

MARKET FAILURE AND CENSORSHIP IN THE MARKETPLACE OF IDEAS¹

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INTRODUCTION

The familiar metaphor of the exchange of ideas as a “marketplace” has “permeate[d] the Supreme Court’s first amendment jurisprudence.”² Founded on the presumption that competition in markets leads to “efficient”³ outcomes, the analogy of a market for ideas suggests that competition among ideas will reliably arrive at truth, or at least the most socially beneficial ideas within the grasp of a community of discourse. And consistent with economic free-market advocates, the received expectation in Western liberal democracies has been that “a process of robust debate, if uninhibited by government [or other] interference, will” best achieve this end.⁴ In other words, the assumption is that the market of ideas is most efficient when it is free. As Thomas Jefferson claimed, “Truth is the proper and sufficient antagonist to error, and has nothing to fear from conflict, unless by human interposition, disarmed of her natural weapons, free argument and debate.”⁵ Similarly, Justice Oliver Wendell Holmes later noted, “the best test of truth is the power of thought to get itself accepted in the competition of the market.”⁶

But even the most fervent economic free-market advocates recognize the possibility of market failure. Market failure is “a market characteristic that

¹ The authors are grateful for the generous support provided for this project by the Law & Economics Center (LEC) at the Antonin Scalia Law School at George Mason University. We presented an earlier version of this paper at the LEC’s Research Roundtable on Capitalism and the Rule of Law in March 2022. The paper has benefited tremendously from the comments and suggestions offered during that roundtable.

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² See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L. J. 1, 3 (1984).

³ Efficiency is an economic term with many meanings, depending on the circumstances and the economist who is speaking. For one plain-language explanation of efficiency, see Jeremy Kidd, *Kindergarten Coase*, 17 GREEN BAG 2D 141, 145-46 (2014).

⁴ Ingber, *supra* note 2 at 3.

⁵ Thomas Jefferson, Statute of Religious Freedom (1779).

⁶ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. Dissenting).

prevents the market from maximizing consumer welfare.”⁷ The exercise of monopoly power, for example, is a common source of market failure. If a market failure is present, externally-imposed solutions—e.g., Pigouvian taxes⁸ or regulatory restrictions—might improve outcomes, though the possibility of government failure⁹ should encourage caution.

The last few years have witnessed increased calls (from both government officials and the private sector) for censorship of speech and research pertaining to a variety of subjects (e.g., climate change; COVID-19 sources and treatments; and viewpoints concerning race, gender, and sexual orientation) across a variety of venues (e.g., social media, the classroom, internet searches, corporations, and even persons’ private bookshelves). The consistent refrain in favor of this censorship is that the spread of false or misleading information is preventing access to or distorting the truth and thereby inhibiting social progress: undermining democracy, fomenting bigotry, costing lives, and even threatening the existence of the planet.

Though on their face these calls for censorship appear anti-liberal and contrary to the marketplace model, they can be made consistent with both if they are understood as a response to a market failure in the marketplace of ideas. For example, could a majority race so dominate the terms or conditions of public and private discourse that minority voices are effectively barred from entry? If so, calls for censorship of expressly or implicitly racially biased voices may be an appropriate liberal response to a market failure in the marketplace of ideas. If not, however, pervasive success at censorship (whether public or private) may itself create inefficiencies equivalent to market failure. While recent calls for censorship have not been justified expressly as a response to market failure, reframing the debate in these terms may prevent parties on both sides of the issue from engaging at cross purposes by locating the debate within an otherwise familiar model.

To this end, this Article constructs a working model for the marketplace of ideas, and explores the possibility of failure in this market. The methodological approach employed for articulating the market model for human discourse will be interdisciplinary. Using the philosopher Robert Brandom’s inferentialist understanding of belief and assertion as a starting point, the Article draws upon the work of Ronald Coase, Harold Demsetz,

⁷ John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 *Cardozo L. Rev.* 1805, 1847 (2020).

⁸ E.g., Arthur C. Pigou, *THE ECONOMICS OF WELFARE* (1920).

⁹ See, generally, Jeremy Kidd & Joseph Padgett, *Trucker Shortage as Government Failure*, 1 *LOYOLA U. CHI. J. REG. COMPLIANCE* 7 (2016).

George Stigler, Armen Alchian, and other law and economics luminaries, to construct the basic model for the marketplace of ideas. Eschewing complex mathematical models in favor of a more intuitive approach, the Article defines the market in which ideas are exchanged, including the institutions that reduce transaction costs and facilitate exchange, paying particular attention to reputational devices and the analogs of the price mechanism. The Article then considers a variety of theorized market failures and identifies those that may apply to the marketplace of ideas. In doing so, the Article avoids “present[ing] the relevant choice as between an ideal norm and an existing ‘imperfect’ institutional arrangement,”¹⁰ offering instead “the relevant choice [as] between alternative real institutional arrangements.”¹¹

Once the model is articulated, the Article relies on philosophical arguments articulated by liberal thinkers from John Milton and John Stuart Mill to Isaiah Berlin and Richard Rorty to argue (in response to classical and post-modern critiques) that the spread of false or misleading information does not on its own reflect a market failure warranting censorship as a corrective. Instead, it is argued recent successful efforts at silencing and deplatforming dissenting voices (particularly in the context of social media, but also in academia and the workplace) may reflect the real market failure in need of correction.

The Article proceeds as follows: Part I offers examples of recent calls for (and efforts at) censorship in the market of ideas concerning a variety of subjects and forums. Part II articulates a model of the marketplace of ideas that jibes with contemporary economic concepts, defines its components (e.g., sellers, buyers, intermediaries, etc.), considers the possibility of associated market failures, and highlights some common fallacies in the application of the concept of market failure more broadly. Part III explores the principal philosophical justifications for the utility of freedom of expression, focusing on the arguments articulated in John Stuart Mill’s classic, *On Liberty*. Part IV argues that, in light of these arguments (and taking into account contemporary critiques), the threat of false and misleading expression does not reflect market failure in the marketplace of ideas as modeled here. To the contrary, Part V argues that the ease with which recent public and private efforts at censorship have succeeded may itself

¹⁰ Harold Demsetz, *Information Efficiency: Another Viewpoint*, 12 *The Journal of Law & Economics* 1 (1969).

¹¹ *Id.* As Demsetz explains, the “nirvana approach is much more susceptible than is the comparative institution approach to committing three logical fallacies—the grass is always greener fallacy, the fallacy of the free lunch, and the people could be different fallacy.” *Id.* at 2.

reflect a market failure warranting correction—if not through legislation or the courts, then by social sanction and the court of public opinion.

I. RECENT CALLS FOR CENSORSHIP

In just the last two years, there have been a flurry of calls for censorship by government and private actors in a variety of contexts, too many to summarize here. This section offers some examples of recent calls for censorship of speech in just a few spheres of discourse (pertaining to COVID-19, climate change, and issues pertaining to race, gender identity, and sexual orientation) to provide context for the discussion to follow.

A. COVID-19'S Treatments and Origins

In February of 2020, as COVID-19 began to spread, Tedros Adhanom, Director General of the World Health Organization warned that “we’re not just fighting an epidemic; we’re fighting an infodemic.”¹² The term “infodemic” is defined as “a rapid proliferation of information that is often false or uncertain.”¹³ Much of the early controversy centered on the effectiveness of various treatments and lockdowns.¹⁴ For example,

there was a great deal of dispute over the use of hydroxychloroquine as a treatment for COVID-19, particularly after then-President Donald Trump suggested that the readily accessible drug might prove effective. At the behest of health officials, social media platforms almost immediately started censoring user claims concerning the drug’s effectiveness (by politicians, medical professionals, and laypersons alike)—and continue to do so today.¹⁵ And when Stanford Professor John Ioannidis posted a video on YouTube questioning “the need to continue the ongoing lockdown and rais[ing] concerns about the negative impact of restrictions,”¹⁶ the video was later removed from the platform because it purportedly contained “medical

¹² Emilia Niemiec, *COVID-19 and Misinformation: Is Censorship of Social Media a Remedy to the Spread of Medical Misinformation*, EMBO REPORTS (Oct. 26, 2020), at <https://www.embopress.org/doi/epdf/10.15252/embr.202051420>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See, e.g., *Doctor who advocates hydroxychloroquine for COVID-19 to file federal lawsuit against social media for censorship*, MSN (September 1, 2020); Andrew Blake, *Sen. Johnson blasts ‘arrogant’ censorship after YouTube suspension for hydroxychloroquine video*, WASHINGTON TIMES (June 12, 2021).

¹⁶ Emilia Niemiec, *COVID-19 and Misinformation: Is Censorship of Social Media a Remedy to the Spread of Medical Misinformation*, EMBO REPORTS (Oct. 26, 2020), at <https://www.embopress.org/doi/epdf/10.15252/embr.202051420>.

misinformation.”¹⁷

The Food and Drug Administration authorized the first COVID-19 vaccines for use in the United States in December 2020.¹⁸ Soon after their distribution, concerns were raised concerning their efficacy and potential side effects. President Joe Biden responded by calling on social media platforms to censor “super-spreaders” of “misinformation” about COVID-19 vaccines, claiming that the platforms’ inaction is “killing people.”¹⁹ It has also come to light that “White House officials [were] notifying Facebook about posts that allegedly spread COVID-19 misinformation as part of efforts by President Joe Biden’s administration to combat what U.S. Surgeon General Vivek Murthy described as ‘an imminent and insidious threat to our nation’s health.’”²⁰ White House spokesperson Jen Psaki suggested that if “you’re problematic on one social media side, you should be banned from them all.”²¹

In February of 2021, Facebook announced that “it had expanded the list of misleading health claims that it would remove from its platforms to include those asserting that ‘COVID-19 is man-made or manufactured.’”²² The company recently changed that policy as new evidence came to light suggesting that “the Wuhan Institute of Virology were hospitalized in late 2019 with symptoms consistent with the virus.”²³

B. Climate Change

In recent Senate hearings on Big-Tech censorship, Sen. Chris Coons called out representatives of some of the leading social media platforms and, as one commentator put it, “demanded censorship of disinformation on climate change.”²⁴ According to Sen. Coons, the role of social media

¹⁷ Jeanne Lenzer & Shannon Brownlee, *Opinion: John Ioannidis and Medical Tribalism in the Era of COVID-19*, UNDARK (Jun. 11, 2020), at <https://undark.org/2020/06/11/john-ioannidis-politicization/>.

¹⁸ Alice Park, *The First Authorized COVID-19 Vaccine in the U.S. Has Arrived*, TIME (Dec. 11, 2020).

¹⁹ See, e.g., Zeke Miller and Barbara Ortutay, *Biden: ‘Killing people’ remark was a call for big tech to act*, AP News (July 20, 2021).

²⁰ Meghan Roos, *Biden Administration’s Admission They’re Flagging Content to Facebook Sparks Furor*, NEWSWEEK (July 15, 2021).

²¹ Dominic Green, *Joe Biden’s Digital Serfs*, SPECTATORWORLD (July 10, 2021).

²² Cristiano Lima, *Facebook no longer treating ‘man-made’ Covid as a crackpot idea*, POLITICO (May 26, 2021).

²³ *Id.*

²⁴ Jonathan Turley, *Opinion: Throttling Free Speech Is Not the Way to Fix Facebook and other Social Media*, THE HILL (Oct. 9, 2021), at

platforms in “helping to disseminate climate denialism . . . further facilitates and accelerates one of the greatest existential threats to our world.”²⁵ Responding to pressure from politicians and non-governmental actors to silence “climate-change deniers,” Facebook, YouTube, and other social media platforms have adopted various policies to censor scientists and others who challenge the conventional wisdom concerning the causes and effects of climate change.²⁶ For example, Science Feedback, one of Facebook’s fact checkers recently drew criticism from conservative journalists for censoring reviews of Steven Koonin’s (former Under Secretary for Science at the U.S. Department of Energy under Obama) book, *Unsettled: What Climate Science Tells Us, What It Doesn’t and Why It Matters*,²⁷ classifying the book’s content as “partly false”.²⁸ Similarly, Google and YouTube announced they will use automated tool and human reviewers to “prohibit ads for, and monetization of, content that contradicts well-established scientific consensus around the existence and causes of climate change.”²⁹ Despite these efforts, many experts claim that these social media platforms are not doing enough. As one commentator put it, “[g]iven that [climate change] is an existential threat, we can’t be casual about the seriousness about the threat of climate misinformation It needs to be addressed with the same level of urgency and proactiveness that they’re showing with COVID-19 and election misinformation.”³⁰

C. Race, Gender, and Sexual Orientation

In June of 2019, the Council on Foreign Relations published a global

<https://thehill.com/opinion/technology/576062-throttling-free-speech-is-not-the-way-to-fix-facebook-and-other-social/>.

²⁵ Miranda Devine, Opinion: Big Tech’s free speech suppression is dangerous information warfare, *New York Post* (Nov. 18, 2020), at <https://nypost.com/2020/11/18/big-techs-free-speech-suppression-is-dangerous-information-warfare-devine/>.

²⁶ See, e.g., Kari Paul, *Facebook steps up fight against climate misinformation – but critics say effort falls short*, *THE GUARDIAN* (Sep. 16, 2021), at <https://www.theguardian.com/technology/2021/sep/16/facebook-climate-change-misinformation>.

²⁷ STEVEN E. KOONIN, *UNSETTLED* 20 (2021).

²⁸ See, e.g., Katie Pavlich, *Facebook “Fact Checker” Punish and Censor Debate on Climate Science*, *TOWNHALL* (May 20, 2021).

²⁹ See, Announcement, *Updating our ads and monetization policies on climate change: Addressing climate change denial*, *GOOGLE ADS HELP* (Oct. 7, 2021), at <https://support.google.com/google-ads/answer/11221321>.

³⁰ Clare Duffy, *The next front in Facebook’s misinformation battle: climate change*, *CNN Business* (Nov. 8, 2021), at <https://www.cnn.com/2021/11/07/tech/facebook-climate-change-misinformation/index.html>.

study of the pervasiveness of “hate speech” on social media platforms.³¹ The study notes that “[v]iolence attributed to online hate speech has increased worldwide,” and argues that “[s]ocieties confronting the trend must deal with questions of free speech and censorship on widely used tech platforms.”³² The authors explain that while the United States grants social media companies “broad powers in managing their content and enforcing hate speech rules,” other countries, “including Germany, can force companies to remove posts within certain time periods.”³³ Yet while internet platforms have greater discretion to censor content in the United States, many from both sides of the political spectrum have argued they exercise this broad discretion in an arbitrary or even discriminatory manner.³⁴ Some on the left have argued that the algorithms employed by social media companies to tag and censor hate speech are themselves biased and often wrongfully identify the speech of racial minorities as offensive.³⁵ For example, one study found that “tweets written in African American English commonly spoken by Black Americans are up to twice more likely to be flagged as offensive compared to others.”³⁶ And many on the political right claim that social media companies have a track record of disproportionately and unfairly censoring conservative or libertarian voices on issues pertaining race, ethnicity, and sexual orientation.³⁷

³¹ Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (Jun. 7, 2019), at <https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons>.

³² *Id.*

³³ *Id.*

³⁴ See, e.g., Oliver L. Haimson, Social Media Sites are Censoring Transgender, Black, and Conservative Users – But for Very Different Reasons, SALTY, at <https://saltyworld.net/social-media-sites-are-censoring-transgender-black-and-conservative-users-but-for-very-different-reasons/>; see also, Janice Gassam Asare, Social Media Continues to Amplify White Supremacy and Suppress Anti-Racism, *Forbes* (Jan. 8, 2021), at <https://www.forbes.com/sites/janicegassam/2021/01/08/social-media-continues-to-amplify-white-supremacy-and-suppress-anti-racism/?sh=6a0e89ad4170>.

³⁵ See, e.g., Merlyna Lim and Ghadah Alrasheed, *Beyond a technical bug: Biased algorithms and moderation are censoring activists on social media*, THE CONVERSATION (May 16, 2021), at <https://theconversation.com/beyond-a-technical-bug-biased-algorithms-and-moderation-are-censoring-activists-on-social-media-160669>.

³⁶ *Id.*

³⁷ Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, COUNCIL ON FOREIGN RELATIONS (Jun. 7, 2019), at <https://www.cfr.org/backgrounder/hate-speech-social-media-global-comparisons>. (noting U.S. Senator Ted Cruz’s claim that “major social media companies’ rules disproportionately censor conservative speech”). See also, Jordan Boyd, *Twitter Implements New Rule So It Can Selectively Ban Memes, Mockery of Democrats*, THE FEDERALIST (Nov. 30, 2021), at <https://thefederalist.com/2021/11/30/twitter-implements-new-rule-so-it-can-selectively>

In addition, college and corporate campuses have made recent headlines for their sensitivity trainings that look to censor the use of certain terms and forms of expression. For example, Western Carolina University's mandatory Resident Assistants training program reportedly instructs students to refrain from referring to America as a "melting pot" because the metaphor "emphasized the idea that people should assimilate to the country's 'dominant' culture."³⁸ The same training also teaches students not to use phrases like "When I look at you I don't see color" and "Gender (or race) does not affect the way I treat you."³⁹ According to the school, such phrases should be censored because they deny the "experiences of people with different identities."⁴⁰ Similarly, The Walt Disney Company's "Reimagine Tomorrow" employee training program reportedly urged white employees to recognize their "white privilege," to reject the ideal of "equality" in favor of "equity," and to "'reflect' on America's 'racist infrastructure' and 'think carefully about whether or not [their] wealth' is derived from racism."⁴¹ One employee who disagreed with these positions reportedly complained, "I know if I said one thing that was truthful, based on data, or even just based on my own personal experience, it would actually be rather unwelcomed."⁴² Indeed, this employee expressed concern that voicing an alternative viewpoint in these discussions would place the employee's career at risk.⁴³

Moreover, after the January 6 Capitol riots, even the United States government has been emboldened to "root out racism" and other forms of

ban-memes-mockery-of-democrats/.

³⁸ Tommy Taylor, *Student Resident Assistants Slam Western Carolina University for Being 'Hijacked by Wokeness' after Being Told Not to Refer to America as a 'Melting Pot' in Forced Racial and Gender Sensitivity Training*, DAILY MAIL (Jan. 8, 2022), at <https://www.dailymail.co.uk/news/article-10381665/North-Carolina-university-RAs-subjected-racial-gender-sensitivity-training.html>.

³⁹ *Id.*

⁴⁰ *Id.* See also Arif Ahmed, *How Our Universities Became Sheep Factories*, UNHERD (Jan. 14, 2020) (noting that one Cambridge University department "tells students that expressions of racism include 'beliefs, feelings, attitudes, utterances, assumptions and actions that end up reproducing and re-establishing a system that offers dominant groups opportunities to thrive while contributing towards the marginalization of minority groups'" and asserts such "beliefs" are not welcome in the university setting), available at <https://unherd.com/2022/01/how-our-universities-became-sheep-factories/>.

⁴¹ Dana Kennedy, *Disney Goes Woke with New Anti-Racist Agenda for Employees*, NEW YORK POST (May 8, 2021), at <https://nypost.com/2021/05/08/disney-goes-woke-with-new-anti-racist-agenda-for-employees/>.

⁴² *Id.*

⁴³ *Id.*

“extremism” within its ranks through various forms of censorship. For example, the Pentagon announced plans to launch a program that “would screen military personnel’s social media for ‘extremist material’—looking to a private firm to do the digging in order to circumvent First Amendment protections.”⁴⁴ The Pentagon’s “extremism analysis” contractor reportedly intends to monitor and flag internet searches by military personnel for terms such as “the truth about Black Lives Matter” as evidence of the platform user’s “White supremacy.”⁴⁵ More still, the U.S. Navy’s newly-implemented anti-“extremism” training reportedly teaches that “it’s okay to advocate for Black Lives Matter while at work but sailors are not allowed to discuss ‘politically partisan’ issues.”⁴⁶

II. UNDERSTANDING THE EXCHANGE OF IDEAS AS A MARKETPLACE THAT CAN ADMIT OF MARKET FAILURE.

These calls for restrictions on expression of ideas, whether public or private, are problematic as barriers to entry into the marketplace of ideas. Markets function best when competition is robust, and competition suffers when potential competitors are barred from entering the market. This harm to competition arises not only from outright bans, but merely from the imposition of excess entry costs. Those proposing these barriers to entry may very well be acting in accordance with a good faith belief that the barriers are necessary to achieve larger goals, but those proposing the barriers should be required to grapple with the impact of their proposals on the marketplace of ideas.

One obstacle to their doing so is the unfortunate reality that, to date, there have been very few attempts to rigorously define the marketplace of ideas. Of those attempts that have been made, only a small minority appear to take it seriously, leading to the suspicion that those attempting the task either do not care much for the free exchange of ideas, or else they do not care much for markets.⁴⁷ In the first category are those who desire greater restrictions on

⁴⁴ Emily Jacobs, *Pentagon Launches Program to Surveil Military Personnel’s Social Media*, NEW YORK POST (May 18, 2021), at <https://nypost.com/2021/05/18/pentagon-to-surveil-military-personnels-social-media/>.

