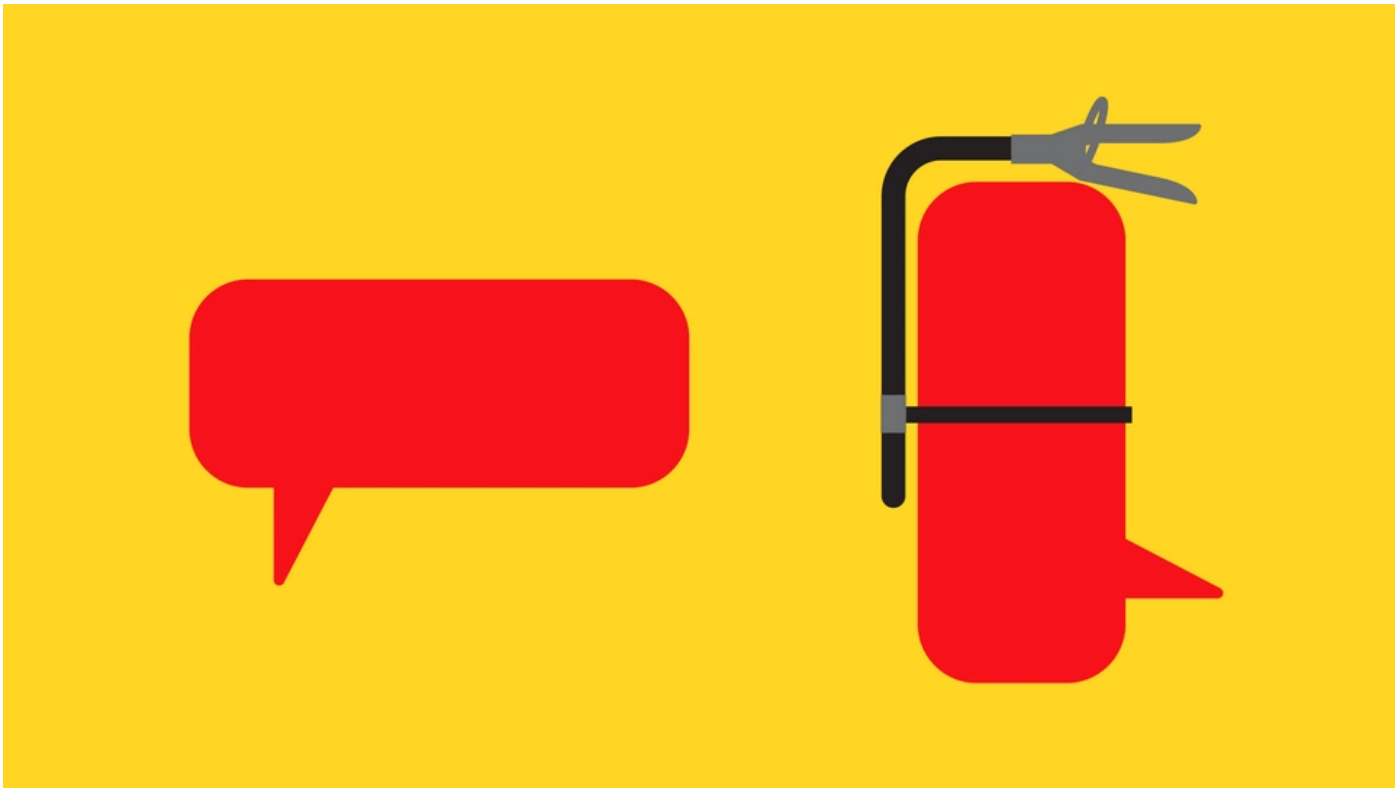
America's Favorite Flimsy Pretext for Limiting Free Speech

Accusing people of "shouting 'Fire' in a crowded theater" isn't sufficient grounds for regulating what they say.

By Jeff Kosseff January 4, 2022



The Atlantic

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Defense.

Even people who know about the First Amendment still have trouble believing that someone can make false, irresponsible, even dangerous statements without paying any penalty. For instance, when Francis Collins, the director of the National Institutes of Health, spoke with National Public Radio to promote COVID vaccinations and boosters just before Thanksgiving, he sharply criticized people who intentionally spread misinformation about the vaccine's safety. "Isn't this like yelling fire in a crowded theater?" he asked. "Are you really allowed to do that without some consequences?"

In fact, you usually *are* allowed to *do that* without fear of arrest, lawsuits, or other legal consequences. *Shouting "Fire" in a crowded theater*, a metaphor that dates to a 1919 Supreme Court ruling by Justice Oliver Wendell Holmes Jr., is widely—and wrongly—held to be a far-reaching exception to the First Amendment, which offers broad protection to free expression in the United States.

Courts have rigorously scrutinized government acts that might plausibly conflict with the amendment. But in common usage, *shouting "Fire" in a crowded theater* has become an all-purpose justification for regulating speech while evading judicial scrutiny. To my eyes, more commentators than ever are turning to this misplaced metaphor, perhaps because the proliferation of news outlets and the growth of social media expose audiences to more speech than ever before, and at least some of that speech is bound to be objectionable.

In the past year, some health experts have joined Collins in applying the metaphor to inflammatory propaganda against public-health measures during the pandemic. The national-security whistleblower Alexander

Vindman used the crowded-theater trope to describe the Fox News host Tucker Carlson's sympathetic portrayal of the January 6 rioters. Still others have categorized hate speech in a similar way. "When it comes to the amplification of hate, Big Tech is profiting off of yelling 'Fire' in a crowded theater," the civil-rights advocate Rashad Robinson said at a House hearing in December. "And so I understand that we have these conversations about the First Amendment, but there are limitations to what you can and cannot say."

