699874670772230> [<https://perma.cc/THC2-MVCM>] (Representative Frank Pallone tweeted that “Trump is losing the platform he used to foment outright insurrection and violence. Finally he will be barred from so openly fanning the flames of hate. I’ve long called on Twitter to take action, and tonight I’m relieved that it has.”); Adam Schiff (@RepAdamSchiff), TWITTER (Jan. 8, 2021, 11:09 PM), <https://twitter.com/repadamshiff/status/1347757310257504259> [<https://perma.cc/QJL5-DEVH>] (“Donald Trump spent years demagoguing, lying, spreading hate, and propagating

The possible repeal or narrowing of the platforms' immunity under Section 230 has been a continuing source of leverage. On July 16, 2021, for example, after earlier proposing to revoke Facebook's immunity under Section 230 on the grounds that it is "propagating falsehoods they know to be false,"²⁴⁴ President Biden went further and asserted that platforms like Facebook were "killing people"²⁴⁵ by allowing disinformation about the coronavirus vaccine to spread online. Press Secretary Jen Psaki had said the previous day that "[w]e're flagging problematic posts for Facebook that spread disinformation . . . So we're helping get trusted content out there."²⁴⁶ Asked about the possible revision of Section 230 immunity, the White House responded, "We're reviewing that, and certainly they should be held accountable."²⁴⁷

Social media targets have not remained passive in the face of such "recommendations." Facebook responded to the White House accusations with a statement that they were already doing a lot to combat misinformation, pointing to their implementation of all eight of the Surgeon General's earlier recommendations on the matter. Facebook's policy was to "[a]mplify communications from trusted messengers and subject matter experts,"²⁴⁸ it said. In a retweet of a post that accused the new conservative social media company Parler of illegal behavior and violating the rules of the Apple App Store and Google Play for content surrounding the Jan. 6th attack on Congress, Rep. Alexandria Ocasio-Cortez asked what Apple and Google were doing about the offending content.²⁴⁹ Later that same day, she pressed Google on

conspiracies on Twitter. And worse, inciting violence. Social media companies have allowed this vile content to fester for too long, and need to do much more. But banning him is a good start.").

²⁴⁴ Editorial, *Joe Biden*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html> [https://perma.cc/WBJ3-CLJ9]. See also Casey Newton, *Everything You Need to Know About Section 230*, THE VERGE (Dec. 29, 2020), <https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation> [https://perma.cc/CD7U-SBZB].

²⁴⁵ Zolan Kanno-Youngs & Cecilia Kang, *'They're Killing People': Biden Denounces Social Media for Virus Disinformation*, N.Y. TIMES (Jul. 19, 2021), <https://www.nytimes.com/2021/07/16/us/politics/biden-facebook-social-media-covid.html> [https://perma.cc/ZQL7-PQMK].

²⁴⁶ White House, *supra* note 236.

²⁴⁷ See Bursztynsky, *supra* note 222; comments of House Speaker Nancy Pelosi, *supra* text at note 186.

²⁴⁸ FACEBOOK, TAKING ACTION TO COMBAT COVID-19 VACCINE MISINFORMATION 4 (Jul. 2021), <https://about.fb.com/wp-content/uploads/2021/07/Combating-COVID-19-Vaccine-Misinformation.pdf> [https://perma.cc/R9JW-X3GV].

²⁴⁹ Alexandria Ocasio-Cortez (@AOC), TWITTER (Jan. 8, 2021, 5:59 PM), <https://twitter.com/aoc/status/1347679332014161920?lang=en> [https://perma.cc/ZYY6-TDHS]

what they would do in response to Apple indicating they would take action with respect to Parler.²⁵⁰ It was fair to question whether these were merely informational requests.²⁵¹ The day after Ocasio-Cortez's tweets, Apple's App Store, Google, and Amazon removed the Parler application from their services, without which it could not operate.²⁵² Twitter banned Trump (after his defeat was confirmed).²⁵³ By the time of the reversal of the *de facto* ban on the lab leak story, Facebook had removed 18 million posts on Covid-19.²⁵⁴ YouTube, the *New York Times* reported, was also vigilant:

YouTube said that in the past year it had removed over 130,000 videos for violating its Covid-19 vaccine policies. But this did not include what the video platform called “borderline videos” that discussed vaccine skepticism on the site. In the past, the company simply removed such videos from search results and recommendations, while promoting videos from experts and public health institutions.²⁵⁵

It was not enough to remove unwanted substantive content. Facebook flagged at least one article on the dangers of Covid censorship as “missing context” and marked it with a link to a separate article fact checking claims of vaccine ineffectiveness.²⁵⁶

C. Identifying Truthful Information

²⁵⁰ Alexandria Ocasio-Cortez (@AOC), TWITTER (Jan. 8, 2021, 6:04 PM), <https://twitter.com/aoc/status/1347680648778153984> [<https://perma.cc/4TAP-AH7P>].

²⁵¹ See Glenn Greenwald, *Congress Escalates Pressure on Tech Giants to Censor More, Threatening the First Amendment*, SUBSTACK (Feb. 20, 2021), <https://greenwald.substack.com/p/congress-escalates-pressure-on-tech?s=r> [<https://perma.cc/XVQ3-RB4C>]; Duffield, *supra* note 233 (“Asking ‘what steps have you taken to address X content’ is not merely a request for information. It is premised upon the assumption that the identified content is a problem that should be addressed. In most cases, ‘addressed’ implies algorithmic deprioritization or removal.”)

²⁵² Jack Nicas & Davey Alba, *Amazon, Apple and Google Cut Off Parler, an App That Drew Trump Supporters*, N.Y. TIMES (Jan. 9, 2021), <https://www.nytimes.com/2021/01/09/technology/apple-google-parler.html> [<https://perma.cc/34TX-863C>].

²⁵³ Twitter, *supra* note 14.

²⁵⁴ See Naomi Nix, *Facebook Removed 18 Million Misleading Posts on COVID-19*, BLOOMBERG (May 19, 2021), <https://www.bloomberg.com/news/articles/2021-05-19/facebook-removed-18-million-misleading-posts-on-covid-19> [<https://perma.cc/A98U-55UG>].

²⁵⁵ See Davey Alba, *YouTube Bans All Anti-Vaccine Misinformation*, N.Y. TIMES (Sept. 29, 2021), <https://www.nytimes.com/2021/09/29/technology/youtube-anti-vaxx-ban.html> [<https://perma.cc/MS55-P6Y8>].

²⁵⁶ See Jordan Boyd, *Facebook Censors Article About Dangers of COVID Censorship*, THE FEDERALIST (Dec. 15, 2021), <https://thefederalist.com/2021/12/15/facebook-censors-article-about-dangers-of-covid-censorship/> [<https://perma.cc/9D5L-T4PY>].

Once the propriety of censoring misinformation or disinformation is accepted, some authoritative source of *correct* information is needed as a metric. The government knows instinctively where correct information can be found: the government. Inevitably, the censor and the source become identical. Social media companies have fallen quickly in line, looking to fact checkers that rely heavily on government sources to ascertain what can be trusted.²⁵⁷ Unfortunately, these sources themselves, not surprisingly, often turn out to be unreliable.

Sometimes government misrepresentations are intentional, as exemplified by the rosy news the government regularly reported with respect to progress in the war in Afghanistan. The security managers flooded the marketplace of ideas with information about Afghanistan that was false and sometimes known to be false, as the *Washington Post* reported in a December 9, 2012 comprehensive investigative review of the U.S. government's performance in combatting the Taliban and "nation building" in Afghanistan. The paper's exposé left little doubt whether trust in government and media accounts of progress in the war there would have been well-placed. Despite U.S. officials' constant assertions that they were making progress, the report concluded, "[t]hey were not, and they knew it."²⁵⁸ The "American people have constantly been lied to," said the head of the federal agency that conducted an after-action report. "Every data point was altered to present the best possible picture," one senior military adviser stated.²⁵⁹ But it was "impossible to create good metrics," a senior NSC official said. "We tried using troop numbers trained, violence levels, control of territory and none of it painted an accurate picture The metrics were always manipulated for the duration of the war."²⁶⁰ This, he said, "went on and on for two reasons, to make everyone involved look good, and to make it look like the troops and resources were having the kind of effect where removing them would cause the country to deteriorate."²⁶¹ In August 2021, Biden himself "bluntly affirmed" to the *New*

²⁵⁷ See, e.g., Politifact's flagging as "false information" accusations that the government has attempted to change the definition of a recession. Robby Soave, *Facebook, Instagram Posts Flagged as False for Rejecting Biden's Recession Wordplay*, REASON (July 29, 2022), <https://reason.com/2022/07/29/recession-facebook-fact-check-biden-politifact/> [https://perma.cc/52VD-J62P].

²⁵⁸ Craig Whitlock, *At War with the Truth*, WASH. POST (Dec. 9, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/afghanistan-papers/afghanistan-war-confidential-documents/> [https://perma.cc/2TPL-892G].

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

York Times that Americans had been lied to over the course of the war.²⁶² “Yes. Yeah,” he told the paper’s editorial board.²⁶³

Intentional or not,²⁶⁴ misstatements occur too often to view government-related sources as reliable arbiters of truth, let alone of scientific certainty. The government’s record on Covid vaccines is illustrative. By August 2022, most coronavirus deaths were people who had been vaccinated or boosted.²⁶⁵ Yet as vaccines became available, government officials regularly issued assurances that vaccination would prevent infection.²⁶⁶ President Biden and virtually every major public health official in the United States have claimed that Covid shots stop the virus, as Jordan Schachtel has reported.²⁶⁷ Biden said, “You’re not going to get Covid if you have these vaccinations.”²⁶⁸ Fauci said, “When you get vaccinated, you not only protect your own health, that of the family, but also you contribute to the community health by preventing the spread of the virus throughout the community. And in other words, you become a dead end to the virus. And when there are a lot of dead

²⁶² Olivier Knox, *The Daily 202: Biden Said U.S. Officials Lied About Afghanistan. It’s Not Clear Whether They’ll Be Held to Account*, WASH. POST (Aug. 18, 2021), <https://www.washingtonpost.com/politics/2021/08/18/daily-202-biden-said-us-officials-lied-about-afghanistan-its-not-clear-whether-theyll-be-held-account/> [https://perma.cc/598X-H5JW].

