Covid and the Court: Why the Supreme Court Should Not Diffuse European Speech Restrictions into American Law

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Speech constitutes an immense power which, at its best, can lead to open dialogue that creates the opportunity to achieve positive political and social change. At its worst, the freedom to speak can precipitate hate speech and violence. Across the world, the standards governing free speech are not necessarily the same. This article aims to analyze the constructs of free speech in both Europe and the United States. To this end, this article concerns two major questions: should the United States adopt legislation to combat hate speech in line with the Digital Services Act which the European Union previously enacted; and should this be enacted via the Supreme Court's opinion in Murthy v. Missouri, a case analyzing possible infringement of Free Speech by the federal government on social media sites. This article discusses the nature of how and which comparative law principles and jurisprudence should be diffused into judicial opinions written by U.S. judges. As well as why this issue is not one that should be handled by the courts, especially through the diffusion of European authored regulations on speech.

In February 2020, COVID-19 emerged as the worst pandemic in almost a century.[206] Hospitals were overwhelmed, store shelves were emptied, masks were mandated, and the

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[206] Please note, *Murthy v. Missouri* is an ongoing case currently pending a decision in the United States Supreme Court. Any perspectives or interpretations provided in this article have been completed as of April 2024 and may be subject to alteration pending the court's decision.

global economy came to an abrupt halt.[207] Globally, to pursue prudent public health measures at the time, masks were worn, social distancing mandates were enacted, and individuals were forced to make hard decisions. Decisions such as attending funerals of loved ones over Zoom and kids attending classes online rather than in person, all in an effort to stop the spread. Across the world, many individuals followed protocols aimed at preventing the virus' spread, while others, contrary to the advice of the United States Center for Disease Control at the time, did not.[208] Subsequently as time went on, the unity of the nation exhibited at the start of the pandemic transitioned into polarized partisanship, with staunch opposition to policies such as mask and vaccination mandates.[209] Nowhere was this opposition to COVID-19 policies more evident than on social media.

Over time, governments across the world, particularly the United States government, came to understand the risks associated with social media during a pandemic.[210] In response to misinformation regarding COVID-19 which circulated across social media and the negative impacts of this misinformation on the nation; the Biden Administration initiated communications through both electronic and physical

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[207] Kate Li, Mona Al-Amin & Michael D. Rosko, *Early Financial Impact of the COVID-19 Pandemic on U.S. Hospitals*, 68 J. Healthc. Manag. 268 (2023).

[208] Judy Stone, *Public Pushes Back On CDC's Plan To Weaken Infection Control*, Forbes, https://www.forbes.com/sites/judystone/2023/08/25/public-pushes-back-on-cdcs-plan-to-weaken-infection-control/ (last visited Jan 9, 2024).

[209] Lu He et al., Why Do People Oppose Mask Wearing? A Comprehensive Analysis of U.S. Tweets during the COVID-19 Pandemic, 28 J. Am. Med. Inform. Assoc. JAMIA 1564 (2021).

[210] Hichang Cho et al., *The Bright and Dark Sides of Social Media Use during COVID-19 Lockdown: Contrasting Social Media Effects through Social Liability vs. Social Support*, 146 Comput. Hum. Behav. 107795 (2023).

means with social media companies such as Facebook, X (formerly known as Twitter), and Google via the White House, Office of the Surgeon General, and Department of Justice.[211] Through these communications, the Biden Administration urged social media companies, often by threat of future government scrutiny and antitrust prosecution, to take down and/or "shadow ban" certain posts and accounts.[212] The Biden Administration's goal as shown by the majority opinion issued in the United States' Fifth Court of Appeals in the case of *Missouri v. Biden,* the prior name for *Murthy v. Missouri* currently pending in front of the United States Supreme Court*,* was to limit the dissemination of COVID-19 misinformation via platforms' internal algorithms, as well as to limit the reach of the accounts of influential individuals who were deemed by the Administration to be spreading COVID-19 misinformation.[213]

As a result of these requests, many social media companies began a widespread crackdown on misinformation, often utilizing data provided to them by executive agencies.[214] In response to this crackdown, a group of plaintiffs, including the State of Missouri, sued the Biden Administration in federal court, alleging that the administration coerced social media platforms into censoring certain social media content. Plaintiffs alleged that these actions amounted to the state suppression of speech and at times "*prior restraint,*" violating the First Amendment's freedom of speech clause.[215] In response, the United States Court of Appeals for the Fifth Circuit issued a ruling in favor of the plaintiffs, stating that the Biden

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[211] Biden v. Missouri, 595 U.S. (2022), https://supreme.justia.com/cases/federal/us/595/21a240/ (last visited Dec 5, 2023).
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*