The subtext of such statements is that certain speech is too harmful to ignore. But what exactly should be done about it? TV networks can opt not to show or discuss Carlson's documentary, and privately operated online platforms can take down inflammatory misinformation and hate speech before it goes viral. Perhaps because Facebook and Twitter remove some false or misleading posts—while failing to remove others—these platforms have created the expectation that *someone* should step in. And the crowded-theater metaphor suggests that this someone is the government.

Read: It's time to stop using the 'fire in a crowded theater' quote

In reality, though, *shouting "Fire" in a crowded theater* is not a broad First Amendment loophole permitting the regulation of speech. The phrase originated in a case that did not involve yelling or fires or crowds or theaters. Charles T. Schenck, the general secretary of the U.S. Socialist Party, was convicted in a Philadelphia federal court for violating the Espionage Act by printing leaflets that criticized the military draft as unconstitutional.

In a six-paragraph opinion issued on March 3, 1919, Justice Holmes wrote for a unanimous Court that Schenck's conviction was justified because the leaflets advocated for obstructing military recruiting and therefore constituted a "clear and present danger" during a time of war. "We admit

that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights," Holmes wrote. "But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."

But less than a year later, Holmes made an about-face, rejecting much of the reasoning that supported Schenck's conviction. Holmes dissented in *Abrams v. United States*, in which seven justices voted to affirm the conviction of Russian immigrants who had distributed leaflets criticizing U.S. military policy in Russia. Joined by Justice Louis Brandeis, Holmes purported to distinguish this case from that of Schenck and others who had been convicted for their speech, writing that this prosecution did not involve an intent to impede U.S. military operations in Russia. In *Abrams*, Holmes famously maintained that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."

Holmes's and Brandeis's preference for an open marketplace of ideas grew more robust throughout the 1920s. In 1927, Holmes joined a concurring opinion by Brandeis that declared, "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." Eventually, the Supreme Court came to embrace their view. In 1969, the Court replaced the "clear and present danger" framework with a much more rigorous principle: that the First Amendment does not "permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

The courts have not interpreted the First Amendment's free-speech protections to be absolute; courts have allowed liability for defamation, obscenity, and other exceptional circumstances. But these are difficult standards to meet. For instance, public officials and figures must prove actual malice to successfully sue for defamation. The Supreme Court has set a high standard for speech to qualify as "obscene." And misinformation is not categorically exempt from the First Amendment. In 2012, the Court struck down a federal law imposing criminal penalties on people who lied about receiving military honors.

Yet the migration of modern discourse to platforms such as Facebook and Twitter has prompted lawmakers to call on those companies to seek out and suppress dangerous or misleading information. Congress is considering dozens of proposals meant to limit the spread of objectionable social-media content by holding platforms responsible for messages that they amplify. Many bills would modify or repeal Section 230 of the Communications Decency Act, a 1996 law that protects internet platforms from liability for much of the content their users post.

Section 230, I have argued, led to the creation of the internet as we know it today. To justify a sweeping change to that law, proponents have seized upon a familiar analogy. "The way I describe this to people is, if you yell fire in a crowded theater, that's not protected speech," Senator Amy Klobuchar of Minnesota told *The Wall Street Journal* in October. "If there's a stampede, the theater probably won't be sued. If the theater decides to use speakers and have it broadcast what the person is saying or whatever misinformation they're putting out there, they'd be sued. Right now, these social media companies aren't putting that content on themselves, but they are broadcasting that content."

Last year Klobuchar introduced a bill that would remove Section 230

protections during a public-health emergency for "health misinformation" that platforms algorithmically promote. The obvious question is: What counts as "health misinformation"? The bill delegates that decision to the secretary of Health and Human Services, who would issue guidance on the topic. Imagine the censorial powers that an HHS secretary could exercise over health commentary that criticizes the incumbent administration—or simply departs from official guidance, as proponents of mask wearing did in the early weeks of the coronavirus pandemic.

Renée DiResta: It's not misinformation. It's amplified propaganda.

As a way to combat health misinformation, the legislation has a more fundamental flaw: Even without Section 230, a great deal of misinformation is constitutionally protected by the First Amendment. With or without Section 230, Twitter and Facebook would remain free to amplify plenty of lies and propaganda if they choose to do so. The notion that special speech restrictions may apply in a crowded theater is distorting lawmakers' view of what regulation can achieve.

Francis Collins's concerns about misinformation during the pandemic are well grounded. Like many Americans, I have friends who disregard scientific recommendations about vaccinations and other COVID precautions because of shoddy commentary they found online. But even if federal courts would allow the states or the other branches of the federal government to play speech referee, no one should root for that outcome—no matter how odious speech on the internet might be.

Countries that have outlawed "fake news" in recent years have used their new powers to suppress dissent. But even when the government does not have nefarious intent, the prevailing view of what counts as misinformation changes over time. The U.S. government's initial COVID-19 guidelines

discouraged masks and focused on the disinfection of surfaces. The hypothesis that the coronavirus escaped from a Chinese lab was a fringe idea in 2020 but gained some mainstream acceptance in the United States in 2021. Americans may never reach a consensus on the lab-leak theory or other controversies, but the U.S. differs from so many other countries by permitting a debate.

I am under no illusion that the most authoritative science or the sleekest public-relations efforts would fully counteract the torrent of misinformation on the internet. But stringent speech regulations are unlikely to banish—and would likely worsen—the suspicion of authority, the rejection of science-based conclusions, and other underlying dynamics that make some people willing to accept sketchy claims in the first place. Americans need to confront these problems, while also accepting that we will be unable to solve all of them. Accusing others of shouting "Fire" in a crowded theater is easy, but protecting a healthy marketplace of ideas will leave Americans far better off.