²⁶³ Editorial, *Joe Biden*, N.Y. TIMES (Jan. 17, 2020), <https://www.nytimes.com/interactive/2020/01/17/opinion/joe-biden-nytimes-interview.html> [https://perma.cc/WBJ3-CLJ9].

²⁶⁴ For examples of the government’s misrepresentations on Covid-19, see Kerrington Powell & Vinay Prasad, *The Noble Lies of COVID-19*, SLATE (July 28, 2021), <https://slate.com/technology/2021/07/noble-lies-covid-fauci-cdc-masks.html> [https://perma.cc/4K39-W6M8]; see also *supra* note 216.

²⁶⁵ McKenzie Beard, *Covid is No Longer Mainly a Pandemic of the Unvaccinated. Here’s Why*, WASH. POST (Nov. 23, 2022), <https://www.washingtonpost.com/politics/2022/11/23/vaccinated-people-now-make-up-majority-covid-deaths/> (“Fifty-eight percent of coronavirus deaths in August were people who were vaccinated or boosted. . . .”) [https://perma.cc/FSH7-X7CX].

²⁶⁶ See, e.g., *Remarks by President Biden Marking the 150 Millionth COVID-19 Vaccine Shot*, WHITE HOUSE (Apr. 6, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/06/remarks-by-president-biden-marking-the-150-millionth-covid-19-vaccine-shot/> [https://perma.cc/3LXD-VQ6C]; David Z. Morris & Sy Mukherjee, *It’s Official: Vaccinated People Don’t Spread COVID-19*, FORTUNE (Apr. 1, 2021), <https://fortune.com/2021/04/01/its-official-vaccinated-people-dont-transmit-covid-19/> [https://perma.cc/Q3R3-67BE].

²⁶⁷ Jordan Schachtel, *Memory Hole: Virtually Every Major Health Official in the United States Has Claimed That COVID Shots Stop the Virus*, SUBSTACK (Dec. 18, 2021), <https://dossier.substack.com/p/memory-hole-virtually-every-major> [https://perma.cc/665E-H4CW].

²⁶⁸ *Remarks by President Biden in a CNN Town Hall with Don Lemon*, WHITE HOUSE (July 21, 2021), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/22/remarks-by-president-biden-in-a-cnn-town-hall-with-don-lemon/> [https://perma.cc/S9KG-ZXFH].

ends around, the virus is not going to go anywhere.”²⁶⁹ The CDC affirmed Fauci’s statement. “Our data from the C.D.C. suggests that vaccinated people don’t carry the virus, don’t get sick And that it’s not just in clinical trials, but it’s also in real-world data,” said CDC Director Rochelle Walensky.²⁷⁰ YouTube did not remove these statements²⁷¹—although the CDC later acknowledged that “vaccinated people can still become infected and have the potential to spread the virus to others.”²⁷² Twitter blocked the *critics* of the government’s misinformation—sometimes after the White House asked questions about why Twitter had yet to take action against specific individuals.²⁷³

Official pronouncements regarding masks were similarly uncertain, confused, and contradictory. Trump’s Surgeon General implored Americans to wear masks. “Wear a face covering when you go out in public,” he said in June 2022. “It is not an inconvenience.”²⁷⁴ In February of 2022, Surgeon General Jerome Adams, in a widely reported statement, inveighed against them. . . . “Seriously people — STOP BUYING MASKS!” he said in a tweet. He warned the public that masks did not work. “They are NOT effective in preventing general public from catching #Coronavirus. . . . ”²⁷⁵ Four months later,

²⁶⁹ *Transcript: Dr. Anthony Fauci on ‘Face the Nation,’ May 16, 2021*, CBS NEWS (May 16, 2021), <https://www.cbsnews.com/news/transcript-dr-anthony-fauci-face-the-nation-05-16-2021/> [https://perma.cc/2CST-23X2].

²⁷⁰ Apoorva Mandavilli, *Can Vaccinated People Spread the Virus? We Don’t Know, Scientists Say*, N.Y. TIMES (Apr. 1, 2021), <https://www.nytimes.com/2021/04/01/health/coronavirus-vaccine-walensky.html> [https://perma.cc/3HQS-QQLF].

²⁷¹ See Jeffrey A. Tucker, *Is YouTube Now Presuming to Be in Charge of Science?*, BROWNSTONE INST. (Dec. 2, 2021), <https://brownstone.org/articles/is-youtube-now-presuming-to-be-in-charge-of-science/> [https://perma.cc/CNW6-QB7S].

²⁷² See *Science Brief: COVID-19 Vaccines and Vaccination*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Sept. 15, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/fully-vaccinated-people.html> [https://perma.cc/82HN-APFG].

²⁷³ See Kaitlyn Tiffany, *A Prominent Vaccine Skeptic Returns to Twitter*, THE ATLANTIC (Aug. 24, 2022), <https://www.theatlantic.com/technology/archive/2022/08/alex-berenson-twitter-ban-lawsuit-covid-misinformation/671219/> [https://perma.cc/HL77-BQAZ].

²⁷⁴ Brett Samuels, *Surgeon General Urges Widespread Mask Use: ‘It Is Not a Suppression of Your Freedom’*, THE HILL (Jun. 30, 2020), <https://thehill.com/policy/healthcare/505354-surgeon-general-urges-widespread-mask-use-it-is-not-a-suppression-of-your/> [https://perma.cc/UP6P-GV7D].

²⁷⁵ Maria Cramer & Knvul Sheikh, *Surgeon General Urges the Public to Stop Buying Face Masks*, N.Y. TIMES (Feb. 29, 2020), <https://www.nytimes.com/2020/02/29/health/coronavirus-n95-face-masks.html> [https://perma.cc/S5UF-XUN6]. Ten days earlier, Anthony Fauci gave the same advice. “Now, in the United States, there is absolutely no reason whatsoever to wear a mask,” Fauci said. The danger posed by Covid, Fauci advised, is “just minuscule.” Jayne O’Donnell, *Top Disease Official: Risk of Coronavirus in USA Is ‘Minuscule’; Skip Mask and Wash Hands*, USA TODAY (Feb. 19, 2020), <https://www.usatoday.com/story/news/health/2020/02/17/nih-disease->

however, the same Surgeon General urged the public to wear a face covering in public. His earlier tweet was not removed, nor were references to the latter message that contradicted it.²⁷⁶

These were not the only times the CDC reversed itself or acknowledged errors in the data on which its conclusions have been based. In October 2021, the CDC released a study indicating that vaccination offers higher protection than previous COVID-19 infection.²⁷⁷ Three months later, it released a study indicating that “persons who survived a previous infection had lower case rates than persons who were vaccinated alone.”²⁷⁸ In March 2022, the CDC admitted that it had over-counted COVID-related deaths by 72,277 across 26 states—or about 7.5 percent of all supposed COVID deaths, resulting in the inflation of pediatric deaths by 24 percent.²⁷⁹ The massive statistical change was attributed to a “coding logic error.”²⁸⁰ Whether the CDC possesses data that would contradict its published data is unknown; in February 2022, the CDC admitted that it had collected data on hospitalizations for Covid-19 in the United States and broken it down by age, race, and vaccination status, but that it has not made most of that information public.²⁸¹

The point is not to fault the CDC or any other public health authority for reversing itself or acknowledging error. Science is relentlessly provisional. Its truths, such as they are, are not fixed; scientific theories and hypotheses are in a state of constant flux, through formulation and revision, validation and

official-anthony-fauci-risk-of-coronavirus-in-u-s-is-minuscule-skip-mask-and-wash-hands/4787209002/ [https://perma.cc/K2FD-XQJ4].

²⁷⁶ The tweet, now since removed, was not removed at the time the statement in question was made. See Miriam Fauzia, *Fact check: Trump Surgeon General Initially Dismissed Mask-Wearing, But Then Endorsed*, USA TODAY (Feb. 17, 2021), <https://www.usatoday.com/story/news/factcheck/2021/02/17/fact-check-ex-surgeon-general-jerome-adams-reversed-position-masks/6765301002/> [https://perma.cc/KJM6-9BSH].

²⁷⁷ See Media Statement, Ctrs. for Disease Control and Prevention, *Vaccination Offers Higher Protection than Previous COVID-19 Infection* (Oct. 29, 2021), <https://www.cdc.gov/media/releases/2021/s1029-Vaccination-Offers-Higher-Protection.html> [https://perma.cc/4HMS-7QWS].

²⁷⁸ See Tomas M. Leon et al., *COVID-19 Cases and Hospitalizations by COVID-19 Vaccination Status and Previous COVID-19 Diagnosis—California and New York, May–November 2021*, CTRS. FOR DISEASE CONTROL AND PREVENTION MORBIDITY AND MORTALITY WKLY. REP. (Jan. 28, 2022), <https://www.cdc.gov/mmwr/volumes/71/wr/mm7104e1.htm> [https://perma.cc/VRK8-TMGP].

²⁷⁹ *CDC Reports Fewer COVID-19 Pediatric Deaths After Data Correction*, REUTERS (Mar. 18, 2022), <https://www.reuters.com/business/healthcare-pharmaceuticals/cdc-reports-fewer-covid-19-pediatric-deaths-after-data-correction-2022-03-18/> [https://perma.cc/9DPL-9QEA].

²⁸⁰ See Melody Schreiber, *CDC Coding Error Led to Overcount of 72,000 Covid Deaths*, THE GUARDIAN (Mar. 24, 2022), <https://www.theguardian.com/world/2022/mar/24/cdc-coding-error-overcount-covid-deaths> [https://perma.cc/WE3E-DXTP].

²⁸¹ See Apoorva Mandavilli, *The C.D.C. Isn't Publishing Large Portions of the Covid Data It Collects*, N.Y. TIMES (Feb. 22, 2022), <https://www.nytimes.com/2022/02/20/health/covid-cdc-data.html> [https://perma.cc/TP56-VBTT].

invalidation. Science's fitful movement toward likelier explanations rests upon allowing, indeed encouraging, orthodox explanations to be challenged, sometimes by what are little more than hunches. Stifling criticism drains science of its lifeblood. Nowhere is an open and robust marketplace of ideas more vital than in the realm of science.