Administration, both directly and through executive agencies, "coerced and significantly encouraged the platforms to moderate content … unlawfully violating the plaintiffs (First Amendment) rights."[216]

COVID-19 misinformation was not just a domestic issue, but a global one, affecting nearly every country in the world, including those within the European Union (EU). In response to the rise in misinformation through social media channels, the EU Parliament on July 5, 2022 enacted the Digital Services Act (DSA). The legislation set January 1, 2024 as the date on which affected companies had to begin complying with the legislation.[217] In this enactment, the EU set forth a comprehensive list of regulatory procedures to control the spread of misinformation, hate speech, terrorist propaganda, as well as specific provisions relating to the suppression of content during times of emergency. The legislation also established penalties for companies not in compliance, including a fine of up to six percent of a company's global revenues, and the barring of the company from operating in EU countries for a period determined by an independent commision.[218]

Through the case of *Murthy v. Missouri*, the Supreme Court has the opportunity to incorporate aspects of comparative law, by adopting ideals of other nations' laws into the laws of the United States, as the Court has done in the past

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[216] *Id.*

[217] The Digital Services Act package | Shaping Europe's digital future, https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package (last visited Dec 21, 2023).

[218] Sweeping EU digital misinformation law takes effect, Legal Dive, https://www.legaldive.com/news/digital-services-act-dsa-eu-misinformation-law-propaganda-compliance-facebook-gdpr/691657/ (last visited Dec 21, 2023).

with cases such as *Roper v. Simmons*.[219] Though uncommon, the practice of adopting the ideals of other nations' laws into the laws of the United States is not unprecedented for the US Supreme Court; in fact, the landmark decision in *Roper v. Simmons* referred to international sources of law, including *The United Nations Convention on the Rights of the Child*, in order to articulate how the Eighth Amendment's cruel and unusual punishments clause bars the sentencing to death of a minor found guilty of a capital offense.[220]

In his opinion in *Roper v. Simmons*, Justice Kennedy not only utilized the laws of Western European nations that bar the execution of minors, but he also compared the United States to nations deemed "international pariahs" in the 1990s, including Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.[221] As shown by this example, it is not unprecedented for the United States Supreme Court's jurisprudence to reference the laws and doctrines of other nations. Utilizing this precedent, this paper will analyze three major questions regarding the implementation of other nations' laws in the legal system of the United States.[222]

1) Under what circumstances should the Supreme Court or lower courts utilize laws and or cases from other nations in their deliberation of cases?

2) In the case of *Murthy v. Missouri,* should the Supreme Court incorporate the ideals or principles of the EU's DSA in its jurisprudence of this case?

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[219] Roper v. Simmons, 543 U.S. 551 (2005), https://supreme.justia.com/cases/federal/us/543/551/ (last visited Dec 21, 2023).
[220] *Id.*
[221] *Id.*
[222] John Marshall, *Murray v. The Charming Betsey, 6 U.S. 64 (1804)*, Justia Law, https://supreme.justia.com/cases/federal/us/6/64/ (last visited Mar 30, 2024).

3) What is a potential counter argument to this type of Jurisprudence?

I. Circumstances in which United States' Courts should Utilize the Laws and Cases of Other Nations

"Courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."[223] In the United States, courts impose checks on the elected bodies of government in accordance with their interpretation of the Constitution. While the Supreme Court was created by Article 3 Section 1 of the Constitution, its role in government was not fully realized until the landmark opinion of *Marbury v. Madison*.[224] In this opinion, Chief Justice Marshall lays out the judiciary's role to review the constitutionality of acts from other branches of government through judicial review.[225] While the courts may have the power to determine the constitutionality of legislative acts, they cannot act in a legislative capacity. This inability is the primary argument against the usage of foreign laws and cases in the deliberation of cases in American courts.[226]

In a democratic system, laws are passed by the people's representatives based on the interests and goals of

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[223] The Avalon Project : Federalist No 78, https://avalon.law.yale.edu/18th_century/fed78.asp (last visited Dec 21, 2023).
[224] The Constitution of the United States: A Transcription, National Archives (2015), https://www.archives.gov/founding-docs/constitution-transcript (last visited Dec 5, 2023).
[225] John Marshall, Marbury v. Madison, 5 U.S. 137 (1803), https://supreme.justia.com/cases/federal/us/5/137/ (last visited Dec 21, 2023).
[226] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.

those affected by the enacted laws.[227] Therefore, it is argued that courts should not base their decisions on the laws and cases of other nations. Looking at the current case at hand, the decision in *Murthy v. Missouri* has no bearing upon the citizens of EU countries, the organization which enacted the DSA; furthermore, the representatives of the American people were not party to the passage of the DSA, and therefore legislative actions enacted by the EU should have no bearing on American courts.