⁴⁵ Sam Dorman, *Pentagon Contractor Investigating “Extremism” Says BLM Web Search Raises Concerns about White Supremacy*, FOX NEWS (July 19, 2021), at <https://www.foxnews.com/us/pentagon-moonshot-black-lives-matter>.

⁴⁶ Houston Keene, *Navy’s ‘Extremism’ Training Says It’s OK to Advocate for BLM at Work but Not ‘Politically Partisan’ Issues*, FOX NEWS (Mar. 29, 2021), <https://www.foxnews.com/politics/navy-extremism-training-black-lives-matter>.

⁴⁷ One notable exception is Ronald Coase, *The Market for Goods and the Market for*

expression but find themselves obstructed in their efforts by the strength of the analogy. In the second category are those who seem inclined to favor free expression of ideas but are often uncomfortable with the marketplace analogy because they see markets as imperfect, potentially exploitative structures.

This section will outline a working model for the marketplace of ideas, beginning with the foundational assumption that markets, generally, are effective means of creating value for market participants.⁴⁸ In this way, our formulation of the marketplace of ideas will differ from most because we will not attempt to defend the notion that markets are perfect or yield an ideal outcome.⁴⁹ We will not attempt to impose unrealistic assumptions about perfect information by buyers or sellers, as those assumptions are used only to make mathematical models more tractable.⁵⁰ We will not attempt to impose assumptions that sellers maximize profits and consumers maximize utility⁵¹—given the ubiquity of uncertainty in the model, such an assumption borders on myth. Instead, we will rely on the less restrictive—but more realistic—assumptions that sellers seek positive profits⁵² and consumers seek

Ideas, 64 *Am. Econ. Rev.* 384 (1974), in which the author argued that the then-accepted view that the market for ideas should be left largely unregulated was also applicable to the market for goods. *Id.* at 385.

⁴⁸ A working market requires both buyers and sellers. Unfortunately, most models of the marketplace of ideas consider only one side, making the analysis incomplete. Gregory Brazeal, *How Much Does a Belief Cost?: Revisiting the Marketplace of Ideas*, 21 *S. CAL. INTERDIS. L.J.* 1, 2 (2011).

⁴⁹ The typical economics classroom presents markets as achieving “equilibrium,” a stable point at which quantity supplied and quantity demanded are equal. In reality, the simple equilibrium model relies on the assumption of *ceteris paribus*, or that all other factors are held constant. But all competent economists understand that the factors of supply and demand are constantly changing, so there is no such thing as a stable equilibrium. Instead, equilibrium is merely a fiction that explains why markets change and in what direction. John Anderson, Jeremy Kidd & George Mocsary, *Social Media, Securities Markets, and the Phenomenon of Expressive Trading*, 25 *Lewis & Clark L. Rev.* 1223, 1243 (2021). Unfortunately, there are some less-than-competent economists—or non-economists who attempt to use the tools of economics without a basic understanding—that continue to propose markets in which the goal is an ideal. *See, e.g.*, Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 *U. COLO. L. REV.* 649, 653 (2006) (describing the marketplace of ideas as defeating error and giving the “victory” to truth).

⁵⁰ *E.g.*, Milton Friedman, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS* 153 (1953) (“the relevant question to ask about the “assumptions” of a theory is not whether they are descriptively ‘realistic,’ for they never are, but whether they are sufficiently good approximations for the purpose at hand”).

⁵¹ Brazeal, *supra* note 48, at 19 (“there is no need to limit the elements in producers’ utility functions in this way”).

⁵² Armen Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 *J. POL. ECON.* 211,

to make their lives better by choosing transactions that yield greater benefits than costs.⁵³

Of course, the marketplace of ideas is not like your local department store, with goods lined up on neatly-kept shelves, prices clearly indicated for your shopping convenience. For some, the lack of such neat organization may be a stumbling block to being able to conceptualize the marketplace of ideas, but there is nothing inherent to markets that requires such organization. Markets, in point of fact, are nothing more than the aggregation of everyone who wishes to engage in mutually beneficial transactions.⁵⁴ Those aggregations can certainly take a clean, orderly form, but there is no reason why they should always do so. So long as there are willing sellers and willing buyers, then, there will be a market, and the only remaining question is whether the government (or some other third party) is justified in standing between those willing buyers and sellers, prohibiting a transaction that both parties believe will make them better off.

Before arriving at the question of when—if ever—the government (or some other third party) is justified in doing so, we will first propose general principles that describe the buyers and sellers in the marketplace of ideas. We will begin with sellers of ideas and how ideas are presented for “purchase.” We will then address what it means for consumers of ideas to buy an idea. In a market characterized more by chaos than the orderly shelves of the local department store, intermediaries are certain to arise, so we will also address the role of intermediaries in the marketplace of ideas. Key to the entire discussion is the concept of what an idea costs, and how a market without explicit prices can coordinate the necessary resource allocation.

Once the parameters of the marketplace have been defined, the task then becomes to identify when government (or other third party) intervention in that marketplace might serve to improve the effectiveness of market mechanisms. This section will therefore conclude by cataloging the various ways in which markets may fail to facilitate value-enhancement as expected and then: (1) describe the mechanism by which those “market failures” might manifest in a marketplace of ideas; and (2) offer a caution about assuming that government intervention will yield superior results.

213 (1950).

⁵³ Paul R. Portney, *Benefit-Cost Analysis*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/BenefitCostAnalysis.html> (last accessed Jan. 17, 2022).

⁵⁴ Anderson, et al., *supra* note 49, at 1236; Louise A. Halper, *Parables of Exchange: Foundations of Public Choice Theory and the Market Formulation of James Buchanan*, 2 CORNELL J.L. & PUB. POL’Y 229, 231 (1993).

A. *Sellers and Buyers*

When we speak of those who “sell” ideas, we mean those who offer ideas for the consumption of others. In other words, the seller of an idea typically asserts it as a true belief, one which she is willing to back up with either a logical defense or an appeal to convincing authority.⁵⁵ Every individual has numerous ideas during the course of a given day, but not all of them ripen into belief.⁵⁶ And even some ideas that are avowed as belief are not offered for sale to others. Some beliefs are withheld from sale because of their private nature, others out of the believer’s trepidation that she is not yet fully prepared to back up the belief if it is challenged. Even when offered for sale, the venue matters—an idea might be offered only to an intimate gathering, or it might be offered broadly, to the public at large.

What motivates one to be a seller in the marketplace of ideas? The

⁵⁵ The basic model for the marketplace of ideas offered here builds upon the inferentialist understanding of belief and rational discourse laid out in the work of the philosopher Robert Brandom. *See, e.g.,* ROBERT B. BRANDOM, *MAKING IT EXPLICIT: REASONING, REPRESENTING, & DISCURSIVE COMMITMENT* (1994).

For Brandom, taking up a belief is a matter of making a move in the “game of giving and asking for reasons.” Brandom’s basic model can be summarized as follows:

The most basic move in this game is that of making an assertion. In asserting a proposition, one puts it forward as a reason one takes oneself to be committed to and also offers it to others as one they are entitled to on the authority of this commitment. According to Brandom, keeping track of these various commitments undertaken by oneself and others is a matter of taking “deontic score.” Brandom explains that being rational is just a matter of “mastering in practice the evolution of the [deontic] score” while talking and thinking.

As in any game, there must be consequences for violating one’s commitments in the game of giving and asking for reasons. The penalty is loss of credibility. This is precisely what happened to the boy who cried “wolf.” As Brandom explains, the boy asserted and thereby committed himself to the claim that a wolf was present several times without owning entitlement to it. He was punished by “withdrawal of his franchise to have his performances treated as normatively significant.” This can be done from the standpoint of the first- or third-person, and indeed we can understand the self-imposed sanctions of guilt or self-reproach as internalizations of this social mechanism.

John P. Anderson, *Law Beyond God and Kant: A Pragmatist Path*, 32 *J.L. & RELIGION* 98, 107 (2017).

⁵⁶ John Milton describes the process in this way: “When a man writes to the world, he summons up all his reason and deliberation to assist him; he searches, mediates, is industrious, and likely consults and confers with his judicious friends.” *AREOPAGITICA, A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING*, 27 (1959)

standard answer—maximization of profits—is overly simplistic, even in markets where profits are sought,⁵⁷ because every seller has more complex motivations than just profit. A broader answer, maximization of “value,” allows sellers to pursue what matters to them, whether pecuniary or not.⁵⁸ In considering the value that sellers gain, it is important to remember that sellers are interested in net value, not gross value, since even an idea that provides a high gross value might have a negative net value if costs are high enough.⁵⁹ Furthermore, value—and, to a certain extent, cost⁶⁰—is subjective, which makes precise definitions impossible, but certain general principles will aid in understanding the seller’s choice.

If one is committed to an idea, then one will typically desire to see it accepted by others in one’s community of discourse—and will therefore offer it up for sale—for at least four reasons. First, every sale of an idea increases its influence and authority in the broader community of discourse (the market). This will benefit the seller by affirming her own conclusion that there is value in the belief, and by increasing the likelihood that this value will be amplified through broad adherence and application in practice. Second, the more authority and influence an idea attains through widespread acceptance, the less time and energy the seller will need to expend in making future sales. Instead of spending resources explaining and justifying the belief to prospective buyers, the seller can simply appeal to the authority of other well-respected who have bought and sold the idea with good results. Third, broad acceptance of the seller’s beliefs will also have the benefit of affirming all the other beliefs held by the seller that support and depend on the truth of the belief that was sold. The more central the sold belief is to the seller’s worldview, the greater the value this compounding affirmation of inferentially related (in economic terms, complementary) beliefs will be to the seller. The increased authority of the sold belief can also be leveraged to reduce costs in making new sales of the complementary beliefs as well.

⁵⁷ Positive profits, not maximum profits, is all that is necessary for a seller to remain in business. Alchian, *supra* note 52, at 213.

⁵⁸ *E.g.*, Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39 (1993).

⁵⁹ Similar to economic treatment of profit maximization, Net-value maximization will lead to a seller producing another idea as long as long as the marginal value gained from selling the idea outweighs the marginal cost. E. Roy Weintraub, *Neoclassical Economics*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/NeoclassicalEconomics.html> (last accessed Jun. 25, 2022).

⁶⁰ Some costs—publication costs, for example—are quantifiable, while others, such as the reputational cost of embarrassment at having sold an idea that turned out to be indefensible, are subjective to the individual seller.

Fourth, the successful sale of a belief also tends to increase the personal reputation of the seller as an authority within some sphere. This enhanced personal reputation will reduce that seller's costs for future sales within that sphere of recognized authority.

The greater the cost of producing, packaging, and distributing an idea, the less likely a potential seller will be to put an idea into the market for sale. Some quantifiable costs will rise and fall with shifts in the supply and demand for inputs in the markets for tangible inputs.⁶¹ Secondary sellers—those who are reselling ideas from someone else⁶²—must first face the cost of buying the idea from its originator, and then choose to either trace out and confirm the idea's justification, or accept it on the authority of the original seller. The latter appears less costly, but a reseller who avows an idea based on nothing more than the original seller's authority exposes herself to reputational risk if that faith in the source's authority proves to be unfounded. That risk is a real cost, one also born by an idea's originator, and it can result in humiliation and reputational harm, including the undermining of related ideas and even the seller's worldview.⁶³

Turning from sellers to buyers, a buyer purchases a belief when the buyer embraces it. Consequently, mere exposure to an idea cannot be said to constitute a purchase. Instead, buying an idea must involve avowal.⁶⁴ As a result, not every person to whom an idea is offered is a buyer, only those who then embrace it as part of their worldview, their broad network of beliefs.⁶⁵ As in all markets, one will be motivated to "buy" a belief when one determines it is value-enhancing, meaning that the value it provides is greater than the cost of purchasing the idea. Whether one actually "buys" an idea also depends on whether the purchase fits within the buyer's budget.

⁶¹ For example, a decrease in printing costs will increase the supply of printing services, thereby reducing the market price of printing and making it easier for a seller of ideas to get an idea to buyers. Continued advances in electronic printing and distribution options have dramatically reduced the cost of publicizing ideas, making it unsurprising that the amount of ideas available for sale has also risen dramatically.

⁶² A secondary seller might be motivated by a desire to amplify the authority of the idea's originator or even to gain value by aligning herself with the originator's authority.

⁶³ Costs of this type will be higher in a hostile environment, as there will be a stronger desire to prove that a disfavored idea is not justifiable. There will therefore tend to be fewer disfavored ideas and more ideas that conform to the conventional wisdom.

⁶⁴ Brazeal, *supra* note 48, at 15. Pleasantly, this corresponds to a colloquialism of American English, that one says "I don't buy it" to mean that an idea was not believed.

⁶⁵ Once again, there are those who strangely reject the notion that individuals have any choice in what ideas they believe. *Id.* at 15-16. We do not adopt this view of human nature, relying instead on the many examples of individuals who make a conscious choice to alter their lives in order to accommodate new beliefs, such as a new religion, or a new food ethic.

“Value,” to the consumer, will reflect the consumer’s preferences. Ideas exhibit various characteristics, such as adherence to known facts, creativity, alignment with various ideologies, and so on. Some characteristics will add to value, while others will subtract, making them more or less attractive to the consumer. Because preferences exist along many spectra, an idea may be less desirable because of one characteristic but highly desirable because of another, and avowal does not mean that the buyer finds value in every characteristic.

Individual buyers face resource constraints in ideas, just as they do in other areas of life. Some budgetary constraints will be monetary—news subscription services, for example—but others will be inferential, in that ideas can conflict, and avowing one idea can make it much harder to avow a range of other ideas. Embracing a new idea that conflicts with an existing belief will cause cognitive dissonance. Alternatively, one may find that inserting a new idea into one’s network of belief solves pre-existing problems for, or remove bugs from, one’s worldview.⁶⁶ An idea will therefore have value in itself—adding to the satisfaction felt by the buyer—but may also provide value through its effect on the buyer’s budget constraint.⁶⁷ An individual’s “idea budget” will be correlated with the individual’s capacity for complexity of thought.⁶⁸ Avowal of new, conflicting ideas requires greater mental attention and depletes the idea budget.⁶⁹ Conversely, a new idea that harmonizes with existing ideas will take up less of the idea budget, and an idea that resolves previous conflicts may reduce cognitive dissonance

⁶⁶ For example, replacing a geocentric astronomy with heliocentric astronomy, or supplementing Newtonian physics with relativity, resolves obvious internal inconsistencies between prior worldviews and observed phenomena.

⁶⁷ This effect has a parallel in traditional markets. For example, a modern cell phone provides the services of many older goods—calculator, encyclopedia, music player, movie player, video game, etc.—allowing the buyer to purchase one device and use leftover budget funds for new things.

⁶⁸ See F. Scott Fitzgerald, *The Crack-Up: A desolately frank document from one for whom the salt of life has lost its savor*, *ESQUIRE* (February 1936), 41 (“the test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function.”).

⁶⁹ For example, avowing the flat-earth theory will be difficult for someone with a basic understanding of the standard view of planetary motion; avowing both of those ideas will consume a significant amount of mental energy. Other conflicting ideas will use up less of the individual’s idea budget, such as that hot dogs taste better with mustard, even to someone who generally dislikes mustard. Notice, however, that a buyer might still avow a contradictory idea, hoping that it can be resolved in the future, only to later abandon it because the budgetary effect is too high.

and free up space in the idea budget.

The greatest obstacle to any formalization of the marketplace of ideas is that there is no readily-apparent price mechanism. However, standard economic theory places pivotal importance on the role of prices,⁷⁰ so it pays to explore the possibilities. It turns out the law of contracts may provide a workable mechanism to presume a price for transactions in the marketplace of ideas.

A requirement of every enforceable contract is the presence of consideration, something given in return for a promise. In other words, contracts require that a price be paid, although that price need not be monetary. When it is not clear whether a price was paid, a court will consider whether the commitments undertaken by the buyer will benefit the seller⁷¹ or, alternatively, be a legal detriment to the buyer.⁷²

In the marketplace of ideas, recall that the sellers obtain value in having their beliefs accepted by others in the marketplace of ideas. As noted above, belief avowal is a matter of commitment. When one is successful in selling an idea, the buyer undertakes a commitment in the broader exercise of providing and demanding empirical or logical support for ideas.⁷³ So, to the extent the *seller's* justification for the belief is later called into question by others, the *buyer* must also stand ready to defend the seller's justification.

The buyer will also pay a price for the belief, by undertaking the time and effort to vet the idea before avowing it—or risk the reputational consequences, and consequences to her broader worldview should a hastily accepted belief later be proven wrong. These reputational risks are real and consequential, as illustrated by Aesop's Fable of the boy who cried wolf. If one earns a reputation as either a buyer or seller of beliefs who can't or won't provide proper justification, then others will exclude them from future

⁷⁰ E.g., ARMEN A. ALCHIAN & WILLIAM R. ALLEN, UNIVERSAL ECONOMICS 133-37 (2018)

⁷¹ See, e.g., 17A Am. Jur. 2d § 104 (2004 & 2005 Supp.) (explaining that an “aid, though not a conclusive test, in determining [whether consideration is present] is an inquiry into whether the occurrence of the condition would benefit the promisor. If so, it is a fair inference that the occurrence was requested as consideration”).

⁷² See, e.g., Restatement (Second) of Contracts § 71. The Requirement of Exchange: Types of Exchange.

⁷³ In Brandomian terms, the game of “giving and asking for reasons.” Anderson, *supra* note55, at 107.

transactions in the marketplace of ideas.⁷⁴ In addition, as noted above, one cannot simply insert a belief in one's worldview without risking inferential consequences for other beliefs. Accepting one belief will often require renouncing others to maintain internal coherence. The seller can assume the buyer will not incur these costs frivolously. Thus, the buyer's willingness to accept commitment to the belief being sold, after having tested it against the buyer's *own* worldview, can enhance the seller's own confidence in the belief; it can also confer additional authority on the seller in offering it for sale to others in the marketplace.

Every transaction in the marketplace of ideas, therefore, involves both a benefit to the seller and a detriment to the buyer. If our topic was contract law, we would know that consideration exists, that something of value was exchanged. The presence of consideration is not intended to measure the "price" of a transaction, but it does assure us that a "price" was paid. Therefore, while the marketplace of ideas does not exhibit express monetary prices, a price certainly exists for each transaction.

The existence of a price mechanism enables sellers and buyers to maximize net value, providing the analogs for standard market supply and demand. As a result, we should expect the marketplace to move towards maximized consumer and producer welfare.⁷⁵ But does that mean that the marketplace of ideas is an "optimal institution for the promotion of true belief?"⁷⁶ Perhaps, but not in the way that some scholars have proposed, usually as they attempt to disprove the premise.⁷⁷ The search for net-improvements in value by buyers and consumers will lead to the provision of value-enhancing ideas. So long as individuals value truth (there is no reason to believe that individuals place a zero value on truth), it will be promoted in the marketplace. The difficult thing for many to accept is that other characteristics will also be valued by consumers and, consequently, promoted

⁷⁴ See, e.g., Brandom, *supra* note 55 at 180 (noting the boy asserted and thereby committed himself to the claim that a wolf was present several times without owning entitlement to it. He was punished by "withdrawal of his franchise to have his performances treated as normatively significant").

⁷⁵ In economic terms, maximized total surplus (consumer surplus plus profit). We consciously use the phrase "moving towards" because the standard assumption of equilibrium is properly viewed as a target, towards which the market moves, rather than a destination that a market can reach. *Supra* note 49.

⁷⁶ Alan I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1, 2 (1996).

⁷⁷ E.g., Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 Leg. Theory 1, 3 (1996) ("More total truth possession will be achieved in a free, unregulated market for speech than in a system in which speech is regulated").

by the marketplace.

B. *Intermediaries and Market Function*

Sellers cannot know exactly how buyers will react to a new idea, and may not know how to find buyers or present new ideas to them. Similarly, buyers may not know where valuable ideas reside, and may not be able to accurately predict how much value the idea will actually bestow once it is bought. For a buyer who places a high value on truth, for example, the context of the idea may make truth a nebulous concept and the seller can package the idea in a way that reduces, rather than improves, clarity. Under certain conditions, discussed *infra*, this can lead to imperfect market performance and leave buyers disappointed in their purchase. Over time, however, buyers typically learn more about the value of ideas and become better consumers. Even in the short run, however, buyers need not rely solely on their own experience because intermediaries tend to emerge,⁷⁸ facilitating transactions between buyers and sellers.

In a system that allows voluntary transactions, an exchange occurs when both parties see the exchange as value enhancing. Value is created by the mere exchange because both parties leave with something they valued higher than what they brought. A portion of the created value can be paid to an interemdiary that can facilitate a transaction that would not otherwise occur, either because the buyer and seller were ignorant of each other, or because buyer and seller needed information before they could trust each other.