Stifling criticism was, however, often the very object of government officials who were intent upon squelching "misinformation" concerning Covid. Indeed, the mission was not simply to discredit what they dubbed misinformation but to freeze the very process of disputation. A case in point involved the so-called "Great Barrington Declaration," issued by several dozen prominent doctors and scientists on October 4, 2020.²⁸² The statement expressed grave concerns about the damaging physical and mental health impacts of the prevailing COVID-19 policies, particularly lockdowns.²⁸³ The three lead authors were experts in epidemiology, biostatistics, immunology, vaccine development and public health from Harvard, Stanford, and Oxford. Four days after the Declaration was issued, the head of the National Institutes of Health, a federal government agency, emailed Dr. Anthony Fauci, the head of another government agency, the National Institute of Allergy and Infectious Diseases. "There needs to be a quick and devastating public take down of its premises," the email advised.²⁸⁴ A massive campaign ensued against the Declaration and its signers. The Oxford signer described the "onslaught of insults, personal criticism, intimidation and threats" directed at their proposal.²⁸⁵ Another signatory, Dr. Jay Bhattacharya of Stanford University, participated in an April 2021 panel discussion with Florida's governor, Ron DeSantis, at the state's Capitol.²⁸⁶ The panel discussion was covered by a local television station and the video was posted on YouTube—until YouTube removed it as violative of its standards.²⁸⁷ The panel, Bhattacharya said, "was a policy forum, in which it is appropriate to consider both the benefits and costs of a policy (child masking) when making judgments and recommendations"; blocking the video, he argued, was "a violation of basic standards of scientific

²⁸² *The Great Barrington Declaration* (Oct. 4, 2020), <https://gbdeclaration.org/> [<https://perma.cc/3D57-R4DP>].

²⁸³ *Id.*

²⁸⁴ Editorial, Opinion, *How Fauci and Collins Shut Down Covid Debate*, WALL ST. J. (Dec. 21, 2021), <https://www.wsj.com/articles/fauci-collins-emails-great-barrington-declaration-covid-pandemic-lockdown-11640129116> [<https://perma.cc/Q9AN-F6UE>].

²⁸⁵ Sunetra Gupta, *A Contagion of Hatred and Hysteria*, AM. INST. FOR ECON. RSCH. (Nov. 1, 2021), <https://www.aier.org/article/a-contagion-of-hatred-and-hysteria/> [<https://perma.cc/FZE7-Z5HP>].

²⁸⁶ Corky Siemaszko, *YouTube Pulls Florida Governor's Video, Says His Panel Spread Covid-19 Misinformation*, NBC NEWS (Apr. 9, 2021), <https://www.nbcnews.com/news/us-news/youtube-pulls-florida-governor-s-video-says-his-panel-spread-n1263635> [<https://perma.cc/R856-Y84G>].

²⁸⁷ *Id.*

conduct, which stand in opposition to unreasoned silencing of contrary views and require the free exchange of ideas.”²⁸⁸

Why would health scientists, of all people, circle the wagons to defend an approved policy orthodoxy? Censorship is, after all, harmful not only to science but the public; it leads to “important views, information and scientific evidence being disregarded.”²⁸⁹ Government support for scientific research is critical. “The NIH invests most of its \$45 billion budget in medical research for the American people,”²⁹⁰ its website proclaims. Like other researchers and analysts funded by the government, however, scientists are subject to the same incentives to defend rather than criticize the source of their funding and to resist restrictions on their work. “Virologists are worried that fingering a lab leak will affect their flow of grant money,” Matt Ridley and Alina Chan observe, “or result in more oversight and regulation of virology research.”²⁹¹ Intentionally or not, funders can shape the research they fund and the attitudinal patterns of researchers.²⁹² The distortive effect on the marketplace of ideas can be invidious when the government promotes rigid policies while entwining itself with organizations and individuals that are expected to exercise independent judgment.

D. Re-defining Dangerous Groups and Individuals

Public health is not the only realm in which social media companies have coordinated content control to align it with evolving governmental policies. Glorifying violence, for example, has long been a ground for barring

²⁸⁸ *Id.*

²⁸⁹ Shir-Razl et al., *supra* note 41.

²⁹⁰ *Budget*, NAT’L INST. OF HEALTH (Aug. 18, 2022), <https://www.nih.gov/ABOUT-NIH/WHAT-WE-DO/BUDGET> (last visited Nov. 1, 2022) [<https://perma.cc/3PR8-ULZV>].

²⁹¹ Ridley & Chan, *supra* note 117.

²⁹² The dynamic is not limited to government funding of science. It is one reason why some academics resist accepting donations from businesses with a political agenda, such as fossil fuel companies. As a former Cambridge professor put it, “[F]unding can exert a subtle influence on research and the researchers themselves.” Huw Price, *Universities Must Wean Themselves Off Fossil Fuel Funding*, FIN. TIMES (Apr. 11, 2022), <https://www.ft.com/content/b80d9715-4204-4592-a135-067878dc589e?>

[<https://perma.cc/J72X-DKVK>]. He continued: “As one young engineering colleague put it: “Ostensibly, fossil fuel dollars at universities fund research, but that money also buys influence, conscious or unconscious — over academics and thus also over students. In my experience, academics funded by fossil fuels were faster to defend, and slower to criticize, big oil.” *Id.* The dynamic is understood by internet companies. The *New York Times* reported a leading privacy advocate’s observation: “Google’s willingness to spread cash around the think tanks and advocacy groups focused on internet and telecommunications policy has effectively muted, if not silenced, criticism of the company over the past several years.” Kenneth P. Vogel, *Google Critic Ousted from Think Tank Funded by the Tech Giant*, N.Y. TIMES (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/us/politics/eric-schmidt-google-new-america.html> [<https://perma.cc/H63V-7Y8B>].

content; Facebook suspended Trump for violating that prohibition in its community standards. With the February 22, 2022 Russian invasion of Ukraine, however, the government and social media corporations confronted a dilemma: how should posts glorifying Ukrainian violence in response to the Russian invasion be handled? “Social media can be used as an ‘instrument’ for governments to achieve wartime aims,” noted Ukraine’s minister for digital transformation.²⁹³ On March 12, Psaki met with about thirty social media “influencers”²⁹⁴ to ensure, a White House official said, that they had “the latest information from an authoritative source.”²⁹⁵ The aim, it seemed, was to align social media content moderation practices with the government’s policy on the war in Ukraine. Facebook, as the war progressed, proceeded to modify the application of its content standards to posts from users in Russia, Ukraine, and other Eastern European nations because its rules were changing too quickly to be enforced.²⁹⁶ Facebook’s workers, the *New York Times* reported, “could not keep up with shifting rules about what kinds of posts were allowed about the war in Ukraine.”²⁹⁷ Sometimes it changed its rules daily, causing “internal confusion” and “whiplash,” the paper reported.²⁹⁸ Facebook revised its content policies more than six times in little more than a month to sometimes permit posts that earlier would have been removed, including some calling for the death of Putin and violence against Russian soldiers.²⁹⁹

Which groups and individuals qualify as extremist, supremacist, and terrorist is constantly changing in both government and social media usage; the concepts are notoriously malleable, varying widely from country to country.³⁰⁰

²⁹³ *The Invasion of Ukraine Is Not the First Social Media War, But It Is the Most Viral*, THE ECONOMIST (Apr. 2, 2022), <https://www.economist.com/international/the-invasion-of-ukraine-is-not-the-first-social-media-war-but-it-is-the-most-viral/21808456> [https://perma.cc/7LRY-WYF7].

²⁹⁴ Jennifer Jacobs, *White House Reaches Out to Social Media Influencers on Ukraine*, BLOOMBERG (Mar. 12, 2022), <https://www.bloomberg.com/news/articles/2022-03-12/white-house-reaches-out-to-social-media-influencers-on-ukraine> [https://perma.cc/4DEN-GSH2].

²⁹⁵ Taylor Lorenz, *The White House is Briefing TikTok Stars About the War in Ukraine*, WASH. POST (Mar. 11, 2022), <https://www.washingtonpost.com/technology/2022/03/11/tik-tok-ukraine-white-house/> [https://perma.cc/K2GD-UUWB].

²⁹⁶ See Ryan Mac, Mike Isaac & Sheera Frenkel, *How War in Ukraine Roiled Facebook and Instagram*, N.Y. TIMES (Mar. 31, 2022), <https://www.nytimes.com/2022/03/30/technology/ukraine-russia-facebook-instagram.html> [https://perma.cc/4UHW-FMQ7].

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ See, e.g., Press Briefing, White House, Press Briefing by Press Secretary Karine Jean-Pierre (Sept. 1, 2022), <https://www.whitehouse.gov/briefing-room/press-briefings/2022/09/01/press-briefing-by-press-secretary-karine-jean-pierre-7/> [https://perma.cc/5WUV-PG7M] (In response to a question about whether the President

Companies such as Facebook accede to U.S. government “terrorist” designations and remove such users from their platforms,³⁰¹ sometimes acknowledging as much in their community standards.³⁰² Not all such collaboration in this regard is transparent. In September 2019, for example, representatives of Facebook, Google, Microsoft, and Twitter met with U.S. law enforcement and intelligence officials to discuss election security. According to Facebook’s head of cybersecurity policy, the goal was to “further strengthen strategic collaboration,” and they discussed ways to “improve how we share information and coordinate our response to better detect and deter threats.”³⁰³

The impulse to coordinate is understandable. Ferreting out unwanted information platform by platform involves duplicative efforts; it is far more efficient to centralize the process. Some of the unwanted content comes from, in Facebook’s words, “dangerous individuals and organizations”,³⁰⁴ it is far preferable to look to authorities possessed of the intelligence and law enforcement resources that are necessary to reliably identify them. Moreover, a platform can be open to criticism for taking down the same content that another leaves up, or for de-platforming a user that another platform still hosts; it is far better to coordinate. Hence the emergence of cooperative arrangements among governments and private companies such as the Global Internet Forum to Counter Terrorism—GIFCT.

GIFCT is an organization that oversees a shared hash database of material taken down by member companies. A member can add material that violates its rules, and then another company, confronted with certain material, can access the database to match that material and apply its own rules to leave it up or take it down.³⁰⁵ GIFCT is governed by an operating board made up of Facebook, Microsoft, Twitter, and YouTube, as well as at least one rotating

thought the effort to restrict abortion was “semi-fascism,” White House Press Secretary Karine Jean-Pierre stated, “And so, when you are not with where a majority of Americans are, then, you know, that is extreme. That is an extreme way of thinking.”)