In the case of *Roper v. Simmons*, Justice Kennedy presents a comprehensive argument for the barring of the death penalty for minors. The opinion applies previous case law, conducts an analysis of states that barred the practice, and examines the psychological and biological differences between minors and adults.[228] These arguments alone would have sufficiently demonstrated that the imposition of the death penalty on minors violated the Eighth and Fourteenth Amendments.[229] However, Justice Kennedy goes further in his opinion, bringing in the laws and practices of other nations to determine if a punishment is cruel or unusual. By mentioning the laws and practices of other nations to justify his opinion, Justice Kennedy grossly misstepped his authority and weakens the strength of his argument.[230]

In his opinion, Justice Kennedy references Article 37 of the United Nations Convention on the Rights of the Child, which prohibits capital punishment for crimes committed by individuals under the age of eighteen.[231] Justice Kennedy

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[227] Overview - Rule of Law | United States Courts, https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law (last visited Dec 21, 2023).
[228] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.
[229] *Id.*
[230] *Id.*
[231] General Assembly resolution 44/25, *Convention on the Rights of the Child*, OHCHR (1989),

specifically mentions how every nation has ratified the treaty, with the exception of the United States and Somalia.[232] He uses this fact to further his point that most of the world has outlawed capital punishment for juveniles, and thus, the cruel and unusual punishment clause of the Eighth Amendment should apply in this case.[233] This rationale is a blatant overstep of separation of powers; and should not have been used in the opinion. The United States Constitution is clear about the procedure of ratifying treaties, as Article 2 Section 2 of the Constitution states that the president "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."[234] The judicial branch of government is not mentioned in this section of the Constitution and plays no role in negotiating and ratifying treaties, therefore should not incorporate laws or beliefs set forth by international treaties in which the United States is not a signatory nation.

Furthermore, Justice Kennedy reads into the rest of the world banning capital punishment for minors (with the exception of the United States and Somalia) as a clear example of times changing, and the world now viewing capital punishment for minors as a cruel and unusual punishment, thus he argued that the United States should follow suit.[235] On the contrary, the fact that the United States Senate did not ratify this treaty, speaks louder than the treaty's ratification by a large majority of the world. By referencing the actions of other legislatures in ratifying this treaty as a motive for baring the practice of imposing capital punishment against juveniles, Justice Kennedy places greater value on the

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https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child (last visited Jan 9, 2024).

[232] *Id.*

[233] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.

[234] The Constitution of the United States, *supra* note 224.

[235] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.

will of other nations' legislatures, values, and people over that of the American Congress, the American Constitution, and most importantly, the American People. Congress did not ratify Article 37 of the United Nations Convention on the Rights of the Child, and this failure to ratify is the best proof that the American people as a whole were not in favor of departing from the imposition of capital punishment for juveniles on the federal level. Given the evolving standards of the Eighth Amendment and his belief on the will and actions of other nations rather than his own, Justice Kennedy decided to override this implicit articulation by Congress.[236]

In general, courts should avoid applying the laws and cases of other nations in their jurisprudence of cases, with one exception. Since the act of creating law is vested in the legislature, lawmakers have immense freedom to craft laws given constituent needs, as long as such laws are in line with the Constitution. Given this freedom, legislatures are free to derive ideas from various sources, one such source can be other nations.[237] A congressperson is free to look at the laws and policies of other nations and decide if it could benefit the United States. That legislator must then go through the process of proposing a bill which diffuses the laws and policies of another nation. The bill must then be passed by the House of Representatives and the Senate, and subsequently signed by the President.[238]

If a legal case arises before a court regarding the meaning of this new law which was passed incorporating the

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[236] *Id.*

[237] Toni Johnson, *Congress and U.S. Foreign Policy*, Council on Foreign Relations, https://www.cfr.org/backgrounder/congress-and-us-foreign-policy (last visited Jan 9, 2024).

[238] The Legislative Branch, The White House, https://www.whitehouse.gov/about-the-white-house/our-government/the-legislative-branch/ (last visited Apr 3, 2024).

laws and policies of another nation.A court who decides to utilize legislative intent as a means to decide what the true intention of the law is could examine the diffused law or policy from the country of origin which served as inspiration for the act of Congress. While the courts should be free to look at the laws and policies of other nations in order to establish legislative intent, the court should only take the lessons learned from the other countries' laws and policies in an advisory capacity. If there are better means of finding legislative intent, those means should take priority over the other countries' cases and enactments.