1. Bringing together buyers and sellers

In more traditional markets, intermediaries can provide a central location where buyers and sellers can come to engage in transactions; historically, bazaars, flea markets, and similar locations. Today, online platforms like eBay, Amazon, Ali Baba, and others provide a virtual gathering place. Sellers know that the intermediary's site is known to buyers, increasing the number of looks a product will get. Buyers know that the intermediary's location will have multiple sellers, increasing competition for buyers' business and improving buyers' choice set. The scope and format of the modern-day bazaar expands with technological innovations, increasing opportunities for buyers to access new and value-enhancing products and sellers to find new buyers for their products.

⁷⁸ Brazeal, *supra* note 48, at 22-23.

The marketplace of ideas is no different. Historically, in primitive societies, every individual could buy only those ideas produced within the confines of the individual's tribe.⁷⁹ Eventually, inter-tribal trade would increase the economic well-being of the tribes, but also increase the availability of new ideas. Human flourishing accelerated not only because specialization and trade led to increased wealth,⁸⁰ but also because of expanded opportunities for transactions in ideas. At first, actual exposure to other cultures would have been limited to certain groups, such as traders,⁸¹ who would travel for commerce and could, as a result, become intermediaries in ideas, as well. As ideas dispersed between groups and cultures, all humanity would have been benefitted. Later, as individuals began to express a variety of different tribal affiliations—family, church, community, athletics, etc.—the meeting places of those affiliations would become a bazaar of ideas, facilitated by intermediaries in the marketplace of ideas.

As technology advanced, intermediaries spread their reach. Newspapers, then radio, then television, and then internet all allowed intermediaries to collect ideas and distribute them to a larger audience. Sometimes this audience was limited to those paying for subscription services, but often the ideas were transmitted over various parts of the telecommunications spectrum, available to anyone with the technology to collect and interpret the signals. Each successive innovation lowered the cost of transmission, allowing greater and greater quantities of ideas to be transmitted. That reduction in cost could have increased the number of individuals who could share their ideas, but other barriers to entry into the communications market⁸² limited individual entry, at least prior to the internet. Whether an idea was widely available for purchase in pre-internet times, therefore, was largely up to intermediaries.

With the advent of the internet age, the cost of bringing together buyers and sellers was reduced even further but, more importantly, the barriers to entry into the marketplace of ideas were largely eliminated. Any individual

⁷⁹ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS*, 31 (Oxford University Press 1976) (describing isolated villages in Scotland where inhabitants must perform every productive task themselves). The situation in primitive societies would have been even more restrictive.

⁸⁰ *Id.* at 31-33.

⁸¹ *Id.* at 397-398.

⁸² The most obvious barrier to entry is the communications market has been the requirement of government permission to utilize much of the telecommunications spectrum. From apportioning radio and television spectrum to requiring licenses for HAM radio operators, use of the spectrum typically required permission from the government.

with an internet connection could in theory present an idea to the rest of the world. Continuing evolution of technology eventually lowered the barriers even further, placing the ability to share ideas into the hands of anyone with a smart phone. The role of intermediaries shifted during this same time period; no longer were they gatekeepers of what ideas would be presented to the larger public, but they still played an important role in amplifying ideas they believed would be valuable to potential buyers.

Just as importantly, as the internet lowered barriers to entry into the ideas market, it also lowered barriers to entry into the intermediary market. Buyers looking for ideas now had far more places where they could look for a range of ideas. Sellers of ideas found new markets for their product. Not everyone would have been pleased with this development, however, since lower barriers to entry translates to higher competition and, consequently, lower profits for those market participants who existed prior to the barriers' lowering.⁸³ The development was therefore beneficial to buyers and sellers of ideas, generally, but harmful to the pre-existing intermediaries, and it would be unsurprising for those intermediaries to oppose the developments.

2. Facilitating Trust

The second way that intermediaries help buyers and sellers benefit from voluntary transactions is to facilitate trust between the parties. Before agreeing to the deal, both parties need to be satisfied that the deal will be value-enhancing. There will always be some uncertainty regarding that conclusion, and that uncertainty can keep a buyer, a seller, or both from saying yes to a deal that would, in fact, make them better off. The uncertainty might arise from buyers' having difficulty judging the quality of the good,⁸⁴ sellers' lack of certainty regarding the value of the method of payment,⁸⁵ or buyers' and sellers' not knowing the other well enough to trust their word about the many warranties and representations made by the other party.

Intermediaries can step into these situations and provide the parties with the ability to trust each other. Financial intermediaries, for example, can provide means to verify, in advance, a buyer's capacity to pay the purchase price. Other intermediaries may arise to provide consumers with neutral

⁸³ E.g., Tess Saperstein, *The Future of Print: Newspapers Struggle to Survive in the Age of Technology*, HARVARD POLITICAL REVIEW (Dec. 6, 2014). Available at <https://harvardpolitics.com/future-print-newspapers-struggle-survive-age-technology/>.

⁸⁴ Armen Alchian, *Why Money*, 9 J. MONEY CREDIT & BANKING 133 (1977).

⁸⁵ A seller might not be able to trust that a buyer has sufficient funds to cover a check, for example.

reviews of products, such as Consumer Reports, the Amazon.com or Ebay rating system, or any number of review websites. Some intermediaries provide a combination of both connectivity benefits and trust benefits, such as ride-sharing apps, which let riders and drivers know where each other are, but also provide ratings and other technologies that allow drivers and riders to trust each other for the duration of the ride.

In the marketplace of ideas, there are a variety of institutions that have arisen to facilitate trust between buyers and sellers. Major media outlets have historically been, and continue to be, the primary source of trust enhancement for many individuals. Disparaging comments about conservatives who only watch Fox News or liberals who only watch CNN/MSNBC illustrates that some media outlets are known to be intermediaries that provide value-enhancing ideas, at least from the perspective of ideological conformity. Buyers who value ideological alignment then know where they can go to buy those ideas.⁸⁶ Other intermediaries will specialize in aggregating ideas that provide other valuable characteristics, such as relative neutrality, scientific rigor, intellectual clarity, inventiveness, and so on. If there is a characteristic that is valued by a sufficiently-large portion of buyers, strong incentives will exist for an intermediary to fill that niche.

Putting together the pieces, a functioning market for ideas has taken shape. We have value-seeking sellers, constrained by costs and buyer preferences. We have value-seeking buyers, constrained by budgets and prices. We have intermediaries that have arisen to facilitate transactions between the two groups. A functioning market is not entirely the same as an efficient market,⁸⁷ however, and many of the criticisms of the marketplace of ideas are claims that the market has failed. The following section will describe the form that most standard market-failures would take in the

⁸⁶ Critics of these ideologically-aligned media outlets imply—or, occasionally, expressly claim—that these intermediaries only cater to buyer’s preference for ideological alignment and care nothing for the truthfulness of the ideas. It is certainly the case that those who value ideological alignment highly will seek out intermediaries that have established a reputation for that alignment. That fact, however, says nothing about what other characteristics are valued by the buyers. It is of course possible that some individuals place zero value on truth or, at least, are willing to sacrifice truth in order to obtain ideological alignment, but the claim that all of one’s political opponents fit into that rare category is surely just political bombast.

⁸⁷ The economists’ term, “efficient” is often under defined. For a straightforward definition, see Kidd, *supra* note 2, at 145-46. In terms of the characteristics of an efficient market, much of what is considered “true” is grossly oversimplified or just wrong. See Anderson, et al., *supra* note 49, at 1243-44.

marketplace of ideas.

C. Market Failures in the Marketplace of Ideas

Markets are aggregations of flawed individuals and, as such, they are prone to imperfections. Contrary to the claims of some critics of free markets, the existence of imperfections does not render markets useless. Most imperfections do not rise to the level of a market failure, which requires a failing so substantial that it significantly weakens our assumptions about value creation. Imperfections of that type relevant to the marketplace of ideas tend to fall into one of three categories: (1) market power; (2) information asymmetries; (3) externalities.⁸⁸

1. Market Power

The market's ability to increase value in the lives of market participants increases with competition between producers. In a competitive market, sellers have strong incentives to identify what buyers value most and provide those things at the lowest possible cost. When competition is robust, those low costs translate into low prices, as well. The prices must be high enough to allow sellers to make a positive profit, but will not be much higher, so that buyers get the things they want at a lower price and have budget left over to buy other things they value. Low but positive profits also incentivize sellers to keep selling as long as the value for the next unit exceeds the cost of producing it.

If competition begins to weaken, some market participants will begin to have market power, which translates roughly into the ability to partially ignore the desires of buyers.⁸⁹ Quality will often be lower in a market without competition because alternatives will be harder to come by and buyers will be stuck with whatever the remaining sellers choose to offer. Price will be higher in the absence of competition for the same reason—less concern that buyers will go to a non-existent competitor if prices are raised. In a non-competitive marketplace, there will also be fewer overall transactions, as

⁸⁸ There are additional recognized market imperfections, including the free-rider problem, manifesting when there are positive externalities, Bryan Caplan, *Externalities*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/Externalities.html> (last accessed Jan. 26, 2022), and public goods, Tyler Cowen, *Public Goods*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/PublicGoods.html> (last accessed Jan. 26, 2022). As these market imperfections are not directly relevant to the present problem, they are better left for future discussions of the marketplace of ideas.

⁸⁹ ALCHIAN & ALLEN, *supra* note **Error! Bookmark not defined.**, at 297-98.

sellers with market power will realize higher profits at a lower output.⁹⁰ As discussed *supra*, robust competition is valuable not only among producers but also among intermediaries.

Market power can arise in a number of ways, but almost all market power is the result of barriers to entry. In other words, the harder it is for a new competitor to enter the marketplace, the more existing sellers can act with indifference to the desires of buyers.⁹¹ Barriers to entry are also a fundamental cause behind mergers that increase market power; buying out an existing business often requires payment of a premium, and only barriers to entry—and resulting higher profits—provide assurances that the premium will be recouped. Those barriers can arise through market collusion,⁹² command of a key input,⁹³ network benefits or economies of scale,⁹⁴ or regulatory burdens.⁹⁵

In the marketplace of ideas, market power in the actual production of ideas will be uncommon. Although education, training, and life experiences might lend some potential sellers to have comparative advantage in certain types of ideas, there is little reason to believe that there are barriers to entry into the production of ideas.⁹⁶ Market power could arise, however, in

⁹⁰ *Id.* at 295-97.

⁹¹ The absence of barriers to entry defines what is known as a “contestable market.” Erica Wessling, *Spirit Airlines, Inc. v. Northwest Airlines, Inc.: A Case for Increased Regulation of the Airline Industry*, 6 WILLIAM & MARY BUS. L. REV. 711, 722 (2015). In a contestable market, even a single seller cannot act like a monopolist because any exploitation of buyers will provide an opening for a new competitor to enter and take away the exploitative seller’s customers.

⁹² If existing participants have the capacity to punish new entrants—for example, as large investment banks can refuse to allow new entrants to participate in syndicate offerings—any new entrants will refrain from offering legitimate competition to entrenched incumbents.

⁹³ If a single producer, or coordinated group of producers, have strategic control over a necessary input, they can prohibit new entrants from accessing that input and, therefore, keep potential competitors out of the marketplace.

⁹⁴ In industries that experience economies of scale, average total cost declines with the scope of production, virtually guaranteeing that large producers—perhaps large enough to obtain market power—will be able to underprice any attempts to enter the market, if that entrance must begin small. In industries that experience network effects, the value provided increases more than arithmetically with the size of production, increasing the difficulty of new competitors’ being able to offer buyers an acceptable alternative.

⁹⁵ If regulatory burdens are imposed in a blanket fashion, the costs of compliance will be more easily spread across greater production. Larger sellers will experience a lower increase in per-unit cost, and so will have a price advantage over potential entrants into the marketplace.

⁹⁶ The experience of racial minorities, women, and those with alternative sexual identities (addressed *infra*, Part IV) may offer an exception to this general rule.

distribution of ideas, particularly in the space filled by intermediaries. Historically, market power would have been concentrated in those who either had sufficient funds to spread their own ideas, or else in those who had the cooperation of intermediaries. If a seller of ideas was not wealthy or powerful enough to command the attention of many potential buyers, the only path to selling ideas was to appeal to intermediaries, like newspapers or, eventually, radio, television, and the internet. Throughout history, certain groups—women, racial minorities, religious minorities, etc.—would have faced significantly more resistance from intermediaries.

The incentives facing each of these intermediaries would have a significant effect on how they responded to the requests of would-be sellers of ideas. Newspapers would have been driven by a combination of profit motive and the ideological bent of the editor and/or publisher. Radio stations, once regulated by the government, were granted a local or regional monopoly over part of the broadcasting spectrum. This market power, however, is still subject to the constraint that the expenses of operating a radio station required some profits. Television stations would have originally operated under a similar model. In either case, the need to raise operating funds would require either catering to the preferences of a benefactor or selling advertisements, which means catering to sellers of other products. In turn, if those sellers operate in a competitive market, the advertisements will cater to the preferences of consumers.

The advent of cable and satellite television allowed new intermediaries to flourish outside of the governmental regulation of broadcast spectrum. Intermediaries that predated the change would have enjoyed initial reputational advantages over newcomers, but without governmental barriers to entry, each new competitor could carve out a niche in which it could flourish. And, as the internet has advanced, barriers to entry for new idea intermediaries has continued to fall. The result is that would-be sellers should have little difficulty finding an intermediary willing to facilitate transmittal of the ideas to buyers. And, even if no such intermediary exists—perhaps because the idea is too novel, or too far outside the mainstream of thought—the same forces that have reduced the cost of being an intermediary have also reduced the cost of being an independent distributor of one's own thoughts.

There is one barrier to entry that might still exist in the intermediary market—network effects. The large market presence of certain social media or other internet companies does raise the benefits they can offer to sellers, making it difficult for smaller intermediaries to draw away potential sellers. Importantly, however, that is a benefit only on the seller side, but the

intermediary must still satisfy buyers to make a profit. Failure to appeal to buyers—with lower prices, higher quality, or a mixture of both—will provide a space into which the smaller competitors can enter.

2. Information Asymmetries

Markets can increase value in the lives of market participants without their having perfect information, but this is less likely when essential information is known to one party and unknowable to the others. Importantly, information asymmetries are not a source of market failure when both parties *could* know the information but one chooses not to incur the cost of gathering or assimilating it, often because the other party has offered to do so for a price.⁹⁷ Markets are only distorted by insurmountable information advantages. Insurmountable information asymmetries increase opportunities for fraud, which can drive honest buyers out of the market because no amount of due diligence will be sufficient to protect themselves from being duped. Honest sellers can also be driven out of the market, as buyers discount their offering price based on the probability of latent defects and sellers refuse to sell products without latent defects at that reduced price.⁹⁸

Information asymmetries *can* but almost never actually *do* destroy markets as predicted by Akerlof,⁹⁹ but why? One answer is that there are contract and tort remedies for those who have been the victim of fraud or material misrepresentation. Tort law might also step in if the latent defects led to actual harm inflicted on the individual who bought the product. Some information asymmetries do not inflict harm on individuals, but can still harm the marketplace, itself. Those information asymmetries, if understood, will cause buyers to be cautious, and those buyers will be more willing to buy from—and/or pay a higher price to—a seller or intermediary who can develop a reputation for honesty and transparency.¹⁰⁰

In the marketplace of ideas, information asymmetries are likely to be present,¹⁰¹ but may be more difficult to identify. For example, many critics

⁹⁷ Jeremy Kidd, *Who's Afraid of Uber?*, 20 Nev. L.J. 581, 638-39 (2020).

⁹⁸ E.g., George Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488 (1970).

⁹⁹ Id.

¹⁰⁰ Jeremy Kidd, *Fintech: Antidote to Rent-Seeking?*, 93 Chi-Kent L. Rev. 165, 190 (2018).

¹⁰¹ Coase, *supra* note 47, at 389-90 (“It is hard to believe that the general public is in a better position to evaluate competing views on economic and social policy than to choose between different kinds of food”).

of the concept of the marketplace of ideas point to the difficulty in ascertaining the truthfulness of a given statement.¹⁰² The buyer may, therefore, choose to avow an untrue idea because it *appears* to be true. Of course this is correct, but it need not be evidence of an information asymmetry. Assume for a moment that an idea is false. The seller or intermediary *might* have knowingly presented a false idea to the buyer, arguably creating an information asymmetry with the unsuspecting buyer. However, given the reputational harms to one who sells a false idea after promising to back it up with logic or authority,¹⁰³ it is at least as probable that sellers who espouse untrue ideas do so out of a sincere belief that the ideas are true. In the latter scenario, both parties stand on an equal footing regarding the truthfulness of the idea, and no asymmetry exists.

The scientific rigor of an idea is another area where information asymmetries are possible but difficult to pinpoint. A layperson, for example, might not be easily able to ascertain how rigorous is the foundation of the idea, even if that layperson was willing to engage in significant due diligence. As a result, an idea that appears to be rigorous might, in fact, be little more than fluff. Similarly, the complex nature of statistical analysis might make it hard for a potential buyer to identify whether or not the statistical claims match the actual data. Even creativity of an idea might not be readily apparent to a potential buyer if the seller takes a modicum of time to repackage an old idea in new trappings.

These information asymmetries may or may not be severe enough to threaten the stability of the entire marketplace, but they could certainly impose some harm on buyers. In a traditional market, buyers who are harmed would have the full panoply of tort and contract remedies, some of which will be available in the marketplace of ideas. Perhaps more importantly, however, is the value of reputation, which will provide a strong incentive for sellers and intermediaries to provide ideas that are what they appear to be. If those incentives are insufficient, it is possible that buyers will suffer some harm.¹⁰⁴

3. External Costs

¹⁰² E.g., Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. Colo. L. Rev. 649, 673-97 (arguing that individuals have a bias towards falsehoods).

¹⁰³ *Supra* at II.A11.

¹⁰⁴ E.g., Bailey Miller, *Arizona man dies after ingesting fish tank cleaner to prevent coronavirus infection*, FOX10PHOENIX.COM (Mar. 23, 2020), available at <https://www.fox10phoenix.com/news/arizona-man-dies-after-ingesting-fish-tank-cleaner-to-prevent-coronavirus-infection>.

Value creation in a market happens one voluntary transaction at a time, but some transactions can appear to be value-creating to the parties involved but diminish value overall if costs are imposed on non-parties to the transaction. A standard example is a contract for power from a coal-fired power plant. In order to make positive profits, the power plant must demand from customers a fee that will cover all fixed and variable operating expenses. If consumers are willing to pay that fee, both producer and consumer are content, but the production process will produce several pollutants, and dealing with those pollutants is costly. If only the power producer and consumers bore those costs, then the transaction would still be value-enhancing. If, however, third parties also bear some of the costs of pollution, the total societal effect of the transaction may be negative. The traditional method for solving negative externalities is to impose a tax on one or both of the parties, so that the transaction considers all the costs and benefits, and will only occur if net total value is positive.¹⁰⁵

A related phenomenon is that of the commons problem, where a resource is over-utilized until it is exhausted. The commons problem is typically referred to as the “tragedy” of the commons,¹⁰⁶ because the resource could be protected from exhaustion if those with access to the resource could discipline and coordinate their use at a lower level of exploitation, allowing the resource to replenish. The reason that self-discipline doesn’t happen in the “tragedy” setting is that the resource is rival—meaning that one person’s use diminishes the ability of all others to use the resource—and each user knows that the other users can use the resource when they choose, and that their doing so will reduce future availability of the resource. In other words, each user believes that if they don’t use it now, everyone else will and nothing will be left. It therefore becomes a race to use up the resource and the entire scenario becomes a net loss to society, in the long run.

Negative externalities and the commons problem, when present, reduce the confidence that we should have in market transactions. How much our confidence should be reduced, however, is unclear, because separate transactions can arise that will mitigate or eliminate the loss arising from either scenario. When it comes to negative externalities, for example, Ronald Coase proposed that, under certain conditions, negotiations that involve the third parties affected by the externality can still provide assurances that the transaction provides a net value improvement.¹⁰⁷ Similarly, some commons

¹⁰⁵ ARTHUR C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

¹⁰⁶ Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

¹⁰⁷ E.g., Kidd, *supra* note 2, at 149-50.

problems might be alleviated by the parties' merely adopting a coordination plan.¹⁰⁸ These caveats do not negate the possibility of market failure,¹⁰⁹ but they should counsel caution in presuming that externalities and commons problems necessarily require intervention.

In the marketplace of ideas, it is possible to view certain bad ideas as having the ability to spread harm beyond the individual unfortunate enough to buy the idea. Importantly, however, a buyer's passing along a bad idea is *not* how those costs would be imposed externally. That would merely be another transaction, where the buyer becomes a seller and finds another willing buyer. Externally imposed costs would only be present if the harm from an idea were imposed on a non-buyer. For example, claims about widespread voter fraud in one election might cause some adherents to refuse to vote in a subsequent election. If the outcome of the next election were different as a result, those who abstained could not claim external costs, because they were the buyers of the idea of widespread voter fraud. However, if that same idea led to a weakening in democratic norms, others who disbelieved the idea might also see themselves adversely affected by the idea.