³⁰¹ Evelyn Douek, *The Rise of Content Cartels*, KNIGHT FIRST AMEND. INST. (Feb. 11, 2020), <https://knightcolumbia.org/content/the-rise-of-content-cartels> [https://perma.cc/J5MH-EXU2].

³⁰² See, e.g., Faiza Patel & Mary Pat Dwyer, *Facebook’s New Dangerous Individuals and Organizations Policy Brings More Questions Than Answers*, JUST SECURITY (Jul. 20, 2021), <https://www.justsecurity.org/77503/facebooks-new-dangerous-individuals-and-organizations-policy-brings-more-questions-than-answers/> [https://perma.cc/BG4Y-KTH6] (discussing Facebook’s DIO policy).

³⁰³ Tony Romm & Ellen Nakashima, *U.S. Officials Huddle with Facebook, Google and Other Tech Giants to Talk About the 2020 Election*, WASH. POST (Sept. 4, 2019), <https://www.washingtonpost.com/technology/2019/09/04/us-officials-huddle-with-facebook-google-other-tech-giants-talk-about-election/> [https://perma.cc/WA4C-KA9E].

³⁰⁴ Patel & Dwyer, *supra* note 302.

³⁰⁵ *Tech Innovation*, GLOB. INTERNET F. TO COUNTER TERRORISM, <https://gifct.org/tech-innovation/> (last visited Oct. 13, 2022) [https://perma.cc/NV5V-TPWQ] (describing the technical process).

company from GIFCT's broader membership.³⁰⁶ Its inaugural executive director formerly served as the director of the U.S. National Counterterrorism Center, held senior posts in the intelligence community, and recently returned to government service.³⁰⁷ Its advisory committee members consist of representatives of the U.S. National Security Council and of six other countries.³⁰⁸ This "voluntary" organization was formed in response to pressure from European governments,³⁰⁹ which maintain legal regimes far less speech-protective than that of the United States. Smaller platforms continue to face pressure to adopt its tools.³¹⁰ "Little is publicly known about the database,"³¹¹ Keller writes, nor do we know how heavily members rely on it in content moderation, as Evelyn Douek points out: "[B]ecause we do not know which platforms are responsible for adding the content or how they use the database to police their individual services," she observes, "we do not know the power or effectiveness of the individual platforms' participation in the project."³¹²

A group of leading NGOs including ARTICLE 19, Human Rights Watch, and the Electronic Frontier Foundation have expressed concern that "[t]here is little visibility to anyone outside of the GIFCT member companies as to what content is represented in the hash database."³¹³ What is clear, they warned, is that the "existence of a centralized resource focused on content removal across platforms" raised the possibility that "protected speech is being censored."³¹⁴ That concern was accentuated by the fact that "governments have been directly involved in the negotiations about the future of the GIFCT" by "increasing reference by governments to GIFCT as a quasi-official body," and by the possibility that GIFCT "would ultimately be vested with some kind of governmental authority or otherwise entangled with state actors."³¹⁵ GIFCT's members have done little to assuage these apprehensions. "[O]ne of the things we've done over time is to expand the mandate of the [GIFCT]," said

³⁰⁶ *Governance*, GLOB. INTERNET F. TO COUNTER TERRORISM, <https://gifct.org/governance/#government> (last visited Oct. 13, 2022) [<https://perma.cc/B57E-2BRG>].

³⁰⁷ *A Note from Nicholas Rasmussen, Inaugural Executive Director*, GLOB. INTERNET F. TO COUNTER TERRORISM (Oct. 3, 2022), <https://gifct.org/2022/10/03/note-from-nicholas-rasmussen/> [<https://perma.cc/F58C-BHJT>]; *Nicholas Rasmussen*, MCCAIN INST., <https://www.mccaininstitute.org/about/fellows/nicholas-rasmussen/> (last visited October 13, 2022) [<https://perma.cc/UQ25-FR88>].

³⁰⁸ GLOB. INTERNET F. TO COUNTER TERRORISM, *supra* note 306.

³⁰⁹ *See* Douek, *supra* note 301.

³¹⁰ Keller, *supra* note 174, at 7.

³¹¹ *Id.* at 6.

³¹² Douek, *supra* note 301.

³¹³ *Joint Letter to New Executive Director, Global Internet Forum to Counter Terrorism*, HUM. RTS. WATCH (Jul. 30, 2020), <https://www.hrw.org/news/2020/07/30/joint-letter-new-executive-director-global-internet-forum-counter-terrorism> [<https://perma.cc/RF2X-MBGM>].

³¹⁴ *Id.*

³¹⁵ *Id.*

Facebook’s head of global policy management, Monica Bickert.³¹⁶ Facebook’s security chief has also called for the tech companies to join in establishing a “much more ambitious coordinating body”³¹⁷—echoing the belief of then-Senator Kamala Harris that “you can’t have one set of standards for Facebook and another for Twitter.”³¹⁸ The social media are now moving on from coordinated content control and are “agreeing to cooperate on the enforcement of more uniform norms of what should be available online,”³¹⁹ Douek writes.

In short, old ways of thinking about the marketplace of ideas—specifically, the notion that it can be preserved merely by protecting speakers from government interference—are outdated. “Those who claim that censorship can only be imposed by the state,” Andrew Doyle observed, “are making arguments that are over twenty years out of date.”³²⁰

III. THE FIRST AMENDMENT

This, then, is today’s public-private cartel—a massive, amorphous security/media complex in which government recommendations shade into directives, in which voluntary private conduct melts into coerced compliance, and in which benefits are continually exchanged between a public and private sector that have become indistinguishable. It is a new phenomenon in the American experience, unprecedented in the power of the forces behind it, in its capacity to shape public opinion, and in its resistance to categorization within our existing jurisprudence. While its participants clearly collaborate in monitoring and suppressing speech, its existence, again, is not the product of a conspiracy; like the earlier structure of double government, it has emerged organically in response to incentives baked into the U.S. political and financial

³¹⁶ Douek, *supra* note 301.

³¹⁷ *Artificial Intelligence and Counterterrorism: Possibilities and Limitations, Hearing before the House Subcomm. on Intel. and Counterterrorism*, 116th Cong. 10 (Jun. 25, 2019) (written testimony of Alexander Stamos, Director, Stanford Internet Observatory), <https://homeland.house.gov/imo/media/doc/Testimony-Stamos.pdf> [<https://perma.cc/J7P2-R9YS>].

³¹⁸ Chandelis Duster, *Kamala Harris Defends Her Push to Get Trump’s Twitter Account Suspended*, CNN (Oct. 16, 2019), <https://www.cnn.com/2019/10/16/politics/kamala-harris-trump-twitter-suspension-cnntv/index.html> [<https://perma.cc/4BSS-75CJ>].

³¹⁹ Douek, *supra* note 301.

³²⁰ ANDREW DOYLE, FREE SPEECH: AND WHY IT MATTERS 13 (2021). *See also* Josh Hammer, Opinion, *The Biden Regime Collapses the ‘Public’-‘Private’ Distinction*, NEWSWEEK (Sept. 2, 2022), <https://www.newsweek.com/biden-regime-collapses-public-private-distinction-opinion-1739197> [<https://perma.cc/R6PE-APZ5>] (stating that “[t]hese technology platforms...have proven themselves to not be ‘private’ actors in any meaningful sense of the term. They are now direct appendages of the state, and they must be constitutionally treated and regulated as such Applying a First Amendment speech standard to Big Tech is manifestly fair—and simply bespeaks the reality of what these platforms have become.”).

order. Yet the cartel is now subverting the core purposes of the First Amendment, the “linchpin of the American constitutional regime.”³²¹

How, if at all, can that be prevented? The answer could hardly be more consequential for the survival of the marketplace of ideas in the United States. On it depends the scope of legislative power in both the states and Congress to limit these activities, as well as the authority of the courts to address them absent statutory regulation. The dilemma is not made simpler by the reliance of both the government and social media companies upon free speech claims.

It is thus useful to begin with the case for the government and the companies. Both look to the First Amendment to justify suppressing the speech of social media users. The government begins with the argument that its speech is immunized from judicial review under the government speech doctrine, the companies with the argument that they are private businesses, not state actors, engaged in their own protected speech. After outlining the government’s and companies’ First Amendment arguments that only their speech interests count, I turn to the opposing argument. As indicated at the outset, I present no recommendation as to how specific cases should be resolved. I suggest merely a simple, initial premise: that the First Amendment cannot mean that only the speech of the government and the companies is entitled to protection, without regard to the free speech interests of social media users and the general public.

A. The Case for the Government and the Companies

In several early cases on the subject, the Supreme Court affirmed seemingly unlimited governmental speech rights. “The Government’s own speech . . . is exempt from First Amendment scrutiny,” the Court said in 2005.³²² In 2015, Justice Breyer wrote, “government speech’ escapes First Amendment strictures.”³²³ In that same year, the Court reiterated that “[w]hen government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”³²⁴ The logic of these rulings was further developed in 2017 when the Court explained that the government could not function subject to a viewpoint-neutrality requirement imposed on its speech. “When a government entity embarks on a course of action,” it said, “it necessarily takes a particular viewpoint and rejects others.”³²⁵ The First Amendment hardly demanded, for example, that the millions of posters that

³²¹ Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 73 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

³²² *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

³²³ *Reed v. Town of Gilbert*, 576 U.S. 155, 178 (2015) (Breyer, J., concurring).

³²⁴ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 207 (2015).

³²⁵ *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017).

the government produced and distributed to promote the war effort during World War II be balanced with posters rebutting that view.³²⁶ What constitutes misinformation concerning public health, the war effort in Ukraine, racialized vigilantism, or other national security concerns is also, it might be argued, a question on which government officials must be free to express their views without confronting First Amendment limits. How private citizens and businesses, such as social media companies, choose to respond to the government's views is up to them, the argument would go; they have their own free speech rights and can accept, reject, or ignore the government's views as they see fit. The courts thus should not seek to monitor the government's words, for "it is the democratic electoral process that first and foremost provides a check on government speech."³²⁷

The case for the social media businesses begins with the proposition that they are not state actors. Their own First Amendment free speech rights, they argue, shield their efforts to control content on their web sites. Since 1976, the Supreme Court has found that the First Amendment protects the free speech rights of corporations as it does individual citizens.³²⁸ A "corporation is simply a form of organization used by human beings to achieve desired ends," the Court said in 2014, and the rights extended to corporations "protect the rights of these people."³²⁹ When social media companies determine what content to place on their web sites, they have argued, they are exercising editorial discretion which the First Amendment immunizes from regulation. The U.S. District Court of the Western District of Texas, in a case featuring the social media companies' assertion of the First Amendment rights, held that "[s]ocial media platforms have a first amendment right to moderate content disseminated on their platforms."³³⁰ Social media companies contend they have a "constitutional right not to be compelled to include unwanted content on their platforms," and "a right to engage in their own direct expression,"³³¹ and are thus permitted to "prohibit all sorts of speech that they deem harmful or objectionable or against their policies, including medical misinformation, hate speech and slurs (spanning the spectrum from race and religion to veteran status), glorification of violence and animal abuse, and impersonation, lies, and misinformation more broadly."³³²

³²⁶ *See id.* at 1758.

³²⁷ *Walker*, 576 U.S. at 207.

³²⁸ *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

³²⁹ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706–07 (2014).

³³⁰ *NetChoice, LLC v. Paxton*, 2021 WL 5755120, at *7 (W.D. Tex. Dec. 1, 2021).

³³¹ Complaint for Plaintiffs at 31, *NetChoice, LLL v. Paxton*, 2021 WL 5755120 (W.D. Tex. Dec. 1, 2021).

³³² *Id.* at 16.

The decision not to carry such content, they claim, is therefore protected by the First Amendment—a point that is often misunderstood. Former President Barack Obama, for example, said: “The First Amendment is a check on the power of the state. It doesn’t apply to private companies like Facebook and Twitter.”³³³ That is not the companies’ position; their position has been that the protection of the First Amendment very much *applies* to them—to the point of trumping the conflicting free speech interests of any of their users. The companies embrace a single-actor approach, under which only their own speech freedom is entitled to constitutional protection. In controlling online content, their argument goes, they are on the same constitutional footing as newspapers making editorial decisions about what to publish. Other actors’ speech freedoms, however weighty, are in this view entitled to no constitutional consideration;³³⁴ the only issue is whether the defendant is a state actor.³³⁵

The courts have generally agreed. A classic example of this approach is the federal district court’s dismissal of Trump’s action against Twitter following Twitter’s suspension of his account. In it, the court based its decision entirely on Twitter’s status, concluding that it is a private actor, and it accorded no weight to the speech interests of Trump, other users, or the general public.³³⁶ The First Amendment, so construed, would empower the companies to suppress any content by any user for any reason. As the Fifth Circuit Court of Appeals observed in upholding Texas’ regulation of large social media platforms in *NetChoice LLC v. Paxton*, “[o]n the platforms’ view, email providers, mobile phone companies, and banks could cancel the accounts of anyone who sends an email, makes a phone call, or spends money in support of a disfavored political party, candidate, or business.”³³⁷

B. The Case Against the Government and the Companies

Before considering countervailing constitutional principles, two preliminary points: First, I accept, for purposes of argument, the companies’ claim that the editorial discretion involved in curating material and deciding

³³³ Barack Obama, Keynote Address at Stanford Univ.’s Challenges to Democracy in the Digit. Info. Realm (Apr. 21, 2022), <https://barackobama.medium.com/my-remarks-on-disinformation-at-stanford-7d7af7ba28af> [<https://perma.cc/U5SR-G2M5>].

³³⁴ “[T]he state action doctrine is an absurd basis for choosing between two liberties. The concept of state action completely ignores the competing rights at stake and chooses based entirely on the identity of the actors.” Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. REV. 503, 537 (1985).

³³⁵ For one of the earliest critiques of the single-actor approach to state action see generally Robert J. Glennon Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment “State Action” Requirement*, 1976 SUP. CT. REV. 221 (1976).

³³⁶ Donald J. Trump v. Twitter, Inc., 2022 WL 1443233, at *2 (N.D. Cal. May 6, 2022).

³³⁷ *NetChoice, LLC v. Paxton*, 2022 WL 4285917, at *2 (5th Cir. 2022).

what to post constitutes a form of speech. There are powerful reasons to reject that argument, as did the Fifth Circuit in *NetChoice*—pointing out, among other things, that the platforms themselves have repeatedly denied engaging in editorial judgment,³³⁸ and that Congress, in granting them immunity, explicitly rejected the proposition that they are publishers or speakers.³³⁹ Nonetheless, it is useful to accept their argument merely to see that it is not dispositive: even if the companies are engaged in a kind of speech, other participants in the marketplace of ideas also have speech interests that warrant protection.

Second, as the Fifth Circuit suggested, it is important to note the practical consequences of the companies' argument.³⁴⁰ As numerous scholars have observed, the identity of the censor often does not matter—censorship's effects are equally pernicious whether the delete key is pushed by a government bureaucrat or a social media content moderator.³⁴¹ Multiple parties

³³⁸ The court said:

They've told their users: "We try to explicitly view ourselves as not editors We don't want to have editorial judgment over the content that's in your feed." They've told the public that they "may not monitor," "do not endorse," and "cannot take responsibility for" the content on their Platforms. They've told Congress that their "goal is to offer a platform for all ideas." And they've told courts—over and over again—that they simply "serv[e] as conduits for other parties' speech."

NetChoice, 2022 WL 4285917, at *13.

³³⁹ Section 230(c)(1) of the Communications Decency Act, the statute that immunizes the platforms from liability for content posted by their users, provides that the Platforms "shall [not] be treated as the publisher or speaker" of content developed by other users, undercutting the claim that the platforms' content moderation constitutes protected speech. *NetChoice*, 2022 WL 4285917 at *18. This provision, the court said, "reflects Congress's judgment that the Platforms are not acting as speakers or publishers when they host user-submitted content." *Id.* at 20.

³⁴⁰ As Eugene Volokh pithily put it, "there's more to actual freedom of speech than just the freedom from government retaliation." Eugene Volokh, *Freedom of Speech ≠ The Free Speech Clause*, REASON (Jul. 21, 2021), <https://reason.com/volokh/2021/07/21/freedom-of-speech-%e2%89%a0-the-free-speech-clause/> [https://perma.cc/4E64-YR26].

³⁴¹ Nossel stated it well:

Many of the fears we associate with government controls over speech—that dissent will be suppressed, that the open exchange of ideas will shrivel or skew, and that power over speech will be abused to benefit those that wield it—are as applicable to conglomerates as they are to a national government. While a tech company doesn't have the authority to arrest and prosecute you, its ability to delete your posts and shut down your account is a potent form of social control, and not subject to the appeals and other constraints of our legal system.

have free speech interests in “content moderation” disputes—not simply the social media companies. The user whose content is blocked or degraded has a free speech interest. The listener who cannot hear or read that content has a free speech interest. Others in society at large who look to those speakers and listeners to create and maintain a vibrant exchange of ideas—third parties who sometimes have little to do with social media—also have a free speech interest.³⁴² The government itself needs to hear its citizens’ views.

These interests are neither speculative nor hypothetical. The Supreme Court has recognized the public’s need for access to the free flow of information. The public has, in fact, a right to hear or listen separate from the First Amendment right to speak. In 1965, the Court confronted a statute that required persons who received “communist political propaganda” sent through the mail by foreign governments to explicitly request delivery by placing their names on a post office registry.³⁴³ The Court struck down the law even though, as Burt Neuborne has pointed out, it found that the “speaker”—the foreign government—had no First Amendment rights whatsoever.³⁴⁴ The Court ruled that the recipient had an independent right to receive the literature.³⁴⁵ “[W]here a speaker exists...” the Court later elaborated, “the protection afforded is to the

NOSSEL, *supra* note 172, at 215. Nearly four decades ago Erwin Chemerinsky forcefully made the same point concerning the effect of private infringement of speech freedom: “Freedom of speech, privacy, and equality—this society’s most cherished values—are trampled without any redress in the courts. Certainly, such private infringements of basic freedoms can be just as harmful as governmental infringements. Speech can be chilled and lost just as much through private sanctions as through public wants.” Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 510 (1985). Jonathan Turley observed this year that the vast new power of social media dwarfs that of earlier state censors:

Recent years have shown that a uniform system of corporate censorship can be far more effective than the classic model of a central ministry in controlling information [T]hese companies have direct control over a far greater range of speech than would any state apparatus. The dangers posed by private censorship for a political system are the same as government censorship in the curtailment of free speech.

Jonathan Turley, *Harm and Hegemony: The Decline of Free Speech in the United States*, 45 HARV. J. L. & PUB. POL’Y 571, 613–14 (2022).

³⁴² Audience and recipient interests are particularly relevant with respect to information. “Restrictions on the free flow of political information are suspect because they invade the audience’s interests in having enough material before it to make informed choices and to participate fully in the democratic process.” ERIC BARENDT, FREEDOM OF SPEECH 25 (2005). “We protect free speech,” Alexander Meiklejohn argued, “to give every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.” MEIKLEJOHN, *supra* note 5, 26.

³⁴³ *Lamont v. Postmaster General*, 381 U.S. 301, 302 (1965).

³⁴⁴ BURT NEUBORNE, MADISON’S MUSIC: ON READING THE FIRST AMENDMENT 102 (2015).

³⁴⁵ See *Lamont*, 381 U.S. at 307.

communication, to its source and to its recipients both.”³⁴⁶ The right to hear or read that communication is “an inherent corollary of the rights to free speech and press that are explicitly guaranteed by the Constitution”³⁴⁷ The Court added that “the right to receive ideas follows ineluctably from the *sender*’s First Amendment right to send them”³⁴⁸

If the Amendment’s purpose is to foster what the Supreme Court has famously described as an “uninhibited, robust, and wide-open” debate,³⁴⁹ recognizing *only* the free speech interests of one set of participants in that marketplace—the internet company “speakers”—falls short of that objective by abridging other participants’ freedom of speech. This is not to suggest that others’ free speech interests necessarily would or should prevail against the speaker’s. As is true in all constitutional litigation, rights will sometimes conflict with other rights (such as a putative interest in associating freely in an online community free from abusive speech); different contexts will counsel different accommodations.³⁵⁰ Tradeoffs will be unavoidable. Yet it remains true that modern First Amendment doctrine, as Neuborne has written, “has become increasingly speaker centered to the virtual exclusion of everyone else” and needs to be reformulated to respect both speakers and hearers.³⁵¹ “The full First Amendment,” he writes, “is a story about the interaction between free speakers and free hearers in a democracy.”³⁵² Speech without hearers is the sound of one hand clapping. Protecting the interest of speakers, hearers, and the public in a vibrant marketplace of ideas is essential to keeping the machinery of deliberative democracy up and running.