Commons problems in the marketplace of ideas are more complicated to identify, as there are no tangible resources to exhaust. However, one possible example of a commons would be public trust. Politicians seek political gain, and one path to political victory is to convince voters that the opposing side cannot be trusted. If both sides understand that is the game, they both have an incentive to use up public trust—casting doubt on their opponents—before the other side does so. One possible outcome of that process is that voters declare “a plague on both [their] houses,”¹¹⁰ leading to the formation of new political parties and/or coalitions, each of whom could restore public trust. If the original process of exhaustion is “successful” enough, however, public trust may be destroyed for a long time, leading to a failed state.

Another example of public-trust-as-commons is the trust typically bestowed on the scientific, medical, and public health community. Any member of that community can draw on the public trust to promote their ideas. If the individual chooses to pursue political, instead of scientific, goals,

¹⁰⁸ E.g., Elinor Ostrom, *A General Framework for Analyzing Sustainability of Social-Economic Systems*, 325 *SCIENCE* 419 (2009).

¹⁰⁹ Coase, for example, felt that the conditions for private resolution of negative externalities—primarily, a working property rights system that would enable necessary transactions—might be more rare in the marketplace of ideas, increasing the likelihood of this kind of market failure. *Supra*, note 47, at 389-90.

¹¹⁰ William Shakespeare, *ROMEO AND JULIET*, Act 3, Scene 1, 90-92.

the public will see those ideas as contrary to the principles that generate public trust—that science is a rigorous, methodical pursuit of fact, following the data to wherever it leads. Each member of the relevant communities will have an incentive to exploit public trust for personal gain, and if even a significant number of individuals do so, it will exhaust public trust in the scientific fields, making scientific progress and innovation more difficult.

4. A Word of Caution

As noted above, the concept of market failure in economics refers to a market that is inefficient due to some characteristic(s) that undermine its ability to maximize wealth through perfect competition and allocation of resources. As one author notes, the “classic sources of market failure are information asymmetries, externalities, public goods, and monopoly.”¹¹¹ For most economists, market failure is a necessary, but not a sufficient condition for government regulation.¹¹² Once a purported market failure is identified, the question then arises “concerning the relative efficiency of alternative solutions, including regulation.”¹¹³

Moreover, one must be careful in one’s analysis of the efficiency or inefficiency of a market in its current state. For example, Harold Demsetz warned against availing oneself of a “nirvana” approach to efficiency that “presents the relevant choice as between an ideal norm and an existing ‘imperfect’ institutional arrangement.”¹¹⁴ Instead, one should employ a “comparative institution” approach to efficiency, whereby “the relevant choice is between alternative real institutional arrangements.”¹¹⁵ As Demsetz explains, the “nirvana approach is much more susceptible than is the comparative institution approach to committing three logical fallacies—the grass is always greener fallacy, the fallacy of the free lunch, and the people could be different fallacy.”¹¹⁶ Demsetz’s concern captures the intuition behind Winston Churchill’s claim that “democracy is the worst form of Government except for all those other forms that have been tried from time

¹¹¹ John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 *Cardozo L. Rev.* 1805, 1847 (2020).

¹¹² Joshua D. Wright, *Net Neutrality Meets Regulatory Economics 101*, 16 *ENGAGE J* 73, 73-74 (2015).

¹¹³ *Id.*

¹¹⁴ Harold Demsetz, *Information Efficiency: Another Viewpoint*, 12 *The Journal of Law & Economics* 1 (1969).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2.

to time.”¹¹⁷

With these considerations in mind, does the recent spread of purported false and misleading information concerning some of the most important (and divisive) issues of the day (e.g., COVID-19, climate change, and race) signal a market failure warranting regulation, censorship, or some other form of government or social sanction? Before addressing this question, we pause to consider the principal philosophical arguments concerning the costs and benefits of censorship.

III. CLASSICAL LIBERAL ARGUMENTS AGAINST CENSORSHIP IN THE MARKETPLACE OF IDEAS

The modern¹¹⁸ intellectual origin of the free-marketplace model for the exchange of ideas is typically traced to John Milton’s argument for religious toleration and against censorship in his *Areopagitica*,¹¹⁹ published soon after Galileo’s death under house arrest for his public defense of Copernicanism.¹²⁰ In this treatise, Milton famously asserted, “though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.”¹²¹ Milton’s challenge to censorship was soon followed by John Locke’s *Letter Concerning Toleration*, in which he too defended the liberty of conscience and opinion.¹²² A century later, Thomas Jefferson wrote that [d]ifferences of opinion, when permitted . . . to purify themselves by free discussion, are but as . . . clouds overspreading our land transiently, and

¹¹⁷ Winston S. Churchill, *The Worst Form of Government*, International Churchill Society, at <https://winstonchurchill.org/resources/quotes/the-worst-form-of-government/>.

¹¹⁸ Some have traced the roots the marketplace of ideas model to antiquity. See, e.g., G. Robert Blakey & Brian J Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U. L. REV. 829, 904-906 (2002) (tracing the origins of the marketplace of ideas model to Lactantius, a leading scholar and Christian theologian in the house of the Roman Emperor Constantine).

¹¹⁹ JOHN MILTON, *AREOPAGITICA AND OF EDUCATION* (George H. Sabine, ed. 1987) (1644).

¹²⁰ See Jeremy J. Ofseyer, *First Amendment Law: Taking Liberties with John Stuart Mill*, 1999 ANN. CURV. AM. L. 395, 398-99 (1999).

¹²¹ JOHN MILTON, *AREOPAGITICA AND OF EDUCATION* 50 (George H. Sabine, ed. 1987) (1644).

¹²² JOHN LOCKE, *A LETTER CONCERNING TOLERATION* (John Horton & Susan Mendas, ed. 1991) (1689). Locke’s defense of freedom of speech and conscience was not unqualified (some of which will be addressed below). See Ofseyer, *First Amendment Law: Taking Liberties with John Stuart Mill*, e, note [?] at 430.

leaving our horizon more bright and serene.”¹²³ Jefferson placed freedom of speech at the top of his hierarchy of rights, claiming that “liberty of Speaking and writing guards our other liberties.”¹²⁴ The first comprehensive philosophical challenge to censorship in the marketplace of ideas, and defense of “absolute freedom of opinion and sentiment on all subjects,” was not, however, introduced until John Stuart Mill published *On Liberty* in 1859.¹²⁵

A. *Mill’s Utilitarianism and Introduction to the Harm Principle*

Mill’s arguments against censorship in *On Liberty* must be understood against the backdrop of his broader philosophical framework of utilitarianism. Utilitarianism is a form of consequentialism. Consequentialism identifies the rightness or wrongness of an act (or act type) with the goodness or badness of its consequences. Any consequentialist moral theory turns on two basic claims. First, the theory will identify the *summum bonum*—i.e., it will commit to an ultimate criterion “for ranking overall states of affairs from best to worst from an impersonal standpoint.”¹²⁶ Second, with the ultimate good defined, consequentialism identifies morally right actions (or act types) as those that maximize the good for society as a whole from an impersonal standpoint. In short, for the consequentialist, the sole aim of morality is to “make the world as good a place as possible.”¹²⁷ Utilitarianism is just a subclass of consequentialism that defines “the good” as happiness (sometimes understood as pleasure, and sometimes as preference satisfaction).¹²⁸ So, Mill’s consequentialist moral philosophy is

¹²³ THOMAS JEFFERSON, THE JEFFERSONIAN CYCLOPEDIA § 3235 (John P. Foley, ed. 1900).

¹²⁴ THOMAS JEFFERSON, THE JEFFERSONIAN CYCLOPEDIA § 3234 (John P. Foley, ed. 1900). Jefferson’s views were shared a number of the Founders. See, e.g., James H. Read, THE FIRST AMEND. ENCYC.: JAMES MADISON, (2009) <https://mtsu.edu/first-amendment/article/1220/james-madison> (“The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable”) (last visited Jun. 28, 2022); Daniel Baracsky, THE FIRST AMEND. ENCYC.: BEN FRANKLIN, <https://www.mtsu.edu/first-amendment/article/1438/benjamin-franklin> (“Franklin viewed the flow of ideas through such freedoms as essential to democracy, and he practiced these rights through numerous literary endeavors and ownership of the Pennsylvania Gazette”) (last visited Jun. 28, 2022).

¹²⁵ JOHN STUART MILL, ON LIBERTY 12 (Elizabeth Rapaport, ed., 1979) (1859) [hereinafter MILL, ON LIBERTY].

¹²⁶ SAMUEL SCHEFFLER, CONSEQUENTIALISM AND ITS CRITICS 1 (1988).

¹²⁷ *Id.*

¹²⁸ Similar to rational choice theory in law and economics, there are hedonistic and non-

utilitarian because it identifies actions as “right in proportion as they tend to promote happiness, [and] wrong as they tend to produce the reverse of happiness.”¹²⁹

Though there are similarities between economic analysis and utilitarianism, they are not synonymous.¹³⁰ Most importantly, economic analysis is, for the most part, an explanatory and predictive tool. Its imperatives are hypothetical: If you set a social goal, economic analysis strives to identify the most efficient means of achieving it, and to predict which strategies are likely to fail. Utilitarianism, by contrast, as a comprehensive moral theory, generates absolute normative imperatives. It therefore sets the ends to which economic analysis may be employed. And, to the extent economic strategies fail to yield the best overall state of affairs from an impersonal standpoint, they are rejected by the utilitarian. Nevertheless, since economic analysis typically employs maximizing strategies, utilitarians often rely upon its models. The theories can therefore yield productive synergies. For these and other reasons developed below, the economic modeling of the marketplace of ideas metaphor in Part II will be particularly illuminating when paired with Mill’s utilitarian arguments against censorship presented here.

hedonistic variants of utilitarianism. The hedonistic versions identify happiness with sensual pleasure, and the non-hedonistic versions identify happiness with preference satisfaction. *See, e.g.*, SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS* 3 (1982). Mill rejected the hedonistic form of utilitarianism in favor of an understanding of pleasure and preference satisfaction that admits of qualitative distinction (“higher” and “lower”). *See*, JOHN STUART MILL, *UTILITARIANISM AND OTHER WRITINGS* 258-59 (Mary Warnock, ed. 1962) (1861). For Mill, it is “better to be a human being dissatisfied than a pig satisfied” and “better to be Socrates dissatisfied than a fool satisfied.” And since utility is calculated from the impersonal viewpoint, the preferences of the Socrateses of the world are, on balance, to be given greater weight than the pigs and the fools.” *Id.* at 260.

¹²⁹ E 257 (Mary Warnock, ed. 1962) (1861).

¹³⁰ *See, e.g.*, RICHARD A. POSNER, *OVERCOMING THE LAW* 403 (1995) (noting that “the economic approach is neither deducible from nor completely consistent with [utilitarianism]. There are a number of reasons for this. For example, it is possible that rules promoting market efficiency will fail to maximize social welfare in certain circumstances. When such deviations occur, the utilitarian must reject the economic model. *e id.* Conflicts may arise where moral and economic conceptions of happiness differ (e.g., hedonistic versus preference, relative versus non-relative), and where maximizing strategies differ (e.g., Pareto efficiency versus the principle of utility). When compared to consequentialism more broadly, the potential conflicts between the approaches can be more exaggerated. If, for example, a consequentialist theory defines the good in terms of aesthetic perfectionism, then it is hard to see how the theories maximization strategies may differ from economic models. *See, e.g.*, THOMAS HURKA, *PERFECTIONISM* 55-60 (1993).

When utilitarianism addresses questions of law or policy for general application, the focus is typically on the utility act types (as opposed to specific acts). In such cases the principle of “rule utilitarianism” is applied, according to which an act is right if and only if it conforms to one of that set of rules general adherence to which would produce at least as much total happiness as would general adherence to any alternative set of rules.¹³¹ Since Mill’s focus in *On Liberty* is “the nature and limits of the power which can be legitimately exercised by society over the individual,”¹³² it is best viewed through the rule-utilitarian lens.¹³³

With this broader moral-philosophical stage thus set, Mill opens *On Liberty* by offering one simple principle for determining the proper limits of political and social sanction: “That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not sufficient warrant.”¹³⁴ This is sometimes referred to as Mill’s “harm principle.”¹³⁵ A cursory reading of the harm principle reveals that paternalistic and moralistic justifications for social sanction (e.g., prohibiting certain behavior, habits, character traits or lifestyles because they are deemed self-destructive or offensive) are precluded from the outset.¹³⁶ So, for example, the harm principle precludes laws against adultery, gambling, substance abuse, sodomy, interracial and same-sex marriage, polygamy, incest, pornography, and drug and alcohol use. For Mill, an individual is only answerable to society for that part of his conduct that affects others: “In that part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”¹³⁷

¹³¹ See, e.g., J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR & AGAINST 9 (2008) (defining rule utilitarianism as in the following terms: “the rightness or wrongness of an action is to be judged by the goodness and badness of the consequences of a rule that everyone should perform the action in like circumstances”).

¹³² *Id.* at 1.

¹³³ Many scholars argue that Mill was a rule utilitarian across the board—in the private moral sphere, as well as on questions of law and policy. See, e.g., J.O. URMSON, *e*, in MILL’S UTILITARIANISM: CRITICAL ESSAYS (David Lyons, ed. 1997) (1953); David Lyons, *Mill’s Theory of Morality*, 10 NOUS 101 (1976).

¹³⁴ MILL, ON LIBERTY, at 9.

¹³⁵ See, e.g., JOEL FEINBERG & JULES COLEMAN, PHILOSOPHY OF LAW 258 (Seventh Edition, 2004) (referring to Mill’s position as the “‘harm to others principle,’ or, more succinctly, the harm principle”).

¹³⁶ See, e.g., John Lawrence Hill, *The Father of Modern Constitutional Liberalism*, 27 WM. & MARY BILL OF RTS. J. 431, 462 (2018).

¹³⁷ MILL, ON LIBERTY, at 9.

Mill's anti-paternalism follows from his utilitarianism. The best means of ensuring that persons' idiosyncratic preferences are identified and satisfied is to leave them free to experiment in their private pursuits of happiness.¹³⁸ According to Mill, "[m]ankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest."¹³⁹

But is Mill naïve to suggest that any behavior or lifestyle choice is truly self-regarding? It seems obvious that any number of acts that appear private on their face may have consequences (sometimes significant) on non-consenting third parties. For example, the person who makes the lifestyle choice to eat nothing but processed snacks, sodas, and fast food, may develop serious health problems that could contribute to an increase in premiums for others who share this person's insurance carrier. Similarly, someone who chooses to drink alcohol in excess may be more likely to be physically abusive in the home, or to turn to violence in public settings. In both cases, innocent third parties are made worse off by one person's self-regarding conduct of food or alcohol consumption. Mill anticipates this concern: "I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly concerned with him and, in a minor degree, society at large."¹⁴⁰ Nevertheless, for Mill, such affects are not "harms" to others as he uses the term. A harm, whether physical or to property, is understood in terms of the direct violation of a legal or moral *duty* to an *identifiable third party*.¹⁴¹ So understood, the harm to others contemplated by Mill's principle must affect others "directly

¹³⁸ It should be noted that Mill did not intend his harm principle to apply to children or to those who have voluntarily assumed special duties or positions. See MILL, ON LIBERTY, at 9-10 (noting "this doctrine is meant to only apply to human beings in the maturity of their faculties" and "[w]e are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood"); 79-80 (where Mill identifies some circumstances in which, by voluntarily undertaking a public duty or by otherwise assuming a role of responsibility to others, one might step outside the application of the harm principle). Unfortunately, Mill also excludes "backward states of society" from the harm principles application. See *id.*, at 10 (arguing "[d]espotism is a legitimate mode of government in dealing with barbarians"). In what follows, the Authors assume Mill's limits in application to minors and those who have undertaken special legal, relational, or contractual duties, but will ignore his limitation on "backward states of society."

¹³⁹ MILL, ON LIBERTY, at 12.

¹⁴⁰ MILL, ON LIBERTY, at 79.

¹⁴¹ Hill, *supra* note 136 at 461-462. Of course, when Mill refers to "rights" and "duties," he assumes such terms are justified on utilitarian grounds. See, e.g., MILL, ON LIBERTY, at 10 (explaining, "I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility")

and in the first instance.”¹⁴² Consequently, as one commentator explains, “[f]riends and family are not ‘harmed,’ [in the relevant sense] . . . when a loved one’s self-destructive behavior causes them severe emotional distress. Nor does some generalized or merely probabilistic threat of harm justify interference.”¹⁴³ For Mill, this definitional constraint on the scope of the harm principle is justified on utilitarian grounds. He explains that such “inconvenience[s are] one[s] which society can afford to bear, for the sake of the greater good of human freedom.”¹⁴⁴ When, however, one’s consumption of alcohol drives one to physically abuse one’s family or friends, or when one commits insurance fraud, then a right is violated by that abuse or fraud, and sanctions may be imposed.¹⁴⁵ In sum, for Mill, self-regarding conduct that is merely offensive or distressful to others, so long as it does not directly violate their rights to life, limb, or property, is not as a general rule “harmful,” and cannot therefore warrant sanctions.¹⁴⁶

Finally, before turning to Mill’s arguments against censorship, it is important for purposes of this Article to note that his harm principle constrains the application of both “legal penalties” and the “moral coercion of public opinion.”¹⁴⁷ So, even if the government does not directly constrain liberty in a particular sphere, the application of social sanctions by private parties (e.g., censorship by private colleges or social media platforms) may nevertheless violate the harm principle. Indeed Mill emphasizes that the tyranny of the private sphere may be every bit as frightening as a tyrannical government. He explains that “[s]ociety can and does execute its own mandates; and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practices a social tyranny more formidable than many kinds of political oppression.”¹⁴⁸ For, “though not usually upheld by such extreme penalties” as governments might impose, non-governmental social sanctions leave “fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.”¹⁴⁹

¹⁴² MILL, ON LIBERTY, at 11.

¹⁴³ Hill, *supra* note 136 at 462 (noting that, for Mill, “[m]erely offensive conduct . . . does not qualify as harmful, though Mill made certain concessions to the moral traditions of our society”).

¹⁴⁴ MILL, ON LIBERTY, at 80.

¹⁴⁵ MILL, ON LIBERTY, at 79 (explaining that “[w]hen, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class and becomes amenable to moral disapprobation). In such cases

¹⁴⁶ See Hill, *supra* note 136 at 462

¹⁴⁷ MILL, ON LIBERTY, at 9.

¹⁴⁸ *Id.* at 4.

¹⁴⁹ *Id.*

Here Mill anticipates the current “cancel-culture” phenomenon whereby, without government participation, social sanctions against a person’s expression of an unpopular idea or participating in disfavored lifestyle choices can be imposed immediately via social media—almost instantaneously placing the target’s job, job prospects, reputation, or familial and social relationships at risk.

B. Mill’s Arguments against Censorship

For Mill, there is one sphere of human liberty that the harm principle protects as absolute and inviolable; this is the sphere of individual conscience and expression. The harm principle demands liberty of “conscience in the most comprehensive sense.”¹⁵⁰ This includes “liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.”¹⁵¹ After all, freedom of thought is the fountainhead of experimentation and innovation in identifying and satisfying new and qualitatively superior preferences for individuals and society as a whole. For Mill,

the peculiar evil of silencing the expression of an opinion is that it is robbing the human race, posterity as well as the existing generation—those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error.¹⁵²

As a corollary to the protection of freedom of conscience, the harm principle safeguards the freedom to express and publish one’s views as well. Mill explains that since expressing and publishing one’s ideas necessarily affects other people (and is not therefore exclusively self-regarding), one might expect that it should be exempt from the harm principle’s protections, but this is not the case: though the “liberty of expressing and publishing opinions may seem to fall under a different principle, [it,] being almost of as much importance as the liberty of thought itself and resting in great part on the same reasons, is practically inseparable from it.”¹⁵³

¹⁵⁰ *Id.* at 11.

¹⁵¹ *Id.*

¹⁵² *Id.* at 16.

¹⁵³ *Id.* at 12. Elsewhere, Mill reiterates this point, noting that liberty of thought “is impossible to separate [from] the cognate liberty of speaking and writing.” *Id.* at 14.