³⁴⁶ Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756 (1976).

³⁴⁷ Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).

³⁴⁸ *Id.* See also Marsh v. Alabama, 326 U.S. 501 (1946), discussed *infra* at notes 398–401.

³⁴⁹ N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

³⁵⁰ Requiring major social media platforms (perhaps those advantaged by Section 230) to provide optional access to one channel moderated pursuant to First Amendment principles would not preclude their offering additional channels moderated with different filters. Companies could offer a menu with different options, including one under which content is moderated under their own standards, or another applying standards such as those imposed under the European Union’s limits. The companies could go further and allow users to filter content individually, blocking categories of content such as racial slurs, pornography, or depictions of violence. Artificial intelligence, in response to pressing a “dislike” button, might block even more particularized content. This type of technology is already in use today, not only with respect to individuals but entire countries in which internet companies employ geo-blocking to tailor content to comply with local legal limits. Employing it, companies could still offer users the same content they do today—provided they also offer unfiltered, “First Amendment” content to those who want it. See Vivek Ramaswamy & Jed Rubenfeld, Opinion, *How Elon Musk Can Liberate Twitter*, WALL ST. J. (Apr. 26, 2022), <https://www.wsj.com/articles/how-elon-musk-can-liberate-twitter-censorship-fact-check-free-speech-buy-website-platform-takeover-content-moderation-hate-speech-misinformation-disinformation-11650983718?mod=mhp> [<https://perma.cc/38AU-2YBL>].

³⁵¹ Neuborne, *supra* note 344, at 99.

³⁵² *Id.* at 98.

If the objective is protecting democracy's marketplace of ideas, it should not matter whether large-scale deprivation of free speech interests comes from the government or outside the government. The marketplace of ideas can wither in response to threats from either source. Moreover, when the modern marketplace has in so many respects become the town hall of modern social media, as the Supreme Court indicated in *Packingham v. North Carolina*,³⁵³ those deprivations and denials can mean its collapse. A blinkered reading of the First Amendment that would protect only the social media companies' freedom of speech would not fulfill its broader purpose of sustaining the marketplace of ideas. The Amendment's reach must be broadened, and that will require, in Neuborne's words, "thinking about when an otherwise unprotected speaker should be allowed to borrow the rights of others in the first place."³⁵⁴

The Supreme Court has, over the decades, developed a set of doctrines that, in effect, do exactly that—doctrines tailored to shielding essential speech freedoms in circumstances where an exclusive focus on governmental infringement would not be adequate. Each of those theories suggests that *some* protection must be available for the speech of persons outside the government and social media companies. The doctrines call for respecting all competing speech freedoms rather than embracing one while repudiating all others.³⁵⁵ A brief sketch of these theories follows. Read together, they affirm the courts' historic responsibility famously set out in footnote four of *Carolene Products*³⁵⁶—in John Hart Ely's words, "to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open."³⁵⁷ Read together, they counsel the application of a constitutional precautionary principle: given the fundamentality of freedom of speech as "the matrix, the indispensable condition, of nearly every other form of freedom,"³⁵⁸ when the threat of serious, irreversible damage to that freedom arises, lack of proof of certain

³⁵³ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (citing *Reno v. ACLU*, 521 U.S. 844, 870 (1997)).

³⁵⁴ Neuborne, *supra* note 344, at 118. "It's time to turn 'borrowed' corporate speech rights into a hearer-centered doctrine." *Id.* at 117.

³⁵⁵ "[T]he most important role for state action in the area of free speech," Jonathan Turley writes, "is to protect the entire 'marketplace of ideas'—both physical and virtual forums for the expression of viewpoints." Turley, *supra* note 341, at 641.

³⁵⁶ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

³⁵⁷ JOHN HART ELY, *DEMOCRACY AND DISTRUST* 76 (1980).

³⁵⁸ *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

governmental responsibility should not be used as a reason for ignoring First Amendment constraints.³⁵⁹

1. Government Speech

The government's free speech rights, contrary to intimations in some early judicial opinions, are not in fact unlimited. The Supreme Court warned in 2017 that "while the government-speech doctrine is important—indeed, essential—it is a doctrine that is susceptible to dangerous misuse."³⁶⁰ One specific danger of misuse lies in the government's power to evade constitutional limits through verbal coercion—to threaten action that would invade constitutionally protected rights. This verbal coercion, the Court has held, is prohibited. The protection of First Amendment rights from government threats has been a particular concern. "[A] government's ability to express itself is [not] without restriction . . .," the Supreme Court has said.³⁶¹ "[T]he Free Speech Clause itself may constrain the government's speech . . ."³⁶²

Moreover, the courts have held that the government cannot deputize intermediaries to do its censoring. The seminal case is *Bantam Books, Inc. v. Sullivan*,³⁶³ decided in 1963. In it, the Free Speech Clause itself was held to constrain the government's speech.³⁶⁴ A Rhode Island commission sent notices to wholesale book distributors that certain books they were selling contained objectionable content.³⁶⁵ The notices thanked the distributors in advance for their "cooperation" and informed them that the notices had also been circulated to local police departments.³⁶⁶ Police officers then visited the distributors to learn what action had been taken; the distributors usually responded that copies had been returned to the publishers.³⁶⁷ "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around," the Supreme Court observed.³⁶⁸ It held that the

³⁵⁹ Heightened scrutiny of restrictions that clog the channels of political change suggests the propriety of similarly heightened scrutiny of restrictions on the speech interests of listeners and bystanders whose access to those channels is blocked by speakers engaged in expression that is immunized from review by the state action or government speech doctrines. See *Carlene Prods. Co.*, 304 U.S. at 152 n.4.

³⁶⁰ *Matal v. Tam*, 137 S. Ct. 1744, 1758 (2017). A moment's reflection reveals the doctrine's insidious threat. Government normally acts through words. If all governmental words were immunized from judicial review, judicial invalidation of unconstitutional government action would come to an end. *Marbury v. Madison*, 5 U.S. 137 (1803) would be history.

³⁶¹ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 208 (2015).

³⁶² *Id.*

³⁶³ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

³⁶⁴ *Id.* at 72.

³⁶⁵ *Id.* at 61.

³⁶⁶ *Id.* at 62–63.

³⁶⁷ *Id.* at 63.

³⁶⁸ *Id.* at 68.

threats had subjected the distribution of constitutionally protected publications to “a system of prior administrative restraints,” a “system of informal censorship,” “a scheme of state censorship effectuated by extralegal sanctions”³⁶⁹ The commission had used “informal sanctions—the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation”³⁷⁰—deliberately to suppress the circulation of protected materials. The authors of these materials were not parties to the case. The government did not threaten the authors, at least not directly. The government went after intermediaries—wholesale distributors—with presumably less direct interest in defending authors’ free speech rights than the authors would have had themselves. But the thinly veiled system of informal censorship carried out by distributors was of course directed at preventing the authors’ works from being read. It was the authors’ and their readers’ interests in free speech that were impinged by the sanctions. That the government’s “speech” vivified those sanctions made the scheme more, not less, constitutionally infirm.

In 2015, the Seventh Circuit Court of Appeals addressed a similar scheme in *Backpage.com v. Dart*.³⁷¹ In that case, Cook County Sherriff Tom Dart set out to, in the court’s words, “crush” Backpage.³⁷² Backpage was an online forum carrying “adult” and other content, including some constitutionally protected content.³⁷³ To “crush” the website, Dart went to intermediaries—credit card companies—and requested that they prohibit use of their cards for ad purchases on Backpage.³⁷⁴ His aim was “to proceed against Backpage not by litigation but instead by suffocation, depriving the company of ad revenues by scaring off its payments-service providers.”³⁷⁵ The credit card companies “knuckle[d] under,” as the court put it, as their cost in potential civil liabilities and negative press far exceeded the small part of their income they received from dealing with Backpage and its advertisers.³⁷⁶ However, Dart’s clever scheme was constitutionally defective. “The First Amendment,” the court held, citing *Bantam Books*, “forbids a public official to attempt to suppress the protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands.”³⁷⁷ The court found, therefore, Dart’s claim that his own First

³⁶⁹ *Id.* at 70–72.

³⁷⁰ *Id.* at 67.

³⁷¹ *Backpage.com v. Dart*, 807 F.3d 229 (7th Cir. 2015).

³⁷² *Id.* at 230.

³⁷³ *Id.*

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 231.

³⁷⁶ *Id.* at 236.

³⁷⁷ *Id.* at 231 (citing *Sullivan*, 372 U.S. at 64–72).

Amendment rights permitted such speech unavailing.³⁷⁸ Had his speech “stop[ped] short of threats”, he could legally have publicly criticized the credit card companies.³⁷⁹ But Dart did not stop short of threats; he used his office to intimidate, and the court found that there is a difference “between government expression and intimidation—the first permitted by the First Amendment, the latter forbidden by it”³⁸⁰

The *Dart* court then looked to a Second Circuit opinion, *Okwedy v. Molinari*, in which the government devised another scheme using intermediaries to carry out its censorship—and again confronted the prohibitory wall of the First Amendment.³⁸¹ At issue in *Okwedy* were objections conveyed by the Staten Island borough president to a billboard company that had displayed messages offensive to gay and lesbian residents, and the company’s response—to take down the signs.³⁸² Here again, the court rejected the claim that the borough president was merely exercising his own First Amendment free speech rights, holding that “[w]hat matters is the distinction between attempts to convince and attempts to coerce.”³⁸³ The court also stated that “[a] public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff’s First Amendment rights even if the public-official defendant lacks direct regulatory or decision-making authority over the plaintiff or a third party that facilitates the plaintiff’s speech.”³⁸⁴ The *Okwedy* court noted that in a prior case, a court had found for plaintiffs even when the threats in question came from an individual member of the United States House of Representatives.³⁸⁵

The democratic electoral process is therefore far from the only check on government speech. The courts protect actors from government speech that threatens to suppress their speech through government coercion.³⁸⁶ When the government squelches the speech of specific individuals through government

³⁷⁸ *Id.* at 238.

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 230.

³⁸¹ *Okwedy v. Molinari*, 333 F.3d 339, 340–41 (2d Cir. 2003).