Censorship is not just a threat to citizens of authoritarian regimes. Mill warns that the fact that one lives in a democratic society is no guarantee that one's freedom of conscience and expression will be protected. For even a healthy democracy can expose its citizens to the risk of a tyranny of the majority. Mill explains that "the most numerous or active part of the people—the majority, or those who succeed in making themselves accepted as the majority . . . , may desire to oppress a part of their number" by silencing them.¹⁵⁴ According to Mill, even where there is broad consensus for an opposing view, censorship is never justified: "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind."¹⁵⁵ A democratic government therefore has no more title to engage in censorship than a dictatorship. Indeed, censorship is "as noxious, or more noxious, when exerted in accordance with public opinion than when in opposition to it."¹⁵⁶

But doesn't Mill overstate the point? Four objections to the claim that censorship is never justified immediately come to mind. First, it would seem imminently reasonable, particularly from the standpoint of utility, to censor the expression of statements that are thought to be false, and which may lead gullible members of the public to embrace dangerous positions—whether social, political, or scientific. Second, one might think there is no real risk in censoring potentially harmful statements society is convinced are false because, on the off chance that they are true, they will ultimately win out in the end. The truth cannot be suppressed for long; the error will self-correct. Third, it may be correct that the majority alone should not be in a position to suppress speech they deem false, but if teams of experts determine (after extensive research) what is true, there is no harm in censoring opposing views. Fourth, what if you are absolutely certain that a statement is false? Certainly there can be no harm in suppressing views, such as the claim that $2+2=5$, that are demonstrably false. Fifth, what about fraudulent, libelous, or seditious speech? Surely the government and civil society may censor such speech. The following section summarize Mill's responses to each of these challenges to his audacious claim that censorship is never warranted.

¹⁵⁴ *Id.* at 4.

¹⁵⁵ *Id.* at 16.

¹⁵⁶ *Id.*

1. What if the vast majority are convinced a statement is false and may lead listeners down the path of error?

The majority's censorship of minority views assumes the former's infallibility.¹⁵⁷ But if history has taught anything, it has demonstrated that groups, like individuals, are susceptible to hubris; and ages can be as fallible as individuals. Mill explains that every age holds opinions "which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, how general, will be rejected by future ages, as it is that many, once general, are rejected by the present."¹⁵⁸ Anyone who doubts this should spend an afternoon skimming through history, political, or scientific textbooks or journals from one hundred years ago. The *New York Times* opinion pages from 1922, though reflecting the most erudite and progressive opinions of the day, would no doubt make contemporary Manhattan resident cringe. The best safeguard against the risks of fallibility is constant testing by competing ideas. Mill notes that even leaders of the Roman Catholic Church, the most "intolerant of churches," will listen "patiently to a 'devil's advocate'" when voting on the canonization of saints.¹⁵⁹ Moreover, the best confirmation of a belief's truth is its ability to persistently win out against vigorous challenge. Mill explains that if "Newtonian philosophy were not permitted to be questioned, mankind could not feel as complete assurance of its truth as they now do."¹⁶⁰ In fact, "[t]he beliefs which we have the most warrant for have no safeguard to rest on but a standing invitation to the whole world to prove them unfounded."¹⁶¹ Subsequent advances upon Newtonian physics (e.g., by Einstein's theory of relativity¹⁶² and quantum mechanics¹⁶³) make Mill's point here particularly poignant in retrospect.

2. Truth Always Triumphs

Even admitting fallibility, it might be argued that there is no real risk in censorship because, if the censored view is in fact true, it will win out in the end. In other words, it makes sense for society to suppress potentially dangerous beliefs that the majority is confident are false because in most

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 17.

¹⁵⁹ MILL, ON LIBERTY, at 18.

¹⁶⁰ *Id.* at 20.

¹⁶¹ *Id.*

¹⁶² Einstein's theory of relativity confirmed, for example, that Newton's laws of physics are incomplete.

¹⁶³ Quantum mechanics violates Newton's First Law of Motion, at least in the quantum domain.

cases the majority will be proven correct. In the rare circumstance they are wrong, however, the truth will ultimately reveal itself. The truth's resilience is therefore a form of insurance against erroneous censorship. Mill dismisses this view as misguided because, even if you cannot keep truth down forever, you can certainly delay its discovery for generations: "History teems with instances of truth put down by persecution. If not suppressed forever, it may be thrown back for centuries."¹⁶⁴ History is rife with examples.¹⁶⁵ According to Mill, "[i]t is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error of prevailing against the dungeon and the stake. Men are not more zealous for truth than they often are for error."¹⁶⁶

3. Experts Should Decide

If the fallibility of the majority of society poses too great a danger of erroneous censorship, then perhaps decisions regarding which dangerous falsehoods are to be repressed should be left to learned experts. Certainly if the experts can agree, then the risks of error in censorship are so miniscule as to be negligible in comparison to the obvious dangers of a false belief taking hold of society. Even experts cannot be certain a belief is false, however, unless all the best arguments in its defense have been aired and decisively answered. But "how are they to be answered if that which requires to be answered is not spoken?"¹⁶⁷ So even the view that consensus among experts should be sufficient to warrant censorship presumes that the censored view must not be suppressed at the outset—at least not while the experts are in the process of evaluating its merits. Mill points out that "the philosophers and theologians who are to resolve the difficulties must make themselves familiar with those difficulties in their most puzzling form; and this cannot be accomplished unless they are freely stated . . . in the most advantageous light."¹⁶⁸ It seems, however, that the proponents of censorship might concede this point but argue that once the experts have weighed the evidence and are satisfied, the refuted belief may be censored without injury going forward. Of course, this presumes that the experts have not only identified every argument made in favor of the contested belief, but anticipated every defense that might be imagined later. Yet even if such confidence could be achieved

¹⁶⁴ MILL, ON LIBERTY, at 27.

¹⁶⁵ Mill offers a number of examples. *See id.*, at 27—28. But, of course, there are many others. *See, e.g.*, Damon Isherwood, *6 World-Changing Ideas That Were Originally Rejected*, LIFEHACK.ORG, at <https://www.lifehack.org/articles/lifestyle/6-world-changing-ideas-that-were-originally-rejected.html>.

¹⁶⁶ MILL, ON LIBERTY, at 28.

¹⁶⁷ *Id.* at 36.

¹⁶⁸ *Id.* at 37.

by contemporary experts, Mill warns that censorship will nevertheless place future generations, for “[b]oth teachers and learners go to sleep at their post as soon as there is no enemy in the field.”¹⁶⁹ This concern leads directly to the challenge raised in the next section.

4. What If the Censor Is Absolutely Certain the Suppressed Belief Is False?

Surely there is no harm in suppressing a belief that may be harmful to the public and that is demonstrably false? Mill offers a number of arguments against censorship under even these circumstances of certainty. To begin, the absence of debate turns living truth into dead dogma: According to Mill, even an expert who is certain another’s view is false should argue against its suppression simply because, however true her own position may be, “if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, and not a living truth.”¹⁷⁰ In such circumstances, an individual’s grasp of the truth is weakened. As Mill explains, [i]f the cultivation of the understanding consists in one thing more than another, it is surely in learning the grounds of one’s own opinions.”¹⁷¹ For example, the historian’s conviction that she has arrived at the best explanation for a given historical event depends entirely upon her having learned and evaluated the principal competing accounts. Since dogmatically held beliefs are not grounded in an informed conviction, they are fragile, and may “give way before the slightest semblance of an argument” to the contrary.¹⁷² But even if one manages to persist in a true belief without having considered why it is superior to competing views, Mill insists that this believer will not have *knowledge* of the truth: “Truth, thus held, is but one superstition more, accidentally clinging to the words which enunciate a truth.”¹⁷³ In short, for Mill, “[h]e who knows only his own side of the case knows little of that.”¹⁷⁴ Perhaps more concerning, Mill argues the absence of debate can transform a truth into falsehood. When persons “attend to only one side of an argument, errors can harden into prejudices, and truth itself ceases to have the effect of truth by being exaggerated into

¹⁶⁹ *Id.* at 41.

¹⁷⁰ *Id.* at 34. *See also*, Joel Feinberg, *Limits to the Free Expression of Opinion*, in *PHILOSOPHY OF LAW*, Joel Feinberg & Jules Coleman, ed., 381 (2004, 7th Edition) (noting that where opposing views are suppressed—even if false—the “rationales of the [true] tenets are forgotten, their vital direction and value lost, their very meaning altered, until at last they are held in the manner of dead dogmas rather than living truths”).

¹⁷¹ *MILL, ON LIBERTY*, at 34.

¹⁷² *MILL, ON LIBERTY*, at 34.

¹⁷³ *Id.* at 35.

¹⁷⁴ *Id.*

falsehood.”¹⁷⁵ Thus, censorship of even demonstrably false statements can, over time (in the absence of debate), have the unintended consequence of leading even the well-intended experts down the path to ignorance. It pays to quote Mill at length on this point:

But it is not the minds of heretics that are deteriorated most by the ban placed on all inquiry which does not end in the orthodox conclusions. The greatest harm done is to those who are not heretics, and whose whole mental development is cramped and their reason cowed by the fear of heresy. Who can compute what the world loses in the multitude of promising intellects combined with timid characters, who dare not follow out any bold, vigorous, independent train of thought, lest it should land them in something which would admit of being considered irreligious or immoral?...No one can be a great thinker who does not recognize that as a thinker it is his first duty to follow his intellect to whatever conclusions it may lead. Truth gains more even by the errors of one who, with due study and preparation, thinks for himself than by the true opinions of those who only hold them because they do not suffer themselves to think.¹⁷⁶

In sum, perhaps the greatest risk of censorship is that young minds and emerging scholars will fear the social stigma and legal sanctions of censorship, and so avoid controversial topics the independent and bold research of which would improve the minds of the researcher and add to society’s collective store of knowledge.

Finally, Mill points out that even a demonstrably false idea may contain within it a kernel of truth, or a partial truth. Censorship of the idea may throw the baby out with the bathwater. According to Mill, it is often the case that conflicting ideas, “instead of being one true and the other false, share the truth between them, and the nonconforming opinion is needed to supply the remainder of the truth of which the received doctrine embodies only a part.”¹⁷⁷ Another way to consider this point is in the context of interpersonal relations. Imagine Jim, Joan, and John are all close friends. The three friends are inseparable, and spend almost all their time together. One day Joan announces that she is leaving on a three-month long vacation. Jim is sad that Joan is leaving, but consoles himself with the knowledge that he will now get

¹⁷⁵ *Id.* at 50.

¹⁷⁶ *Id.* at 32.

¹⁷⁷ *Id.* at 44.

to spend some time alone with John. But while Jim does enjoy his time alone with John over the next three months, he comes to the realization that John is not the same person. He discovers that there is a side to John's personality that only Joan brings out, and he misses its absence. The same might be said of ideas. For example, there are no doubt sides to Christianity that come to the fore when answering the Hindu's objections, but not the Muslim's. Challenges to an orthodoxy (even if the challenging idea is demonstrably false) may bring aspects of the received position to light that would lie dormant had censorship precluded the challenge.

But there is still one more objection to Mill's bold claim that censorship of even false speech is never justified. This objection focuses on fraudulent, libelous, and perjurious speech. As one commentator notes, "immunity for all types of speech would . . . unsettle large areas of the law."¹⁷⁸ This objection is not, however, telling against Mill. He does permit the suppression of such speech, but it is because these forms of expression can be precluded by a straightforward reading of the harm principle. Speech that is fraudulent, libelous, or perjurious is, by definition, directly harmful to an identifiable victim's property or contractual rights—and may therefore be the subject of sanction pursuant to Mill's principle.¹⁷⁹ Other classical liberal advocates of freedom of speech and the marketplace of ideas have explicitly endorsed limits on speech that directly injures an identifiable third parties rights as well.¹⁸⁰

C. Mill and the Marketplace of Ideas

With the basics of Mill's arguments in place, it is appropriate to take stock and consider how they might motivate, fill out, and supplement the model for the marketplace of ideas laid out in Part II.

Recall that Part II fleshed out the marketplace of ideas metaphor in terms of an actual, functioning market model. There are buyers of ideas constrained by budgets and prices, sellers of ideas constrained by costs and buyer preferences, and intermediaries that have arisen to facilitate transactions between these buyers and sellers. While the marketplace of ideas may not

¹⁷⁸ Jeremy J. Ofseyer, *First Amendment Law: Taking Liberties with John Stuart Mill*, 1999 ANN. SURV. AM. L. 395, 400 (1999) (identifying defamation, perjury, and fraud as examples of established law that would be upset by too broad a prohibition against censorship).

¹⁷⁹ See MILL, ON LIBERTY, at 94. See also, Ofseyer, supra note 178 at 411, 416-17.

¹⁸⁰ For example, both John Locke and Immanuel Kant excluded fraud, slander, and other directly harmful lies from their arguments against censorship. See Ofseyer, supra note 178 at 430-32.

create a clear and certain path to “truth” in all cases, so long as it operates in response to market forces—consumers buying ideas that add value to their lives, and producers selling what customers will buy—the market will supply ideas that, over time, prove to be value-enhancing to individuals. And, so long as those individuals value truth/happiness, it will be promoted in the marketplace.

Mill’s arguments help to motivate this model by injecting it with a normative punch. As noted above, Mill, perhaps more than any other thinker, has been associated with the free marketplace of ideas model.¹⁸¹ And, given Mill’s preference-based, qualitative understanding of the principle of utility, this should come as no surprise. For, all things being equal, economists predict that unfettered markets will tend to identify consumer preferences and promote their satisfaction.¹⁸² If, therefore, the unfettered marketplace of ideas offers the best model for preference satisfaction in the sphere of thought and conscience (i.e., the sphere in which one’s life plan and source of meaning is developed and avowed), then it is not just prudent to embrace the model—it is a moral imperative. Moreover, Mill’s rule utilitarianism emphasizes, along with Demsetz, that the goal is identifying the best rule among available alternatives.

Market models also need some characteristic that offers a means of determining whether the market is functioning well or poorly. Traditionally, theories of the marketplace of ideas have set the goal of “truth” as this defining characteristic.¹⁸³ But truth is a notoriously difficult concept to define. Mill’s utilitarianism, however, helps to demonstrate why the market model articulated in Part II need not commit to a particular definition of truth (or any other specific goal) as the end of inquiry. The broad concept of happiness as preference satisfaction can serve as the defining characteristic of a functioning market. Preference satisfaction offers content to the goal of the market, but allows sufficient flexibility to include its participants’ various conceptions of truth and well-being within its scope.

Furthermore, while the market model articulated in Part II predicts that the marketplace of ideas will, on the whole, function best when unfettered,

¹⁸¹ See, e.g., Eric T. Kasper and Troy A. Kozma, *Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill’s Enduring (and Ever-Growing) Influence on the Supreme Court’s First Amendment Free Speech Jurisprudence*, 15 U. MASS. L. REV. 2 (2020).

¹⁸² See *infra*, Part II.

¹⁸³ Ofseyer, *supra* note 178, at 427 (noting that marketplace of ideas theories “often seem to place excessive emphasis on truth”).

its explanations and justifications are offered in the abstract. Mill's arguments against censorship help to illustrate why this is the case—and how censorship can be expected to play out—with concrete examples from within the practice of public and private discourse. Mill's arguments demonstrate why, despite the obvious risks, sellers of false or misleading ideas should be permitted to reach potential buyers. Neither intermediaries nor government regulation should intercede because, in the long run, from the standpoint utility, the costs of censorship can be expected to outweigh any benefits.

Also, while, as explained above, a functioning market should—absent interference—promote preference satisfaction, it may not be maximally efficient in doing so. As in markets for goods and services, the marketplace of ideas can admit of market failure (e.g., due to market power, information asymmetries, and externalities). And a number of scholars have argued that “[i]f the government [through regulation] can make the economic marketplace fairer and more efficient, [then] why can it not do the same for the . . . speech marketplace?”¹⁸⁴ Mill's arguments help illustrate what market failure in the marketplace of ideas will look like from within the practice of public and private discourse. For example, Mill recognizes that some false statements, e.g., those that are fraudulent or defamatory, should be censored because they violate the harm principle. In these cases, the seller's information asymmetries place them in an unfair bargaining position in relation to the relevant buyers. Market mechanisms alone are unlikely to avoid or correct for this unfairness—at least not before irreparable harm is imposed on innocents. Mill also points to potential correctives. In particular, Mill's work emphasizes that the market constraints to address the market failure need not be imposed by the government. Social constraints can be equally effective in remedying market failures. (This point will be important to the arguments in Part V below.)

Finally, it is important to note that most of Mill's arguments against censorship and freedom of expression have been embraced by the U.S. Supreme Court's First Amendment jurisprudence.¹⁸⁵ Indeed, Justice Holmes' famous articulation of the marketplace of ideas model as “the best test of

¹⁸⁴ David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 NORTH CAROLINA L. REV. 223, 234 (2003) (summarizing arguments by Owen Fiss, Cass Sunstein, Morton Horwitz, Jack Balkin, and others for increased censorship of the marketplace of ideas).

¹⁸⁵ *See, e.g.*, Kasper & Kozma, *supra* note [], at 5 (noting that [o]ver time, . . . a majority on the Court has adopted reasoning on the freedom of expression that mirrors” what Mill argued).

truth” in his *Abrams* dissent was directly inspired by a recent reading of *On Liberty*.¹⁸⁶ Consistency between the market model articulated in Part II and Mill’s arguments will be important for potential legal applications of the model.

With the basic model and arguments in favor of a free and uncensored marketplace of ideas in place, we can now turn to the question of whether contemporary calls for censorship of ideas pertaining to COVID-19 treatments and origins, climate change, and race, gender, and sexual orientation are justified. In addressing these questions, Part IV will also consider some post-modern critiques of Mill and freedom in the marketplace of ideas.

IV. WHAT IF THE COSTS OF CENSORSHIP OUTWEIGH THE BENEFITS?

When considering recent efforts at censorship summarized in Part I (concerning COVID-19, climate change, and race, gender, and sexual orientation) in light of market model articulated in Part II and Mill’s arguments laid out in Part III, this Part argues the harm of the censorship (whether private or public) outweighs any benefits. The mere presence of harms can lead a casual observer to conclude that external intervention is necessary, but even an imperfect market might be better than the available alternatives. Given the conclusions of the previous two parts, there is limited evidence of market failure and, even in those cases where market imperfections exist, censorship by government or private actors and intermediaries is not justified.

A. The Spread of Alternative Views Pertaining to the Treatment and Origins of COVID-19 Does Not Justify Censorship

Calls for the censorship of claims pertaining to COVID-19 treatments (such as ivermectin and hydroxychloroquine) and the effectiveness of available vaccines have come from federal officials, medical professionals, and media pundits from the onset of the pandemic, and persist today.¹⁸⁷ For example, a recent open letter from scientists, doctors, and academics called

¹⁸⁶ Kasper & Kozma, *supra* note [], at 13-15.

¹⁸⁷ See, e.g., Bruce Y. Lee, Doctors, *Scientists Petition Spotify To Stop “Joe Rogan Experience” Covid-19 Misinformation*, FORBES (Jan. 14, 2022), at <https://www.forbes.com/sites/brucelee/2022/01/14/doctors-scientists-petition-spotify-to-stop-joe-rogan-experience-covid-19-misinformation/?sh=46a548c968fc>.

on Spotify, a Swedish audio streaming and media service provider, to censor “The Joe Rogan Experience,” one of the service’s most listened-to shows after the host interviewed two controversial vaccine critics. According to the letter, “[b]y allowing the propagation of false and societally harmful assertions, Spotify is enabling its hosted media to damage public trust in scientific research and sow doubt in the credibility of data-driven guidance offered by medical professionals.”¹⁸⁸ YouTube and other social media platforms responded by removing the content.¹⁸⁹ As noted in Part I, calls for COVID-19-related censorship have also targeted claims pertaining to the origins of the virus, resulting in Facebook removing claims that “COVID-19 is man-made or manufactured” from its media platform.¹⁹⁰ Censorship of claims pertaining to COVID-19 origins on social-media platforms have even extended to artistic expression. For example, performing artist, Bryson Gray’s hit song, “Let’s Go Brandon,” was removed from multiple social media platforms because it contained “medical misinformation” with its lyric “pandemic ain’t real.”¹⁹¹

It is beyond dispute that false, misleading, and uninformed claims pertaining to the treatments and available vaccines for COVID-19 may have harmful consequences. Persons believing false claims concerning COVID-19 preventatives may take unnecessary risks, thereby exposing themselves and others to the virus. People believing false claims regarding experimental COVID-19 treatments may rely on those measures instead of seeking more proven treatments; and this may lead to more severe symptoms or death. Moreover, those who refuse vaccination based on false information may increase their chances of contracting and dying from the virus. Finally, those who believe false (or even accurate) statements that COVID-19 was created in a lab may develop a distrust of immunology as a science, or of their own government (for its participation or cover-up). Such distrust might lead people to eschew potentially life-saving recommendations from medical professionals and government authorities (e.g., mask and vaccine mandates).

¹⁸⁸ Lee Moran, *270 Doctors, Scientists Call Out Joe Rogan’s COVID Misinformation*, HUFFINGTON POST (Jan. 13, 2022) (quoting the letter), available at https://www.huffpost.com/entry/joe-rogan-spotify-open-letter_n_61dff11ae4b04e9d84e0cfaf.

¹⁸⁹ Tom Fenton, *YouTube takes down antivaxx Joe Rogan interview with Dr. Robert Malone which likened vaccines to mass psychosis*, Yahoo (Jan. 3, 2022), available at <https://www.yahoo.com/now/youtube-takes-down-antivaxx-joe-174640545.html>.

¹⁹⁰ Cristiano Lima, *Facebook no longer treating ‘man-made’ Covid as a crackpot idea*, POLITICO (May 26, 2021).

¹⁹¹ See Gina Martinez, *YouTube deletes MAGA rapper’s “Let’s Go Brandon” song because it contains “medical misinformation” with Lyric “pandemic ain’t real,”* DAILY MAIL (Oct. 23, 2021).

These are all genuine risks arising from the unfettered exchange of false, misleading, or unfounded ideas pertaining to the pandemic, but do they evidence a market failure in the marketplace of ideas?

Consider whether false, misleading, or uninformed ideas in this sphere fit into one or more of the three categories of market failure identified in Part II. To begin, lack of competition in a market resulting from significant barriers to entry can lead to some market participants having market power, which can translate into the ability to partially ignore the desires of buyers. It is unlikely, however, that the production of false, misleading, or uninformed ideas pertaining to the pandemic are the result of market power. There are few, if any, significant barriers to entry into the market for idea production. Indeed, this seems to be the principal concern of censors: it is too easy for anyone (with or without qualifications) to formulate and share their opinions on the matter.

Nor does the selling of false, misleading, or uninformed opinions concerning the pandemic appear to reflect an information asymmetry problem. As noted in Part II, market failure due to information asymmetries arises where essential information is known to one party, but is unknowable to the other. If censorship is warranted as a corrective for market failure due to an information asymmetry enjoyed by the seller of idea pertaining to the pandemic, then it must be the case that those spreading the false or misleading information have better access to the truth about pandemic-related matters. And certainly this is not the case. Those looking to censor pandemic-related ideas are alleging that they have the same (or better) access to the relevant information and have reached different conclusions.

Thus, the best argument that the pervasive selling of pandemic-related misinformation reflects a market failure would seem to be that these ideas impose external costs. What are these costs? Well, if they are external, they cannot be costs incurred by the parties to the transaction. So, one concern may be that transactions in false or misleading pandemic-related information between sellers of that information (e.g., Joe Rogan), intermediaries (e.g., Spotify), and the buyers (e.g., some of the show's listeners) are generating negative externalities born by non-listeners. What externalities? There have been repeated claims that the choice not to wear a mask, or not to get vaccinated, harms those who *do* wear masks and *are* vaccinated by (1) increasing their chances of exposure, and (2) filling hospital beds that are needed for other non-pandemic-related medical emergencies. Moreover, to the extent the information being sold contradicts that being sold by the government, it may undermine the government's credibility, and therefore its

ability to govern on this and other unrelated matters. But, as explained in Part II, proof that a market reflects an inefficiency due to a negative externality alone does not necessarily warrant the imposition of a corrective. Once a purported market failure is identified, the question then becomes whether available correctives would make matters worse.

If the proposed corrective measure is censorship, then Mill's arguments outlined in Part III give good reason for concluding that the medicine may be more harmful than the disease. First, those who seek to censor the sellers of alternative perspectives on the origins and treatment of COVID-19 are convinced these ideas are false and misleading. But this assumes the current majority's infallibility. If the last few years under the cloud of the pandemic have taught us anything, however, it is that the situation is fluid, and majority opinions concerning the usefulness of masks, the effects of the virus on children, the effectiveness of lockdowns, preventives, treatments, and vaccines have changed dramatically. And we must not forget the lessons of history. Early pioneers in the science of vaccination were panned by "serious scientists" as quacks. Many thought that the idea that one could protect persons from a virus by exposing one to it was absurd.¹⁹²

One might argue, then, that experts, and not the majority, should decide these questions. But, as Mill's arguments anticipate, the "experts'" opinions on these matters have proven to be just as fallible. Initially the experts communicated that masks were unnecessary, then that they were essential, and now that only certain kinds of masks may be of limited effectiveness in preventing the spread.¹⁹³ Experts were quick to push the mRNA vaccines (such as those offered by Pfizer and Moderna) and then boosters, and they sought to censor those who warned against significant risks of side effects, particularly the risk of myocarditis. But recent studies have suggested that

¹⁹² Aaron Rothstein, *Vaccines and Their Critics, Then and Now: Why Skeptics Believe What They Believe*, *The New Atlantis* (Winter 2015) (quoting a nineteenth century physician's claim that "future ages will read with wonder of the credulity of our nation....That a people should be found to contaminate their offspring with a poison taken from the brute creation...will stand among the incredible tales of some future Pliny"), available at <https://www.thenewatlantis.com/publications/vaccines-and-their-critics-then-and-now>.

¹⁹³ Miriam Fauzia, *Fact check: Trump surgeon general initially dismissed mask wearing, but then endorsed*, *USA TODAY* (Feb. 17, 2021, 5:38 PM), <https://www.usatoday.com/story/news/factcheck/2021/02/17/fact-check-ex-surgeon-general-jerome-adams-reversed-position-masks/6765301002/>; see also, Apporva Mandavilli, *The C.D.C. concedes that cloth masks do not protect against the virus as effectively as other masks*, *N.Y. TIMES* (Jan. 14, 2022), <https://www.nytimes.com/2022/01/14/health/cloth-masks-covid-cdc.html>.

these concerns are real, and that the Center for Disease Control may be underestimating the risks.¹⁹⁴ Pertaining to the origins of COVID-19, experts were quick to push for censorship of claims emerging on social media that the virus was introduced into the human population due to a lab leak in the Wuhan province of China.¹⁹⁵ As noted in Part I, however, subsequent evidence came to light that corroborated the theory.¹⁹⁶

Mill's arguments also discredit the claim that censorship presents little risk because, if these alternative ideas are in fact true, they will ultimately win out. For, as Mill notes, the anticipated correction may take generations—and countless lives may be lost in the meantime. Moreover, Mill would argue that, even if demonstrably false, alternative perspectives pertaining to COVID-19 should not be censored because the very act of addressing and refuting them both educates the public and the experts, and will continually affirm and refine the correct view. More still, the history of science is rife with examples of experiments that failed to prove the motivating hypothesis, but nevertheless advanced knowledge in the field by either identifying a dead end or happening (by serendipity) on a new (often totally unrelated) discovery. In fact, one key to the enduring utility of the scientific method is that its failed experiments can be as crucial to discovery as its successes. Finally, it was suggested above that one potential negative externality of the selling of false or misleading views concerning the pandemic might be an erosion of trust in government and the medical authorities. But how much more threatening to that trust is the implication these authorities would rather censor than answer opposing views.¹⁹⁷ Such censorship offers fertile soil for planting the seeds of public suspicion of conspiracy. Openly answering dangerous ideas with irrefutable logic would seem the more promising tack.

In sum, even if the exchange of false or misleading ideas concerning the pandemic raises the risk of negative externalities in the marketplace of ideas, under the comparative institutional model, the corrective of censorship would likely generate greater inefficiencies. The buying and selling of these claims

¹⁹⁴ See, e.g., Vinay Prasad, *We Need to Talk about the Vaccines*, UNHERD (Jan. 19, 2022), available at <https://unherd.com/2022/01/we-need-to-talk-about-the-vaccines/>.

¹⁹⁵ Cristiano Lima, *Facebook no longer treating 'man-made' Covid as a crackpot idea*, POLITICO (May 26, 2021).

¹⁹⁶ *Id.*

¹⁹⁷ See, e.g., R. Armitage, *Online 'Anti-Vax' Campaigns and COVID-19: Censorship Is Not the Solution*, 190 PUBLIC HEALTH 29 (2021) (noting that an "unintended effect of shutting down anti-vax groups may be to silence those with legitimate questions for fear of shame or ridicule and lead them to harbor greater suspicion of public health authorities and sympathize with anti-vax rhetoric).

within the marketplace of ideas does not, therefore, offer evidence of a market failure.

*B. The Spread of Alternative Views Pertaining to
Climate Change Does Not Justify Censorship*

In October of 2021, Google announced that, consistent with its existing ban on anti-vaccine content, it is “pulling the plug on climate deniers on its platform, banning content that contradicts well-established research from the scientific community.”¹⁹⁸ More recently, in June 2022, Gina McCarthy, the White House climate adviser, suggested that tech companies need to do more: “The tech companies have to stop allowing specific individuals over and over again to spread disinformation. . . . We need the tech companies to really jump in.”¹⁹⁹ These tech policies and calls from the White House to act are having their intended effect. Michael Shellenberger, a prominent eco-activist, and a *Time* magazine “Hero of the Environment,” published an article on Forbes.com titled, “On Behalf of Environmentalists, I Apologize for the Climate Scare.”²⁰⁰ In the post, he agrees that climate change is real, but claims it is “not the end of the world,” and “not even our most serious environmental problem.”²⁰¹ The article was taken down by *Forbes.com* (where Shellenberger is a regular contributor) the same day it was published.²⁰² The article was also censored with a content warning by Facebook’s social media platform.²⁰³ In fact, members of Congress went so far as to propose a bill to “prohibit the use of funds to Federal agencies to establish a panel, task force, advisory committee, or other effort to challenge the scientific consensus on

¹⁹⁸ Francis Agustin, *Google and YouTube say they will cut off climate-change deniers from being able to monetize their content and display ads*, BUSINESS INSIDER (Oct. 7, 2021), available at <https://www.businessinsider.com/google-youtube-bans-climate-denier-content-ads-2021-10>.

¹⁹⁹ Paul Bedard, *Climate ‘Fuhrer’ Ripped for Urging Censorship of Biden’s Critics*, WASHINGTON EXAMINER (Jun. 10, 2022), at <https://www.washingtonexaminer.com/news/washington-secrets/climate-fuhrer-ripped-for-urging-censorship-of-biden-critics>.

²⁰⁰ *Down with eco-censorship: Forbes has censored Michael Shellenberger’s sensible critique of eco-alarmism*, SPIKED (Jun. 30, 2020), available at <https://www.spiked-online.com/2020/06/30/down-with-eco-censorship/>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Michael Shellenberger, *I Have Been Censored by Facebook for Telling the Truth About Climate Change and Extinctions*, ENVIRONMENTAL PROGRESS, (Jul. 7, 2020), available at <https://environmentalprogress.org/big-news/2020/7/7/i-have-been-censored-by-facebook-for-telling-the-truth-about-climate-change-and-extinctions>.

climate change.”²⁰⁴ One commentator called the bill “uncomfortably reminiscent of a 1546 decree by the Council of Trent that attempted to suppress challenges to Church doctrine.”²⁰⁵ These are just a few examples of censorship in the context of the ongoing climate-change debate.

To what extent might these and other examples of climate-related censorship be justified as a response to market failure in the marketplace of ideas? As with false, misleading or uninformed claims pertaining to the pandemic, it does not appear such claims pertaining to climate change reflect market power or information asymmetries. Those advocating for censorship of false or misleading climate claims are not alleging that there are significant barriers to entering the discourse—they are claiming that there are too few barriers. The worry is that it is too easy for climate deniers to make and amplify their claims through intermediaries. Similarly, climate advocates do not allege climate deniers are taking advantage of unremovable information asymmetries to peddle their false or misleading claims; the claim is that these deniers are ignoring the indisputable data that is available to everyone with internet access.

So, as with pandemic-related claims, if the selling of false or misleading climate-related ideas reflects a market failure, it is likely because it generates negative externalities. In this context, external costs might arise on two levels. At the primary level, the buying and selling of false or misleading climate-related misinformation can be expected to impact the behavior of the participants to the transaction. Namely, one who avows the claim that global warming is a fiction is less likely to take measures to decrease their carbon footprint. In such circumstances the transaction in ideas will resemble the classic case of negative externalities (e.g., the factory that is able to externalize the costs of the pollutants it emits into the air). The costs of the climate deniers’ increased carbon emissions (i.e., its impact on climate change and associated extreme weather events) will be borne by others not party to the transaction.

At a secondary level, climate activists often justify calls for censorship with the concern that the selling of misleading climate information undermines the authority and influence of the true experts. With diminished authority, these experts are unable to push through policy changes necessary to prevent the negative impacts of climate change. As one commentator explains, when false, misleading, and uninformed ideas are permitted to be

²⁰⁴ S. 729, 116th Congress (2019).

²⁰⁵ KOONIN, *supra* note [] at 202.

sold, “these uninformed comments undermine [the experts’] authority. People are less inclined to believe experts when their views are presented alongside hostile opinions.”²⁰⁶ If preventive actions are forestalled due in part to the diminished authority of climate majority-view scientists, then the worry is that a majority of the world’s population will suffer for the misguided beliefs of the minority.

Applying the comparative institutional model, however, the negative externalities associated with the buying and selling of false, misleading, or uninformed climate-related information only justify external intervention if alternative arrangements (e.g., where the claims are censored) would be more efficient. And, again, Mill’s arguments offer some good reasons for thinking this is not so. First, climate advocates’ claims that they are only looking to censor false or misleading claims concerning climate science presumes the infallibility of the current scientific consensus. Setting aside the concern that any such claim of infallibility is itself inconsistent with the scientific ethos and method, the examples of censorship offered above (and in Part I) concern efforts at censoring the claims of recognized experts who do not deny the climate is changing, or that humans are playing a role in the change. Instead, both Koonin and Shellenberger focus their claims on the magnitude of the change, the imminence of the threat, and the costs versus benefits of aggressive measure to reduce worldwide consumption of fossil fuels.

Even the United Nations’ Intergovernmental Panel on Climate Change (IPCC) does not claim certainty regarding the conclusions of its reports. The IPCC reports offer six levels of likelihood for their predictive claims, ranging from “Virtually Certain” to “Exceptionally Unlikely” and a corresponding confidence scale that ranges from “Very High” to “Very Low.”²⁰⁷ Certainty is not an option. With respect to climate-change-related extreme weather events, the IPCC’s 2013 Assessment reported “*low confidence* regarding the sign of trend in the magnitude and/or frequency of floods on a global scale.”²⁰⁸ It reported “*low confidence* in a global-scale observed trend in drought or dryness (lack of rainfall) since the middle of the 20th century” and “*low confidence* in trends in small-scale severe weather phenomena such as hail and thunderstorms.”²⁰⁹ And it reported that “*confidence* in large scale

²⁰⁶ Editors of The Conversation, *There’s a good reason we’re moderating climate change deniers: uninformed comments undermine expertise*, THE CONVERSATION (Sept. 19, 2019).

²⁰⁷ STEVEN E. KOONIN, UNSETTLED 20 (2021).

²⁰⁸ *Id.* at 98.

²⁰⁹ *Id.*

changes in the intensity of extreme extratropical cyclones [storms] since 1900 is *low*.”²¹⁰ With so little confidence concerning so many of the central issues related to climate-change policy, it would seem the science (and society as a whole) would benefit from increasing, rather than stifling, debate.

Some would argue that the stakes are so high when it comes to climate change (the inhabitability of Earth) that the risks of delayed action outweigh any benefit from continued research and debate. But this ignores the risk of immediate, extreme, but *unwarranted* action. Koonin and others argue, for example, that achieving carbon neutrality by mid-century (if this goal is even possible) would come at an astronomical cost to the world economy—and would risk depriving the poorest of the world’s population access to cheap (life-saving) energy. But, even if this goal were achieved, Koonin points out that the consensus models suggest that the net impact on the habitability of the planet by the turn of the century would likely be negligible by comparison to models that do not include top-down imposed reductions in the use of fossil fuels. In other words, even among those who agree that human-influenced climate change is real, there appears to be significant room for debate concerning the relative utility of available responses. This latter point defuses the common argument, as expressed by Timothy Wirth, President of the UN Foundation, “We’ve got to ride this global warning issue. Even if the theory of global warming is wrong, we will be doing the right thing in terms of economic and environmental policy.”²¹¹ This is similar to the argument anticipated and rejected by Mill: Who cares if the majority view is wrong in censoring opposition; if it is, then the censored minority view will eventually come to light because truth inevitably triumphs. This attitude underestimates the ability of censorship to suppress value-enhancing ideas—and underestimates the costs (in terms of lives and human suffering) that may be paid due to the delay.

Thus, pursuant to the comparative institutional model for determining market failure, the persistent scientific uncertainty concerning appropriate responses to the fact of climate change forces the conclusion that the risks of censorship (foreclosing scientific discourse) outweigh the known risks of permitting potentially false or misleading climate-related claims to be bought and sold in the marketplace of ideas.

²¹⁰ *Id.*

²¹¹ *Id.* at 8.

*C. The Spread of Alternative Views Pertaining to
Race, Gender, or Sexual Orientation Does Not
Justify Censorship*

In Europe, hate speech is censored aggressively by government mandate.²¹² And for decades critical race and gender theorists have called for such regulation in the United States, but, to date, these efforts have not survived First Amendment challenges.²¹³ The American private sector has, however, recently embraced a rigorous censorship regime without government prodding. For example, Facebook’s hate speech policy proscribes posting content that “attacks” persons based on “protected characteristics” such as “race, ethnicity, national origin, disability, religious affiliation, caste, sexual orientation, sex, gender identity and serious disease.”²¹⁴ The policy defines “attacks” as “violent or dehumanizing speech, harmful stereotypes, statements of inferiority, expressions of contempt, disgust or dismissal, cursing and calls for exclusion or segregation.”²¹⁵ Universities and employers have gone further in censoring speech pertaining to race, gender and sexual orientation—extending restrictions beyond “attacks” (or hate speech) to proscribing or discouraging challenges to now-dominant critical narratives concerning “whiteness,” American history, and even political philosophy. For example, in 2021, the Raytheon Company was reported to have encouraged its employees to “decolonize [their] bookshelf[ves],” and to have asked its “white, strait, Christian, able-bodied, English-speaking employees to deconstruct their identities, ‘identify [their] privilege,’ and ‘step aside’ in favor of other identity groups.”²¹⁶

Very few deny that bigoted speech is vile. There is nevertheless ample evidence of it in the news, on social media, on university campuses, and in the workplace. Some would, however, argue that the market functions as it should in response to bigotry.²¹⁷ The reputational costs of buying and selling

²¹² See, e.g., Adam Santariano, *E.U. Takes Aim at Social Media’s Harms with Landmark New Law*, NEW YORK TIMES (Apr. 22, 2022).

²¹³ See, e.g., MARI MATSUDA, CHARLES LAWRENCE, RICHARD DELGADO & KIMBERLE WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

²¹⁴ Meta Hate Speech Policy, available at <https://transparency.fb.com/policies/community-standards/hate-speech/>.

²¹⁵ *Id.*

²¹⁶ Jesse O’Neill, “Decolonize your bookshelf”: Leaked documents show defense contractor Raytheon uses critical race theory, NEW YORK POST (Jul. 6, 2021).

²¹⁷ See, e.g., Jeffrey Rosen, *Google, Twitter, Facebook and the new global battle over the future of free speech*, THE NEW REPUBLIC (Apr. 28, 2013), available at

these ideas is exceptionally high, rendering it an unsuccessful, and unsustainable business model. For example, as one commentator notes, within days of a recent anti-Semitic “hashtag” being introduced on twitter, “the bulk of the tweets carrying the hashtag had turned from anti-Semitic to denunciations of anti-Semitism, confirming that the Twittersphere is perfectly capable of dealing with hate speech on its own, without heavy-handed intervention.”²¹⁸ But many have argued that, when it comes to bigoted speech, a “free market fundamentalism” is naïve and misguided.²¹⁹ Does the prevalence of bigoted speech suggest a market failure in the marketplace of ideas that is in need of correction?

If bigoted speech in the marketplace of ideas reflects a market failure, it is likely due to market power or negative externalities. Given that market power arises from barriers to entry, it should come as no surprise that straight, white men have historically enjoyed market power in the marketplace of ideas. Most obviously, barriers to entry have arisen at the level of distribution. Straight, white men have historically controlled the wealth necessary to broadcast ideas and have also controlled the principal intermediaries (the media, publishers, universities, etc.). Pervasive bigotry, by its nature, also builds into the marketplace an artificial reputational barrier to ideas being sold by minority populations. Of course, these barriers are not insurmountable. History abounds in examples of minorities who have found success in the marketplace of ideas,²²⁰ but few would argue that such populations have not been underrepresented.

Bigoted speech also offers a classic example of negative externalities. Much of the damage that results from hate speech and bigoted ideas will fall on the buyers and sellers of those ideas themselves (e.g., they will suffer from the hardening of their own hearts and miss out on all the advantages diversity), but damage will certainly fall on the targets as well—who are *not* party to the exchange. Such damage may be reputational (raising barriers to

<https://newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules>.

²¹⁸ Jeffrey Rosen, *Google, Twitter, Facebook and the new global battle over the future of free speech*, THE NEW REPUBLIC (Apr. 28, 2013), available at <https://newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules>.

²¹⁹ See Sean McElwee, *The Case for Censoring Hate Speech*, THE HUFFINGTON POST (Sep. 23, 2013), available at https://www.huffpost.com/entry/hate-speech-online_b_3620270.