³⁸² *Id.* at 339–341.

³⁸³ *Id.* at 344.

³⁸⁴ *Id.* at 340–341.

³⁸⁵ *Id.* at 343. The case was *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56 (2d Cir. 1999).

³⁸⁶ Tim Wu proposes a parallel approach based not on an assumed agency relationship but on a theory of independent liability under which, for example, “[i]f the president or other officials order private individuals or organizations to attack or publish critics of the government,” the courts could find state action based on concepts akin to accomplice or secondary liability. Tim Wu, *Is the First Amendment Obsolete?*, in *THE FREE SPEECH CENTURY* 272, 286–87 (Lee C. Bollinger & Geoffrey R. Stone eds., 2019).

threats or enticements, it violates the First Amendment.³⁸⁷ That the intermediary is a private actor is not a matter of constitutional consequence. This year, the Supreme Court reiterated its intent to police the line separating government speech from private expression. In *Shurtleff v. City of Boston*, the Supreme Court stated that, when the boundary between the two blurs, it will conduct a holistic inquiry to determine “the extent to which the government has actively shaped or controlled the expression.”³⁸⁸ At that point, as suggested below, government speech considerations shade into state action concerns, and state action claims become unavailing.

2. State Action

The First Amendment, to reiterate, limits only action by the government. The Constitution provides no protection against private conduct, however wrongful.³⁸⁹ A murderer or kidnapper or robber does not violate the Constitution. Their actions may interfere with our life, liberty, and property *interests*, but they do not deny or deprive us of our *rights*. According to the state action doctrine, the Constitution protects rights only from government interference.

It’s noteworthy that neither *Bantam Books* nor *Dart* nor *Okwedy* was decided on state action grounds. In fact, the issue of state action was not explicitly addressed in any of the three opinions. Each of the three courts

³⁸⁷ See *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (“[A] state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.” (quoting *Lee v. Macon County Board of Education*, 267 F. Supp. 458, 475–76 (M.D. Ala. 1967))); Vivek Ramaswamy & Jed Rubenfeld, Opinion, *Twitter Becomes a Tool of Government Censorship*, WALL ST. J. (Aug. 17, 2022), https://www.wsj.com/articles/twitter-becomes-a-tool-of-government-censors-alex-berenson-twitter-facebook-ban-covid-misinformation-first-amendment-psaki-murthy-section-230-antitrust-11660732095?mod=opinion_lead_pos5 [<https://perma.cc/8NBV-SS5A>].

³⁸⁸ *Shurtleff v. City of Boston*, 142 S. Ct. 1583, 1590 (2022). The three justices joining a concurring opinion written by Justice Alito drew a similar line. The inquiry, they indicated, is “whether the government is actually expressing its own views or the real speaker is a private party and the government is surreptitiously engaged in the ‘regulation of private speech.’” *Id.* at 1596 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009)).

³⁸⁹ See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) (“Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as ‘state action.’”); *Peterson v. Greenville*, 373 U.S. 244, 250 (1963) (Harlan, J., concurring in the result) (“Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.”).

refused to be distracted by the existence of private intermediaries, as has the Supreme Court. A state normally can be held responsible for a private decision, the Court said in *Blum v. Yaretsky*, “only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”³⁹⁰ In *Bantam Books, Dart*, and *Okwedy*, government coercion and encouragement were obvious: the choice in each case was unmistakably the state’s.³⁹¹ But in many cases, where, when, and by whom the “choice” is made is anything but obvious. At that point, the government speech and state action doctrines dovetail, triggering the question posed in *Shurtleff* whether the speaker is the government or a private actor. Coercive power or significant encouragement by the government, it will be seen, pervade many environments—such as the snarl of interrelationships between the governmental and internet companies, described above—and many cases stand ready to be deployed by a court that is willing to give weight to speech interests beyond those of only the companies. What follows is a summary outline of those cases.

In some such cases, as the Court noted in *Blum*, government coercion or encouragement can be covert or more subtle than it was in *Bantam Books, Dart*, and *Okwedy*. Subtlety may make the coercion harder to detect but it is not constitutionally immunizing. It is “axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish,” the Court said in 1973 in *Norwood v. Harrison*, finding state action in the government’s provision of free textbooks to a private school with racially discriminatory practices. The program violated the Fourteenth Amendment, as it had “a significant tendency to facilitate, reinforce, and support private discrimination.”³⁹²

Sometimes the benefits the government derives from facilitating, reinforcing, or supporting private activity and the correlative benefits private actors derive from government involvement are so great that a symbiotic relationship results. Such a dynamic occurred in *Burton v. Wilmington Parking Authority*, decided in 1961. In that famous case, the Court found state action in the discriminatory practices of a private restaurant that rented space in a public parking garage. Both benefited from the arrangement. Upkeep of the building was paid for out of public funds, and guests in the restaurant were afforded a convenient place to park their cars, while the government took in additional revenues from the restaurant and additional demand for its parking facilities. As Erwin Chemerinsky has observed, “the government was so entangled with the restaurant that there was a ‘symbiotic relationship’ sufficient to create state

³⁹⁰ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

³⁹¹ In *Blum* itself, the Court found it was not the choice of the state to discharge or transfer nursing home residents, who claimed they were denied due process. *See id.* at 991.

³⁹² *Id.* at 466.

action.”³⁹³ The Court found it irrelevant that the government acted through omission rather than by commission. “By its inaction,” the Court found, the government “not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity”³⁹⁴

Burton is sometimes said to represent the jurisprudence of an earlier era, but even justices disinclined to find state action recognize that state action is created when private organizations act in a symbiotic relationship with the government. In 2001 the Court reaffirmed that excessive entanglement indicates state action, holding in *Brentwood Academy v. Tennessee Secondary School Athletic Association* that the government’s “pervasive entwinement” in the structure and operations of a private organization that oversaw high school sports in public and private high schools constituted state action.³⁹⁵ The breadth of the Court’s holding was not lost on Justice Thomas who, joined by three other dissenters, wrote that “[w]e have never found state action based upon mere ‘entwinement.’ Until today, we have found a private organization’s acts to constitute state action only when the organization performed a public function; was created, coerced, or encouraged by the government; or acted in a symbiotic relationship with the government.”³⁹⁶ State action can be found with respect to organizations that do not perform a public function but that are encouraged by the government and act in a symbiotic relationship with it—organizations like major social media companies.

Another concept sometimes dismissed as outdated is the notion of the public square—until it was revived by the Supreme Court in 2017, when the Court relied upon the notion to invalidate a North Carolina law that made it a felony for a registered sex offender to access social media websites like Facebook and Twitter. The Court found in *Packingham v. North Carolina* that the law barred access to what it called the “modern public square”:

By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars 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

³⁹³ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 578 (6th ed. Aspen Publ’g 2019).

³⁹⁴ *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961).

³⁹⁵ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 288 (2001).

³⁹⁶ *Id.* at 305 (Thomas, J., dissenting).

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.”³⁹⁷

The concept of the public square thus is not only alive and well in existing case law, the Court has explicitly recognized that the major social media platforms are “perhaps the most powerful mechanisms” within it.

The seminal public square case is, ironically, one in which the Supreme Court did not use the term: *Marsh v. Alabama*.³⁹⁸ *Marsh* posed the question whether a company-owned town could prohibit the distribution of literature by Seventh Day Adventists that would be constitutionally protected had the streets and sidewalks not been privately owned. The Court answered no, finding state action. “[T]he town and its shopping district are accessible to and freely used by the public in general,” the Court found, “and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.”³⁹⁹ It did not matter whether speech was stifled by the government or by a private company—the effect was the same: “Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.”⁴⁰⁰ Residents in both public and private towns had the same need for access to those channels of communication to fulfill the responsibilities of citizenship. “Just as all other citizens,” the Court said, “they must make decisions which affect the welfare of community and nation. To act as good citizens, they must be informed. In order to enable them to be properly

³⁹⁷ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (citing *Reno v. Am. C.L. Union*, 521 U.S. 844, 870 (1997)).

³⁹⁸ *Marsh v. Alabama*, 326 U.S. 501 (1946). See also *PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980) (upholding the right under the California Constitution of students to solicit signatures in a privately-owned shopping center). “[W]e can plausibly analogize Facebook, Google, and Twitter to the shopping center in *PruneYard* [sic]” Pozen, *supra* note 215 “[I]f government is not favoring any point of view and if it is genuinely improving the operation of democratic processes,” Cass Sunstein writes, “it is hard to find a legitimate basis for complaint. Indeed, the Supreme Court has expressly held that the owner of shopping centers—areas where a great deal of speech occurs—may be required to keep their property open for expressive activity [citing *PruneYard*].” Cass Sunstein, *The Future of Free Speech*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 305 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002). “[I]n *PruneYard*, the speech of the shopping mall owner was not hindered in the slightest by the public’s pamphleteering right.” *NetChoice v. Paxton*, 49 F.4th 439, 457 n.7 (5th Cir. 2022) (internal quotations omitted). The shopping center was a business establishment that was open to the public, the *NetChoice* Court noted. See *NetChoice*, 49 F.4th at 491.

³⁹⁹ *Marsh*, 326 U.S. at 503.

⁴⁰⁰ *Id.* at 507.

informed, their information must be uncensored.”⁴⁰¹ The Court reemphasized the need to be informed in *Packingham*: “A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more.”⁴⁰² It is entirely plausible, Geoffrey Stone has observed, that cases such as *Marsh* could be deployed against what the Court “might perceive as profound private threats to our system of free expression.”⁴⁰³ He continues:

For example, one could imagine the Court holding that extraordinary powerful internet sites, like Facebook, Twitter, and Google, are so powerful that they are in effect government actors and must therefore be deemed the equivalent of public forums. *Marsh*, which dealt with company towns, might be a good jumping-off point for such an analysis.⁴⁰⁴

The owners of the company town, the *Marsh* Court opined, had no more right to censor information than did “the owners of privately held bridges, ferries, turnpikes and railroads,” which are “built and operated primarily to benefit the public” and perform “essentially a public function.”⁴⁰⁵ None of these private concerns operated “as freely as a farmer does his farm” and thus, the Court reasoned, none was able to ban the distribution of objectionable literature.⁴⁰⁶

Though he did not mention *Marsh*, the passage quoted above presaged the much-discussed concurring opinion of Justice Thomas in *Biden v. Knight First Amendment Institute*. Historically, Justice Thomas wrote, businesses known as common carriers, such as railroad companies, insurers, and telegraph companies, have long been subject to special regulations, including a general requirement to serve all comers.⁴⁰⁷ “In many ways,” Justice Thomas wrote, “digital platforms that hold themselves out to the public resemble traditional common carriers.”⁴⁰⁸ Digital platforms also, he suggested, resemble public utilities and places of public accommodation—places that provide lodging, food, entertainment, or other services to the public—where companies’ right

⁴⁰¹ *Id.* at 508.