²²⁰ For a small sampling, see, e.g., DERRICK P. ALRIDGE, ET AL., THE BLACK INTELLECTUAL TRADITION: AFRICAN THOUGHT IN THE TWENTIETH CENTURY (2021); ESTELLE FREEDMAN, THE ESSENTIAL FEMINIST READER (2007); ILAN STAVENS, THE NORTON ANTHOLOGY OF LATINO LITERATURE (2010); MASON FUNK, THE BOOK OF PRIDE: LGBTQ HEROES WHO CHANGED THE WORLD (2019).

entry the marketplace—as noted above), or it may be in the form of lost employment or other opportunities or, at its worst, it may manifest hate crimes against the targets.

Under the comparative institutional model adopted by this Article, however, evidence of market power and negative externalities only justifies external intervention if there is confidence that the fix (in this case, censorship) would not make matters worse. Mill's by now familiar arguments give reason for thinking censorship would do more harm than good, even in this context. It is assumed that, unlike speech pertaining to the pandemic or climate, we can assert with confidence (and without fear of the charge of infallibility or hubris) that bigoted speech is false. This admission, however, does nothing to defuse some of Mill's most compelling arguments against censorship.

As a preliminary matter, if bigoted speech actually violates rights (e.g., if it is defamatory) or intentionally incites a violent hate crime, then even Mill would endorse censorship and legal sanction consistent with his harm principle.²²¹ But what about the censorship of other bigoted or hate speech that does not rise to this level?

Recall that Mill offers a number of arguments against censorship even when (as here) there is certainty that the censored view is false. First, the absence of debate turns living truth into dead dogma. There is no reason to think this is not a concern in the context of racial or other forms of bigotry. If racial bigots are not permitted the opportunity to introduce their ideas into the marketplace, then market participants lose the opportunity to repeatedly and openly expose their quality. This process of constant testing and rejecting has the benefit of teaching each new generation precisely why those views are false and misguided. When anti-racism becomes mere dogma, however, market participants may lose sight of why racism should be avoided. As a result, subsequent generations will have few discursive defenses against the unexpected (but inevitable) reintroduction of racist ideas in new, reimagined forms. Recall that Mill warns that when people “attend to only one side of an argument, errors can harden into prejudices, and truth itself ceases to have the effect of truth by being exaggerated into falsehood.”²²² Censorship of racist speech may preserve the general population in the correct belief that anti-black racism is bad. But if this belief is reduced to mere dogma, it may evolve into a prejudice—a reverse racism against historical white oppressors. Continued, lively, and free discourse about race, gender, and sexual

²²¹ *See supra*, Part III.

²²² MILL, ON LIBERTY, at 50.

orientation would seem to be the best defense against such risks.

Moreover, Mill points out that many claims that are false on the whole may nevertheless contain a kernel of truth. Consequently, censorship of those claims may deny the marketplace the advantages such half-truths may have in refining related ideas and thereby maximizing the general welfare. Consider, for example, the claim that “All white people are racist and therefore morally inferior to blacks, who, by definition, cannot be racist.” This is a claim of moral inferiority directed at an entire group based on race. Many would argue it is false. Even those who believe the claim is false, however, may identify a kernel of truth in it—namely that being white in a predominantly white society will inevitably lead to a cultural imbedding of racial bias (sometimes explicit and sometimes implicit) that will not infect the racial minorities in that society in the same way. If such racially motivated claims of inferiority were censored, then society would not benefit from the kernel of truth the statement contains. If critics respond that minority critiques should not be censored, just the bigoted claims of the dominant group, then the above-stated worry that an untested truth will become dogma and then “exaggerated into falsehood” arises. Such one-sided censorship would potentially exaggerate the truth of anti-racism into the falsehood of reverse racism.

Compelling as these arguments may appear on their face, contemporary critics will raise a deeper, more structural concern. What if the nineteenth-century, classical liberal paradigm that Mill and his followers assume is itself a manifestation of white, male, European market power? This basic worry informs a vast array of post-modern challenges to Western liberalism as “systemically” racist, sexist, or otherwise bigoted. Mill did not, of course, anticipate these post-modern structural critiques. Nevertheless, they have become central to the twenty-first century debate over the wisdom of censorship. The next section engages these concerns.

D. Post-Modern Challenges to the Free Marketplace of Ideas Model

A recent National Public Radio (NPR) segment collected a number of contemporary educators and intellectuals to warn of the perils of Mill’s “free speech absolutism.”²²³ A recurring theme was that Mill’s arguments in *On*

²²³ Matt Taibbi, *NPR Trashes Free Speech. A Brief Response*, SUBSTACK (Aug. 31, 2021), available at <https://taibbi.substack.com/p/npr-trashes-free-speech-a-brief-response>. The NPR broadcast is available at <https://www.wnycstudios.org/podcasts/otm/episodes/on->

Liberty assume an “outdated conception of harm.”²²⁴ One of these free-speech critics, Andrew Marantz, relies on the neopragmatist philosophy of Richard Rorty to challenge Mill’s paradigms of harm and individual rights.²²⁵ Rorty famously rejected Western philosophy’s persistent attempts (dating back to Plato) to use language to accurately represent (or “mirror”) reality as it exists in itself.²²⁶ Since any claims about the world will be conceptual, and concepts are linguistic constructs, and language is a human practice, Rorty argued there is no reality beyond these practices.²²⁷ One corollary of this view is that, since all human practices are contingent, concepts like “freedom” and “rights” are contingent and fluid as well. In the face of this contingency, the concept of individual freedom, for example, should be reimagined as the ability to engage in the ongoing and constantly evolving linguistic activity of creating and recreating an original, ideal self-description—what Rorty calls an individual’s “final vocabulary”—and making that description manifest in practice.²²⁸ An individual’s final vocabulary reflects their core religious, ethnic, racial, sexual, gender-based, aesthetic, philosophical, or other commitments and identity.²²⁹

This “linguistic turn”²³⁰ in philosophy has led Rorty and many others to conclude that words can be used to directly *harm* others in previously unappreciated ways. For example, Rorty explains that linguistic beings can be “given a special kind of pain: They can all be humiliated by the forcible tearing down of the particular structures of language and belief in which they were socialized (or which they pride themselves on having formed themselves).”²³¹ In other words, if one’s sense of self-respect and well-being is crucially tied to one’s final vocabulary pertaining to one’s race, gender, sexual-orientation, etc., and that final vocabulary (though unique to the individual) depends in part on certain shared linguistic structures, then the application of market power to tear down those structures through bigoted speech by an empowered majority can directly and cruelly harm individuals and groups where it hurts most.²³²

the-media-constitutionally-speaking.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ See generally, RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979)

²²⁷ RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 3 (1989)

²²⁸ *Id.* at 73.

²²⁹ *Id.*

²³⁰ See, e.g., RICHARD M. RORTY, *THE LINGUISTIC TURN: ESSAYS IN PHILOSOPHICAL METHOD* (1992).

²³¹ RORTY, *CONTINGENCY*, *supra* note 227, at 177 (1989)

²³² See John P. Anderson, *Achieving Rorty’s New Private-Public Divide*, in HUNDBUCH

Rorty offers the example of O'Brien, the principal villain in George Orwell's novel, *1984*, to illustrate this alternative form of torture.²³³ In that novel, Winston, the protagonist, famously staked his identity on the claim that "Freedom is the freedom to say that two plus two make four. If that is granted, then all else follows."²³⁴ O'Brien, the party official, and paradigmatic post-modern sadist, thrilled at identifying the final vocabularies of dissenters like Winston, and forcing their disavowal. While more prosaic sadists may get their kicks from tearing their victims' physical bodies apart, O'Brien enjoyed "tear[ing] human minds to pieces and put[ting] them together again in new shapes of [his] own choosing."²³⁵ When O'Brien ultimately succeeded in forcing Winston to avow the proposition that two plus two make five, he also succeeded in tearing the latter's world apart in such a way that it could not be repaired. Winston's gin-drenched quasi-existence in front of the telescreen at the Chestnut Tree Café at the close of the novel illustrates the very real suffering that results from such forced redescription.

Once can, however, accept this post-modern understanding of suffering through forced redescription as real without also accepting that it exposes Mill's harm principle as wrong-headed or antiquated. Indeed it is surprising that critics like Marantz fail to appreciate that Rorty himself did just that. Rorty claimed that *On Liberty* "seems to me pretty much the last word" on the role of government.²³⁶ Moreover, Rorty was adamantly opposed to the "identity politics" that motivates many of these post-modern challenges to Mill precisely because the very censorship they recommend, if followed, risks imposing the cruelty of forced redescription just described.²³⁷

In his later work, Rorty warned that under the identity-politics model the dominant members of the relevant (racial, gender, sexual-orientation) groups would seek to impose their preferred understanding of their group identity on other members to solidify the relevant group's identity and maximize its political and cultural impact. To succeed in such reification of the group identity, the dominant members may look to censor the self-descriptions of

RICHARD RORTY, Martin Muller, ed., 1-17 (2022), available at https://doi.org/10.1007/978-3-658-16260-3_51-1.

²³³ See, RORTY, CONTINGENCY, *supra* note 227, at 169-188.

²³⁴ *Id.* at 172.

²³⁵ *Id.* at 177.

²³⁶ *Id.* at 63.

²³⁷ See, e.g., Richard Rorty, *Is "Cultural Recognition" a Useful Concept for Leftist Politics*, 1 CRITICAL HORIZONS 7-20 (2000).

members who avow non-conforming final vocabularies.²³⁸ As Professor Nancy Fraser explains it, in the attempt to “consolidate an authentic self-elaborated group culture, [identity politics] essentializes identity, pressuring individual members to conform, denying the complexity of their lives, the multiplicity of their identifications, and the cross-pulls of their various affiliations.”²³⁹ In such circumstances, post-modern identity politics “can end up freezing group differences, stifling individuals, and fueling the very antagonisms” it purports to correct.²⁴⁰ For example, blacks who do not conform to the dominant members’ understanding of “blackness” may be labeled an “Uncle Tom,” or as the “black face of white supremacy.”²⁴¹ Such social sanctions are painful and humiliating to their targets, but imagine the suffering that would result from the absolute censorship of alternative understandings of a group identity under this model. Censorship would look to actually remove words from some members’ final vocabularies altogether. There can be no clearer sense in which the cruelty of humiliation through forced redescription might be manifest.

For Rorty, the post-modern proponent of identity politics runs counter to “most of the left’s rhetoric since the French Revolution.”²⁴² In contrast, the post-modern liberal poet, Rorty’s hero, “refuses to be stereotyped as an X, resents being thought of as an X, and tries to create a self-image for herself which escapes all the classificatory terminologies employed by those around her.”²⁴³ Of course, if the post-modern liberal “chooses not to break free from her roots, and instead tries to develop a self-image to which group membership is central,” Rorty thinks “it important that this decision be fully

²³⁸ See, e.g., WILLIAM CURTIS, *DEFENDING RORTY: PRAGMATISM AND LIBERAL VIRTUE* 150-155 (2015).

²³⁹ Nancy Fraser, *Why Overcoming Prejudice Is Not Enough: a Rejoinder to Richard Rorty*, 1 *CRITICAL HORIZONS* 21-28 (2000). It should be noted that, contrary to Rorty, Fraser is nevertheless convinced that identity politics should not be abandoned, just modified. William Curtis, however, questions whether Fraser’s proposed modifications to identity politics is so subdued that it differs little from Rorty’s liberal model. See CURTIS, *DEFENDING RORTY*, *supra* note 238, at 152-155.

²⁴⁰ Fraser, *supra* note 239, at 27.

²⁴¹ See e.g., Dominick Mastrangelo, *Scott: “Uncle Tim” social media responses to GOP speech “so disappointing,” THE HILL* (Apr. 29, 2021), available at <https://thehill.com/homenews/senate/550984-scott-uncle-tim-responses-on-social-media-to-gop-rebuttal-speech-so>; Erika D. Smith, *Larry Elder is the Black face of white Supremacy. You’ve been warned,* L.A. TIMES (Aug. 20, 2021), available at <https://www.latimes.com/california/story/2021-08-20/recall-candidate-larry-elder-is-a-threat-to-black-californians>.

²⁴² Rorty, “Cultural Recognition,” *supra* note 237, at 14.

²⁴³ *Id.*

conscious and free, rather than being treated as the recognition of an evident duty.”²⁴⁴ Thus, even if we recognize that post-modern philosophy has led to the identification of new forms of humiliation achieved by bigoted speech, if we agree with Rorty, censorship does not promise to eradicate these sufferings, but to *amplify* them.

A related contemporary argument offered by post-modern critical legal theorists in favor of the censorship of bigoted or hate speech is that such censorship will actually “enhance the diversity and range” of social discourse.²⁴⁵ This argument claims that hate speech actually undermines free speech because “public discourse is robbed and weakened by the silencing and exclusionary effects of” racist, sexist, and homophobic speech.²⁴⁶ Consequently, “[r]estricting hate speech actually increases the circulation of speech . . . by defending the rights of victim groups whom such abuse would otherwise silence.”²⁴⁷ In other words, as the authors of the landmark critical legal studies collection, *Words that Wound*, state in their joint “manifesto,” they see themselves engaged in “a fight for a constitutional community where ‘freedom’ does not implicate a right to degrade and humiliate another human being.”²⁴⁸ Professor Henry Louis Gates, Jr., however, worries that such a model would “signal a regime so heavily policed as to be incompatible with democracy.”²⁴⁹ And, perhaps more concerning, “[o]nce we are forbidden verbally to degrade and humiliate, will we retain the moral autonomy to elevate and affirm?”²⁵⁰

Professor Gates points out that this argument for censorship turns on Isaiah Berlin’s distinction between positive and negative liberties in his famous essay, *Two Conceptions of Liberty*, “without having learned from it.”²⁵¹ These proponents of censorship suggest that the goal of positive liberty (substantive equity in resources and status) must take precedence over the goal of negative liberty (freedom from external coercion) because the latter is useless without the former. Berlin, however, argued that negative liberty is a “truer and more humane ideal than the goals of those who seek in the great,

²⁴⁴ *Id.*

²⁴⁵ See Henry Louis Gates, Jr., *War of Words: Critical Race Theory and the First Amendment*, in Joel Feinberg & Jules Coleman, ed., *PHILOSOPHY OF LAW* 429 (2004, 7th Edition).

²⁴⁶ *Id.* at 429.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 430-31.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 431

disciplined, authoritarian structures the ideal of ‘positive’ self-mastery by classes, or peoples, or the whole of mankind.”²⁵² Berlin concludes the negative form of liberty is “truer, because it recognizes the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another.”²⁵³ As was suggested above, if we assume that concepts such as race, gender, and sexual identity are fluid, then who is to be the authoritative voice for determining the acceptable bounds of their interpretation? Any such claim of authority would be dubious—and the consequences (in terms of humiliation and suffering) for those who have built their ideal self-descriptions around the “cancelled” understandings will be significant. In short, as Gates puts it, to assert, as many critical race and feminist theorists do, “that equality must precede liberty is simply to jettison the latter without securing the former.”²⁵⁴

In sum, let us assume that the post-modern critics are correct in their claim that Mill’s liberalism is a contingent, Western European historical construct—now what? Its contingency alone is neither an argument for its illegitimacy nor a justification for its replacement. At most, the realization that our cultural embrace of Mill’s harm principle is a historical accident warrants an honest and continuing reevaluation of its utility in light of our shifting individual and social aims. In other words, any new disutility arising from our continued embrace of Mill’s harm principle under changing social circumstances (e.g., the recent identification of the psychological harm of forced redescription through hate speech) must be balanced, under the comparative institutional model, against the risks of even worse outcomes under alternative paradigms. Mill’s rule utilitarianism, which focuses on the net utility of adopting one set of rules by comparison to all available alternatives accounts for (indeed it demands) such continuing reevaluation. Mill was convinced that his harm principle, and its correlative “free-speech absolutism,” generated more net utility for nineteenth-century Western liberal societies than any alternative arrangement. And Rorty and Gates have suggested that our post-modern understanding of suffering through forced redescription has not altered this conclusion for twenty-first century democracies. Rather, it confirms its enduring application.

None of the above is intended to suggest that bigoted, hateful speech cannot humiliate and be hurtful. This point is conceded, and post-modern critical legal theorists have done much to help make this reality more salient. The point of this section is that any suffering or humiliation resulting from

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

bigoted or hateful speech would predictably be outweighed by the far more significant harms resulting from attempts to censor such speech.

V. IF THERE IS MARKET FAILURE, THEN IT IS REFLECTED IN CENSORSHIP

This Article has not attempted to claim that markets are perfect engines of efficiency. Instead, a premise of these arguments (the comparative institutional approach) has been that imperfect market mechanisms may be the best that can be hoped for, so long as they are better than the available alternatives. Anything emerging organically—as markets do—will have many rough edges, but the overall outcomes will typically be superior to those generated by concentrated planners. This is so because any system—organic or planned—is going to get many things wrong; but organic, bottom-up processes keep mistakes small and localized. Organic systems also allow everyone else in the system to learn from localized mistakes so that they do not become systemic. The concentrated power of planned systems, on the other hand, will often generate problems of far greater scope and scale; and those few who make decisions for the whole will often be invested in not admitting to the mistakes, so inefficiencies will linger and become systemic.

The marketplace of ideas has its imperfections, but the previous Part has shown that these are not necessarily standard market failures of a kind that could justify intervention by government into the marketplace. Instead, the examples of the proliferation of erroneous and bigoted speech offered so far resemble the natural rough edges of an organic system. However, there are other flaws in the marketplace of ideas that have largely avoided scrutiny, and these flaws do appear to arise from structural problems with the market. The reason they have gone largely unremarked is that their existence facilitates *successful* censorship, so those most concerned about failures in the marketplace of ideas view them as features, rather than bugs in the system. This section will show that those demanding censorship as a solution to market failures are, at best, obscuring, and at worst, causing, that which they purport to solve.

Intermediaries stand at the locus of these potential market failures, which has led some individuals to demand restrictions on the ability of intermediaries to curtail content.²⁵⁵ Any effort to interfere with the

²⁵⁵ E.g., *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies* (June 19, 2019), <https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies>.

intermediary role runs the risk of inhibiting the benefits—reduction of transaction costs, facilitation of trust²⁵⁶—but if intermediaries are the source of market imperfections, then reforms *might* be warranted.

Intermediaries will argue that limiting their ability to restrict content is itself a limitation on *their* freedom of expression.²⁵⁷ The answer is that such limitation can be warranted as a corrective for market failure. If the censorship by intermediaries in these contexts violates the harm principle,²⁵⁸ it should motivate an inquiry into the possible presence of market failures and, if market failures exist, corrective measures (including censorship) *might* lead to a net increase in market efficiency. The complex nature of the intermediary role—as provider of important free speech benefits and as consumer in the same market—urges caution in determining whether to intervene, but intervention cannot be dismissed out of hand.

Importantly, interventions in the marketplace of ideas, even when necessary to correct market failures, need not come from the government. Government correctives are planned correctives and will be subject to the same risk of systemic flaws as any planned system. Private correctives are far more likely to be organic, and therefore more likely to yield overall net gains. Indeed, even Mill’s caution regarding the dangers of private censorship—that it can be more dangerous because it is more comprehensive and, therefore, more oppressive²⁵⁹—can be inverted to show that private correctives might be more effective. Identification of a market failure in the marketplace of ideas is therefore never a sufficient condition for government intervention, and efforts to push back against private censorship must have, as a foundation, not only a skepticism of interventions but a willingness to eschew government interventions, notwithstanding the government’s monopoly on coercive force.

A. Recent Success at Censorship by Intermediaries (and others) Reflects Market Power

The nature of the marketplace of ideas makes it difficult to amass market power as a producer of ideas. Specifically, there are no barriers to entry into

²⁵⁶ *Supra* at II.B.

²⁵⁷ See, e.g., Kyle Langvardt, *Platform Speech Governance and the First Amendment: A User-Centered Approach*, LAWFARE (Dec. 7, 2020), at <https://www.lawfareblog.com/platform-speech-governance-and-first-amendment-user-centered-approach>, (noting the view that “content moderation is a form of constitutionally protected ‘speech’ in itself, much as a newspaper’s editorial choices are speech”).

²⁵⁸ *Supra* at IV.

²⁵⁹ *Supra* notes 147-149 and accompanying text.

the production side because anyone can generate and share whatever comes into their minds. Whether doing so is wise is a separate question, one that requires consideration as to the actual quality of the idea, but production of ideas is not constrained in ways that would allow anyone to amass market power. However, the widely dispersed nature of the marketplace creates opportunities for intermediaries to amass market power. In the past, for example, reputational factors allowed the *New York Times* and other large newspapers to become known as “the newspaper of record” for their communities, leading many readers to assume that reading that paper would give access to “all the news that’s fit to print.”²⁶⁰

Print media has experienced a decline in its market share, and so even a dominant player in that industry has less overall market power than it once would have had. Radio and television have also faded, and online intermediaries have filled the gap. Moreover, certain online intermediaries have leveraged network effects²⁶¹ to grasp a larger share of the online portion of the marketplace of ideas. It is the ability to connect with a large number of other users that renders social media services valuable; the larger the number of users, the greater the benefit to each individual user. An aspiring competitor faces a barrier to entry: the need to offer a comparable or larger network of users. Existing intermediaries therefore have market power and could choose to exercise that power in censoring certain content.

In a competitive market, an intermediary who engaged in censorship would be ignored;²⁶² those censored would simply utilize the services of other intermediaries. The censor would then lose profits, and further censorship would be disincentivized. An intermediary might still engage in censorship if doing so allowed the intermediary to fill a specific niche in the market, in which the demand for censorship of a particular kind is high enough to generate premiums that outweigh the loss in revenues. Most intermediaries, however, will only lose from censorship in a competitive marketplace. By contrast, when intermediaries begin to gain market power, there are fewer—perhaps no—alternative paths for anyone dissatisfied with an intermediary’s behavior—including active censorship. Because consumers and producers

²⁶⁰ See W. Joseph Campbell, *Story of the most famous seven words in journalism*, BBC NEWS (Feb. 10, 2012), available at <https://www.bbc.com/news/world-us-canada-16918787>.

²⁶¹ *E.g.*, *Federal Trade Commission v. Facebook, Inc.*, -- F.Supp.3d --, 2022 WL 103308 (D.D.C. Jan. 11, 2022) (“The FTC alleges that Facebook’s dominant position in the U.S. personal social networking market is durable to to . . . direct network effects and high switching costs”).

²⁶² There would be some hard feelings towards the censor, of course, but availability of alternatives would make it far more value-enhancing for the censored to merely seek validation on other paths.

have fewer alternatives, intermediaries will therefore be able to ignore many—all, in extreme cases—of their complaints. Consequently, censorship will not be punished with lost revenues and the market will be less likely to efficiently connect buyers and sellers. The increase in unpunished bad behavior by intermediaries will also lessen trust in the marketplace, making it less likely that valuable ideas will be purchased.

Recent censorship by social media platforms have followed precisely this pattern.²⁶³ One result has been a reduction in the willingness of consumers to trust potentially valuable ideas about the very subjects the platforms claim are important enough to justify censorship.²⁶⁴ In turn, that has led to increased pressure for new competition in the market, showing that network effects are not insurmountable barriers to entry.²⁶⁵ Initial entry into the market, however, does not always mean that a competitor can stay, as incumbents can, jointly, marshal significant forces and raise additional barriers to competition, in an attempt to stymie new competition.

One seeming example of this coordinated attack on new competition was the case of Parler and its aborted emergence in the wake of Twitter's outright ban on Donald Trump.²⁶⁶ Parler existed prior to the ban, but its avowed commitment to a no-censorship business ethic propelled it into the spotlight and allowed it to gain many users in short order. As those numbers increased, so did the network benefits of joining Parler, creating greater competitive pressures in the marketplace of ideas. It is unclear whether the movement towards Parler was a temporary phenomenon or the emergence of a true competitor in the marketplace. We will never know with certainty because the moment that Parler seemed poised to offer a no-censorship alternative, a group of powerful tech companies, in near unison, took action against Parler, including limiting its access to their their platforms and, in the case of

²⁶³ E.g., *Twitter's Censorship Model*, WALL STREET JOURNAL (Oct. 28, 2020), available at <https://www.wsj.com/articles/twitters-censorship-method-11603927356>.

²⁶⁴ E.g., Chloe Taylor, *Covid vaccine skepticism may be fueling 'worrisome' rise in wider anti-vax sentiment, doctors say*, CNBC.com (Jan. 26, 2022), available at <https://www.cnbc.com/2022/01/26/covid-vaccine-skepticism-fueling-wider-anti-vax-sentiment-doctors-say.html>; Sabrina Tavernise, *Vaccine Skepticism Was Viewed as a Knowledge Problem. It's Actually About Gut Beliefs*, THE NEW YORK TIMES (Apr. 29, 2021), available at <https://www.nytimes.com/2021/04/29/us/vaccine-skepticism-beliefs.html>.

²⁶⁵ See Jim Tobin, *five Upcoming Social Networks To Keep An Eye On In 2021*, Forbes.com (Feb. 19, 2021), available on <https://www.forbes.com/sites/forbesagencycouncil/2021/02/19/five-upcoming-social-networks-to-keep-an-eye-on-in-2021/?sh=fcedab635577>.

²⁶⁶ Brian Fung, *Twitter bans President Trump permanently*, CNN.com (Jan. 9, 2021), available at <https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html>.

Amazon, shutting down Parler's servers.²⁶⁷

Parler has since been able to resume operations, but the apparent ability of incumbents to thwart the emergence of new competition is strong evidence of market power. Two words of caution, however, are appropriate at this point. First, social media incumbents are not to blame for network effects, as those arise naturally. Any attempt by the government to "correct" that feature of social media would likely do more harm than good, as network effects are more than a barrier to entry—they are the source of the benefits to consumers. Second, those who took action against Parler were not just competitors, but also counterparties, so their actions *might* be justified as contractual remedies for breach by Parler, although the seeming coordination of the actions has left many unconvinced.²⁶⁸

At the end of the day, the story of Parler shows that it is possible for circumstances of the moment to generate sufficient demand for competition that network effects can be overcome. Unfortunately, network effects also virtually guarantee a smaller number of intermediaries, which will lend itself to collusion and the formation of cartels. Cartels are notoriously unstable, as they are subject to strong pressures to defect,²⁶⁹ but a cartel of intermediaries need only avoid defection for as long as it takes the wave of dissatisfaction to crest.

B. Recent Success at Censorship Reflects Information Asymmetries

The actions of intermediaries, particularly in their efforts to censor certain ideas, may also exhibit information asymmetries. It is not enough that the intermediary have aggregated information about consumers and producers. Aggregation is a service that intermediaries often provide to consumers and producers,²⁷⁰ and while the consumers and producers often could not replicate the aggregated data, the information is theirs to begin with, and is not immediately available to consumers and producers only because attempting to duplicate the intermediary's aggregation efforts would be wasteful. In the case of idea intermediaries, however, asymmetries exist in

²⁶⁷ Billy Perrigo, *Big Tech's Crackdown on Donald Trump and Parler Won't Fix the Real Problem With Social Media*, TIME (Jan. 12, 2021), available at <https://time.com/5928982/deplatforming-trump-parler/>.

²⁶⁸ Queenie Wong, *Conspiracy theories collide online as Parler goes dark*, CNET.com (Jan. 15, 2021), available at <https://www.cnet.com/news/politics/conspiracy-theories-collide-online-as-parler-goes-dark/>.

²⁶⁹ George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

²⁷⁰ Kidd, *supra* note 97, at 642 n.322.

the form of social media algorithms. For obvious—and understandable—reasons, social media intermediaries do not reveal their proprietary algorithms (those that decide what content is presented to individual consumers), which means that consumers do not know the content of those algorithms. This information asymmetry is problematic. Nevertheless, the algorithms also offer tremendous potential benefits to consumers, as they reduce the immense number of ideas to a manageable level.

The intermediary must make choices when designing or revising its filtering algorithms. One of the most important choices is how to determine what ideas will be presented to the consumer, and what to do if the consumer's preferences conflict with those of the intermediary. The consumer will be searching for valuable ideas, and will have preferences that guide the search for ideas. These consumer preferences cannot be communicated to the intermediary with any real precision—it is possible the consumer might not be able to articulate what those preferences are. The intermediary will also have preferences for what kind of ideas survive filtering. The intermediary is run, after all, by humans, and they have their own ideas, preferences, and biases.²⁷¹

At the beginning of the relationship between intermediary and consumer, the intermediary will have a much stronger sense of its own preferences than those of the consumer. Over time, interactions with the consumer will allow the intermediary to aggregate much more detailed information about the consumer, illuminating the consumer's preferences. At no point, however, will the consumer's preferences be as clear as those of the intermediary's employees, those making decisions regarding algorithmic filtering. As a result, there will always be an incentive to design the algorithm with the intermediary's preferences in mind, rather than the consumer. In a market with strong competition, that incentive would be countered by reputation and monetary incentives to aim for filtering that has the highest probability of being valuable to the consumer.²⁷² As competition decreases, so will the likelihood that value will be created for the consumer.

The consumer will be harmed under these circumstances in two ways. The first, as described, is that the consumer may be presented with ideas that

²⁷¹ Mirroring public choice assumptions about government actors, we can think of this principle as “algorithms without romance.” *E.g.*, James M. Buchanan, *Public Choice: Politics Without Romance*, 19 *POLICY* 13 (2003).

²⁷² Note that this does not mean providing the consumer with duplicate ideas to those consumed in the past—successful entrepreneurs are able to recognize and exploit opportunities for profitable change.

are value maximizing for the intermediary, rather than for the consumer. More concerning than just not presenting the ideas best tailored to the consumer, a wider disparity between intermediary preferences and consumer preferences increases the likelihood that the consumer will be presented with ideas that run counter to the consumer's established ideas. That, in turn, will create greater dissonance for the consumer and take up a greater portion of the consumer's budget,²⁷³ making it harder for the consumer to process any of the new ideas. Intellectual progress for the consumer will be artificially slow.

The second harm to the consumer comes in the form of an ignorance that precludes any self-help efforts by the consumer. Because the algorithms are unknown to the consumer, the consumer will be unaware that there are cheaper and more valuable ideas available, but which are not being provided by the intermediary because those ideas do not fit the intermediary's employee preferences. In a competitive market, another intermediary could gain by informing the consumer of this fact, but a more concentrated market might leave consumers ignorant of their suboptimal situation. The current marketplace of ideas retains some competition, but some consumers—those with the lowest budgets—will depend on filtering algorithms and, therefore, will be susceptible to harm inflicted by those algorithms. This is particularly the case when the intermediaries censor any mention of bias. Intermediaries will naturally claim that there is no algorithmic bias

C. Recent Success at Censorship Reflects Externalities

Intermediaries' acting to censor certain viewpoints does not impose the kind of external costs that economic analysis is geared to measure. Censorship has generated a commons problem, however, by depleting public trust in various subject matter areas, as well as in the marketplace of ideas generally. By actively censoring certain competing views on COVID-19 origins, prevention, and treatment, for example, intermediaries have created the impression that the official narrative cannot withstand the normal give-and-take of scientific debate. Those representing the official narrative are therefore seen as politicians—or worse—rather than as scientists offering an impartial view. Whether those officials are motivated by politics or not is largely irrelevant to the actual effects of intermediaries' censoring opposing views. In short, intermediaries are able to pursue their own preferences in public health debates, but public trust in the public health community is

²⁷³ See, *supra*, at II.A.

depleted as a result.

Similar scenarios have played out in other realms, as well. Irrespective of the state of scientific debate on climate change, the censoring of opposing viewpoints does not strengthen the public's trust in the scientific consensus. Those who prefer policy outcomes aimed at curbing climate change continue to support those policies, but not because they trust the scientific community. Conversely, climate change skeptics view censorship as an admission that the pro-regulation arguments are weak, and that those arguments cannot win unless the debate is artificially curtailed in favor of regulation. In sum, censorship risks diminishing the store of public trust, whether in debates over COVID-19, climate change, or race, gender, and sexual orientation.

D. Proposed Correctives

At one level, censorship in the marketplace of ideas is little different from discrimination in more traditional markets—the question is not whether it will occur, but to what effect and whether corrective measures can improve the market's efficiency. Some censorship (and discrimination) will occur through official government channels. To the extent that this happens, the First Amendment is implicated, and a governmental response is warranted, including legal sanctions for those who engage in the objectionable behavior. In other words, when government action has caused the problem, removing the source of the problem—possibly even imposing legal sanctions to deter future bad behavior—is the easiest solution.

When those engaging in censorship are private actors, determining the effects and appropriate response can be more complex. If the censorship is highly localized, such as an individual refusing to entertain or repeat certain ideas because of a personal opposition to them, there may be little to no distortions in the market. The individual will have limited their own ability to fully participate in the marketplace, and that may have personal consequences, but those consequences will not spill over to others, who are free to make their own choices regarding what ideas to entertain. This is similar to an individual consumer who refuses to buy ice cream; they may have limited their own consumption options—and arguably made themselves worse off—but there is nothing that external sanctions can do to improve the situation.

If the censorship begins to affect more individuals, there may be a role for external intervention. The greater the external effect of censorship, the

greater the argument for intervention, though most circumstances would justify only social sanctions, not legal sanctions. For example, a parent who censors certain ideas within the family has limited the ideas available to family members. Friends and relatives might be justified in attempting to change the parent's mind, but the government would never be justified in becoming involved.

When the censorship affects broad swaths of the public, as when intermediaries have market power, the case for external sanctions will be much stronger. Yet, even then, government intervention will be problematic. The reason is that the network effects that give rise to market power provide benefits to the consumer, and interfering with the market to curb those effects would also curb the benefits. Antitrust laws, for example, are often seen as the solution to high levels of market power,²⁷⁴ but using those laws to restrict intermediaries would keep them artificially small and the benefits to consumers of network effects artificially low.

If society should not look to government to curb market power arising from network effects, where are we to find a solution? The beginning of a solution is to remember that markets are resilient, and that resilience increases as competition in the market increases. Any intervention that will increase competition should be considered, but interventions that inhibit competition, particularly if they raise barriers to entry into the intermediary market, should be rejected.

One common proposal is to regulate the internal decisions of intermediaries, usually by defining intermediaries as common carriers.²⁷⁵ It may be tempting for those who believe, as Mill did, that private censorship can be worse than government censorship,²⁷⁶ that government regulation of intermediaries is the answer, but there is reason to be skeptical. First, government interference with the internal decisions of the incumbents will not reduce network effects, which are the source of intermediaries' market

²⁷⁴ E.g., Jeremy Ulm, *Antitrust Changeup: How a Single Antitrust Reform Could Be a Home Run for Minor League Baseball Players*, 125 Dick. L. Rev. 227, 227 (2020) ("In 1890, Congress passed the Sherman Antitrust Act to protect competition in the marketplace").

²⁷⁵ E.g., John Steele Gordon, *The New Censorship*, CITY JOURNAL (July 23, 2021), available at <https://www.city-journal.org/social-media-platforms-are-eroding-free-speech>. See also *Biden v. Knight First Amendment Institute at Columbia University*, 141 S.Ct. 1220, 1224 (2021) (Thomas, J., concurring) ("There is a fair argument that some digital platforms are sufficiently akin to common carriers or places of accommodation to be regulated in this manner").

²⁷⁶ *Supra*, notes 147-149 and accompanying text.

power. Network effects emerge because of the nature of the good or service being sold, not the internal management choices of a given intermediary. Banning censorship by intermediaries will not reduce barriers to entry, but might serve to increase them, as incumbents use the regulatory process to their advantage.²⁷⁷ Second, banning censorship by intermediaries can itself be censorship,²⁷⁸ and should therefore be disfavored because it infringes on the ability of the intermediary to speak for itself. Third, banning censorship by intermediaries is, by itself, an external intervention, virtually guaranteeing that it will cause unintended distortions in the marketplace of ideas.

Others have proposed amending Section 230 of the Communications Decency Act to remove immunity from liability for social media intermediaries.²⁷⁹ This relatively short statutory provision has been called “the twenty-six words that created the internet.”²⁸⁰ While certainly somewhat hyperbolic, this sentiment reflects the foundational importance that grant of immunity has had on development of social media, and removing immunity could have unintended consequences, such as impeding new entrants who might not have the legal wherewithal to defend themselves legally. Obviously, a reduction in potential entrants increases the market power of existing intermediaries.

If government agents are truly concerned about market power in the industry, they would be well-served to generally stay out of the way, so that consumers and producers are free to seek competing intermediaries, but be prepared to intervene only when there is evidence of collusion. Any

²⁷⁷ It would not be unusual for current incumbents to eventually support some form of government regulation, as they could then help form the regulations in a way that would make it easy for incumbents to comply but difficult for new competitors. This would be a standard “bootlegger and Baptist” strategy. E.g., Bruce Yandle, *Bootleggers and Baptists—The Education of a Regulatory Economist*, REGULATION, May-June 1983, at 12.

²⁷⁸ See, e.g., Kyle Langvardt, *Platform Speech Governance and the First Amendment: A User-Centered Approach*, LAWFARE (Dec. 7, 2020), at <https://www.lawfareblog.com/platform-speech-governance-and-first-amendment-user-centered-approach>, (noting the view that “content moderation is a form of constitutionally protected ‘speech’ in itself, much as a newspaper’s editorial choices are speech”).

²⁷⁹ E.g., Marguerite Reardon, *Section 230: How it shields Facebook and why Congress wants changes*, CNET.COM (Oct. 6, 2021), available at <https://www.cnet.com/news/politics/section-230-how-it-shields-facebook-and-why-congress-wants-changes/>.

²⁸⁰ Anshu Siripurapu, *Trump and Section 230: What to Know*, Council on Foreign Relations (June 4, 2020), available at <https://web.archive.org/web/20201120013118/https://www.cfr.org/in-brief/trumps-executive-order-what-know-about-section-230>.

intervention, of course, would then need to be timely, something planned mechanisms do very poorly. In the end, the most promising solution to the market-power problem may come from consumers and producers becoming so frustrated with intermediaries' ongoing censorship that they determine its costs outweigh the benefits of network effects.

Entrepreneur Elon Musk, beginning in April 2022, provided an example of how this might happen. After purchasing over 9% of Twitter, Inc., Musk offered to purchase the company, announced that he intended to take it private, and overcame a poison pill in order to obtain the board's unanimous recommendation that shareholders approve Musk's proposal. Musk's stated goals for a privately-held Twitter were to foster free speech and make the company more successful, indicating that Musk believed that Twitter's previous actions—including banning certain individuals and ideas—had harmed its overall value. It is unclear whether Musk's efforts will be successful, but those efforts indicate that market forces can provide a corrective regulation of censorship in the marketplace of ideas.

Potential information asymmetries are equally difficult to correct through external intervention. The filtering algorithms that are the source of the asymmetries are essential in narrowing down the flood of ideas available in the marketplace to something digestible by the consumer. Without those algorithms, producers and consumers would find it much more difficult to connect, so any effort to interfere with those algorithms would likely reduce consumer welfare, rather than improve it. Neither would it be helpful for the government to force disclosure of the algorithms, as that would reduce the incentive for intermediaries to generate better products and reduce competition in the market. Reducing competition would decrease, rather than increase efficiency. At best, government could provide sanctions for provable fraud if an intermediary had misled producers and consumers regarding the nature and function of their algorithms.

Finally, returning to the concerns over a commons problem, the depletion of public trust has occurred largely because government has been seen to artificially curtail debate—scientific or cultural—in favor of specific policy goals. Commons problems typically arise because an effective means of managing use does not exist. In some of the cases discussed in this article (e.g., pertaining to COVID-19 and climate change), subsets of the relevant communities commandeered the mantle of “scientific consensus” in order to pursue their policy preferences. Minority voices in the relevant scientific communities either refused or were unable to challenge the alleged consensus and restore a sense of dispassionate scientific inquiry that forms the

foundation of public trust. Moreover, many of the scientists who emerged as figureheads of the alleged consensus were affiliated with government entities, making it impossible for further government action to counter the previous damage done by government and quasi-government actors. When this happens, public trust will be restored only when the relevant scientific communities demand a restoration of free and open debate. The commitment to free and open debate must be robust, and accompanied by social sanctions against those within the communities who express any sympathy for censorship. In the end, it is likely that social (rather than government) sanctions will prove the best corrective for censorship as a form of market failure in the marketplace of ideas.

CONCLUSION

Recent calls for censorship of false, misleading, or bigoted speech in a variety of contexts appear to fly in the face of the time-honored liberal commitment that truth and democracy are best served by free and uninhibited exchange in the marketplace of ideas. But markets are sometimes subject to imperfections that might require external correctives. And, although demands for censorship have not been explicitly justified as a response to imperfections in the marketplace of ideas, this Article has taken the concept of a marketplace of ideas seriously, providing a way to reframe the debate and provide a common ground from which to advance the public discourse concerning censorship. To this end, this Article outlined a working model for the marketplace of ideas, including contemporary economic concepts such as sellers, buyers, intermediaries, price mechanisms, budgets, and the possibility of failure as a result of market power, information asymmetries, and externalities.

The model reinforces the plausibility and defensibility of the classic liberal philosophical justifications for freedom of speech offered by John Stuart Mill's utilitarian thought (as well as with contemporary and post-modern liberal thinkers). Using the examples of recent calls for censorship in the context of COVID-19, climate change, race, gender, and sexual orientation, the Article has argued that while false, misleading, and bigoted speech in these spheres of discourse may result in market disruptions, under the comparative institutional test, these disruptions do not warrant the corrective of censorship. On the contrary, it is concluded that the ease with which recent efforts at censorship have succeeded may be important indicia of other market imperfections warranting independent correction in the form of social (though probably not government) sanction. While it is expected that the conclusions reached in this Article will be controversial for some, the

hope is that the model presented will offer a shared framework for future debate over censorship that will prevent participants from engaging at cross purposes.