⁴⁰² *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

⁴⁰³ Geoffrey R. Stone, *Reflections on Whether the First Amendment Is Obsolete*, in *THE PERILOUS PUBLIC SQUARE: STRUCTURAL THREATS TO FREE EXPRESSION TODAY* 45 (David E. Pozen ed., 2020).

⁴⁰⁴ *Id.*

⁴⁰⁵ *Marsh*, 326 U.S. at 506.

⁴⁰⁶ *Id.*

⁴⁰⁷ See *Biden v. Knight First Amend. Inst.*, 141 S. Ct. 1220, 1223 (2021) (Thomas, J., concurring).

⁴⁰⁸ *Id.* at 1224.

to exclude has similarly been limited.⁴⁰⁹ The idea has generated considerable support among free speech scholars. The Fifth Circuit in *NetChoice* found that the common carrier doctrine supports the constitutionality of imposing nondiscrimination obligations on the platforms,⁴¹⁰ and, importantly, observed that courts have imposed common carrier duties absent statutes requiring or authorizing them to do so.⁴¹¹

The point to be emphasized, made implicitly by Justice Thomas and the courts in the earlier cases outlined above, is—again—that focusing exclusively on the status and interests of only one actor is too limited. It makes more sense to examine all interests at issue, identify the precise rights that are potentially impinged, and protect those rights directly, rather than safeguarding only those that happen adventitiously to be represented by a single particular litigant.⁴¹² The Court has recognized a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁴¹³ The interests of the listener or reader and of the general public to know and be informed are crucial in upholding that commitment. It should not matter whether information is withheld from intended recipients by an officious Federal Express or an officious U.S. Postal Service. *Lamont*, described earlier,⁴¹⁴ underscores the independent right to read and hear. The *Lamont* Court might well have been referring to the internet when it quoted Justice Holmes—the post office, Holmes said, “is almost as much a part of free speech as the right to use our tongues”⁴¹⁵—or when it quoted the D.C. Circuit:

Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.⁴¹⁶

⁴⁰⁹ See, e.g., Turley, *supra* note 341, at 644 (“The regulation of social media companies as akin to a telephone company would allow the government to impose public forum protections from censorship.”).

⁴¹⁰ *NetChoice v. Paxton*, 49 F.4th 439, 473–74 (5th Cir. 2022).

⁴¹¹ An early example cited by the court is *State ex rel. Webster v. Nebraska Telephone Co.*, in which the Supreme Court of Nebraska ordered a telephone company to put a telephone in a lawyer’s office. *NetChoice*, 49 F.4th at 471 (citing *State ex rel. Webster v. Neb. Tel. Co.*, 22 N.W. 237 (Neb. 1885)).

⁴¹² See Chemerinsky, *supra* note 341, at 538.

⁴¹³ *N.Y. Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴¹⁴ See *supra* notes 343–344 (discussing *Lamont v. Postmaster General*, 381 U.S. 301 (1965)).

⁴¹⁵ *Milwaukee Pub. Co. v. Burlison*, 255 U.S. 407, 437 (1921) (Holmes, J., dissenting).

⁴¹⁶ *Lamont v. Postmaster General*, 381 U.S. 301, 305 n.3 (1965) (quoting *Pike v. Walker*, 121 F.2d 37, 39 (D.C. Cir. 1941)).

The “main artery through which the business, social, and personal affairs of the people are conducted” is now social media. These are the channels through which the people now receive information, and the right to receive publications, Justice William Brennan argued in his concurrence in *Lamont*, is a fundamental right. “The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them,” he wrote. “It would be a barren marketplace of ideas that had only sellers and no buyers.”⁴¹⁷ And, we might add today, it would be a barren digital marketplace that protected only the speech interests of the government and the social media platforms but not their users or the general public.

IV. CONCLUSION

Freedom of speech is neither liberal nor conservative; it is the operating system of our political order on which the smooth and safe functioning of all else depends. In the digital era, it is possible to freeze that operating system by inducing widespread public deference to authoritatively-defined truths. A sprawling, unelected security-media cartel now does so. It employs new tools of soft censorship to keep unwanted ideas and information out of the marketplace of ideas. That cartel defies constitutional categorization as either public or private. Yet its interwoven components seek immunity in established constitutional doctrines concerning state action and government speech. The marketplace of ideas will not likely survive if the First Amendment, cramped by those doctrines, is construed as protecting only the speech freedom of the government and its big tech partners but not the speech freedom of social media users or the general public. If ever a threat to freedom of speech counseled the application of a constitutional precautionary principle, described above,⁴¹⁸ it is the menace posed by the security-media cartel.

For those trained in the law, who have honed skills in placing established facts into fixed categories, the analytic challenge is formidable. Multiple actors move in and out of a constantly shifting mix of technocrats, managers, political operators, lobbyists, alumni, content moderators, internet moguls, intelligence and law enforcement officials and allied groups. The cartel is diffuse; at its core are networks within networks,⁴¹⁹ adapting continually to changing political currents with ever-improving technologies. In its structure as in its “unwarranted influence,” it resembles the amorphous military-industrial complex memorably identified by President Dwight

⁴¹⁷ *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).

⁴¹⁸ See *supra* note 386.

⁴¹⁹ See Glennon, *supra* note 7, at 86.

Eisenhower.⁴²⁰ Yet its very shapelessness and its resistance to classification within traditional categories allow it to elude legal limits—and indicates the urgent need to address its malign effect: the cartel chokes the traditional channels of information and political change on which legislative reform depends,⁴²¹ with the result that legislative inaction can no longer stand in the way of judicial redress.

The courts' jurisprudential challenge will be particularly daunting. The pervasive presence of state actors within the cartel requires assessing second- and third-order effects that courts normally avoid. The questions before them concern nothing less than the system-wide impact on democracy of efforts to stopper the channels of political communication. It will be tempting for judges to vacillate in the face of recognized cultural constraints on judicial capacity.⁴²² It will be tempting to look to earlier decisions that, in a simpler era, turned upon straightforward, immediate questions of *who* was speaking and *whether* that person was with the government. But times have changed. With those changes have come corresponding changes in the meaning of the constitutional predicate for judicial intervention.⁴²³ If individual cases can still be abstracted so reductively, the larger controversy—the larger *crisis*—cannot. To place the survival of free speech on the resolution of those narrow *who* and *whether* questions will hasten its disappearance.

Some members of the public will neither rue nor even notice its absence. They will have been convinced that only hate speech or medical disinformation or foreign propaganda has disappeared. They will not see what never reaches their eyes. They will be gratified to read no challenges to their worldview in inoffensive search results or in deeply buried social media posts or in politically tailored news feeds. But the free exchange of ideas in America will be a relic of an earlier era. A diligent few will still dig out dissent, but their views will increasingly be shunted aside as extremist, and free speech itself will increasingly be dismissed as dispensable.

The security-media cartel and its allies already consider free speech dispensable. They believe that they, not the people, are better able to decide

⁴²⁰ For a fine account of the drafting of Eisenhower's January 17, 1961 speech, see generally JAMES LEDBETTER, *UNWARRANTED INFLUENCE: DWIGHT D. EISENHOWER AND THE MILITARY-INDUSTRIAL COMPLEX* (Yale Univ. Press 2011).

⁴²¹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See generally JOHN HART ELY, *supra* note 357.

⁴²² Learned Hand's admonition is widely accepted: "Liberty lies in the hearts of men and women," Hand said; "when it dies there, no constitution, no law, no court can save it." LEARNED HAND, *THE SPIRIT OF LIBERTY* 190 (Irving Dillard ed., 3d ed. 1960).

⁴²³ Article III, Section 2 of the Constitution empowers federal courts to decide "all cases . . . arising under this Constitution" and all "controversies to which the United States shall be a party." U.S. CONST. art. III, § 2, cl. 1.

how to advance the people's well-being. They do so by excluding information and ideas from the marketplace. Sometimes they are right. The people do not always distinguish fact from fiction. Pernicious ideas sometimes prevail. But the American republic is premised on the belief that choices made by the people at large are more trustworthy than choices made for them by a select, unaccountable subset of the people.

There is no reason to believe that recent technological breakthroughs have suddenly made the noble lies of modern-day philosopher-kings more compatible with democracy. Nor is there any reason to suppose that the cultishness and mobthink to which the public is sometimes vulnerable cannot also infect decision-making at "senior" levels. The censors assume that they are immune from the familiar frenzies, biases, and cognitive distortions that beset the public. Their assumption engenders a sense of infallibility, an unawareness that they are subject to their own distinctive array of cognitive biases, a conceit that they are possessed of unique expertise and an exclusive capacity to ferret out error. To acknowledge that the security agencies are themselves susceptible to error is hardly to suggest their expendability. One need look no further than daily news reports to know that safeguarding national security requires an infrastructure of the trained and prepared, led by the honest and the able. Nor is it to imply invidious intent; unaccountability, insularity, and banality plagued bureaucracy long before Hanna Arendt's incisiveness.⁴²⁴ But the impulse is ever-present to mistake personal preference for universal truth. It is the highest object of free speech to keep both the governed and the governors from succumbing to that temptation. And it is the highest duty of the judiciary to protect free speech when it is imperiled. "If we would guide by the light of reason," Brandeis wrote, "we must let our minds be bold."⁴²⁵ The courts have met this duty boldly in the past, bequeathing the United States the most speech-protective legal regime the world has ever known. Its survival now depends upon renewed judicial boldness.

⁴²⁴ "In a fully developed bureaucracy there is nobody left with whom one can argue, to whom one can present grievances, on whom the pressures of power can be exerted. Bureaucracy is the form of government in which everybody is deprived of political freedom, of the power to act; for the rule by Nobody is not no-rule, and where all are equally powerless, we have a tyranny without a tyrant." HANNA ARENDT, *ON VIOLENCE* 81 (1970).

⁴²⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).