II. Should the Supreme Court Incorporate the Ideals or Principles of the DSA in their decision on *Murthy v. Missouri?*

Applying the principles articulated in the prior question, the Supreme Court should not incorporate the ideals or principles of the EU's DSA in their decision of *Murthy v. Missouri*. Courts in the United States, as referenced in question I, should not apply the laws and doctrines of other nations in their jurisprudence of cases in the US.[239] In fact, applying foreign law to this case necessitates condemnation in even stronger terms than did Justice Kennedy's use of international examples as applied in *Roper v. Simmons.*[240] In the case of *Roper v. Simmons,* one could argue for an international consensus, excluding the United States and Somalia, in regards to the imposition of capital punishment against minors.[241] It cannot be argued that the same international consensus exists in regards to deciding the appropriate regulations to curb misinformation in the age of social media, as this issue is very

[239] Cornell Law School, *Jurisprudence*, LII / Legal Information Institute, https://www.law.cornell.edu/wex/jurisprudence (last visited Jan 9, 2024).
[240] Roper v. Simmons, 543 U.S. 551 (2005), *supra* note 219.
[241] General Assembly resolution 44/25, *supra* note 231.

new and there has been far less time for consensus to emerge than there was in the case of capital punishment for juveniles. While as argued prior, such consensus should not impact the jurisprudence of American courts, this lack of consensus serves to differentiate between the cases of *Roper v. Simmons* and *Murthy v. Missouri.* Some, such as Justice Kennedy, have made the argument that comparative principles must be diffused into the United States jurisprudence in regards to *Roper v. Simmons.* This same argument cannot be made for *Murthy v. Missouri,* given the lack of an international consensus on the issue, as the international consensus which existed in regards to capital punishment for minors, which was a core aspect of Justice Kennedy's opinion, does not exist in regards to the American interpretation of governmental intrusion on free speech.

The First Amendment of the United States Constitution—and subsequent interpretations by the courts—have endowed the US with some of the strongest protections for the freedoms of speech and expression in the world.[242] With particular reference to Europe, almost every country within the EU can be described as a western democracy with certain protections for free speech.[243] However, many members of the EU have freedom of speech laws which are not nearly as strong or go as far as those in the United States. For example, in Germany, an EU member state, Section 130 of the German Criminal Code bans "incitement to hatred and insults that assault human dignity against people based on their racial, national, religious or ethnic

[242] Alex Gray, *Freedom of Speech: Which Country Has the Most?*, World Economic Forum (2016), https://www.weforum.org/agenda/2016/11/freedom-of-speech-country-comparison/ (last visited Jan 9, 2024).
[243] *Id.*

background."[244] This law has been used to prosecute individuals who publicly deny the Holocaust, as well as those who distribute Nazi propaganda both on and offline.[245]

Laws like this undoubtedly would be deemed unconstitutional in the United States, as freedom of speech is a fundamental concept strictly enforced by the Supreme Court.[246] Given that the restrictions imposed by the DSA would constitute a *content based restriction,* a restriction on speech imposed by the government that regulates speech on the basis of the content that the speech entails.*[247]* The doctrine of *strict scrutiny* applies in which the government is required to demonstrate a *compelling state interest,* as well as a narrowly tailored least restrictive approach*,* to any legal limitations imposed in the form of content based restrictions.[248]

One of the most famous cases in regards to content based restriction on speech is the case of *Cohen v. California.[249]* In this case, Paul Robert Cohen entered the corridor of a court room wearing a jacket which stated "Fuck the Draft", in reference to the Draft associated with the

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[244] Dan Glaun, *Germany's Laws on Antisemitic Hate Speech and Holocaust Denial*, https://www.pbs.org/wgbh/frontline/article/germanys-laws-antisemitic-hate-speech-nazi-propaganda-holocaust-denial/ (last visited Jan 9, 2024).

[245] Germany: Constitutional Court Upholds Free Speech Restriction in Banning Public Support of Former Nazi Regime, Library of Congress, Washington, D.C. 20540 USA, https://www.loc.gov/item/global-legal-monitor/2009-11-20/germany-constitutional-court-upholds-free-speech-restriction-in-banning-public-support-of-former-nazi-regime/ (last visited Apr 3, 2024).

[246] Strict scrutiny, LII / Legal Information Institute, https://www.law.cornell.edu/wex/strict_scrutiny (last visited Mar 30, 2024).

[247] Content Based Regulation, LII / Legal Information Institute, https://www.law.cornell.edu/constitution-conan/amendment-1/content-based-regulation (last visited Mar 30, 2024).

[248] Strict scrutiny, *supra* note 246.

[249] Cohen v. California, Oyez, https://www.oyez.org/cases/1970/299 (last visited Apr 1, 2024).

Vietnam War ongoing at the time.[250] He was subsequently arrested for violating section 415 of the California Penal Code which criminalizes "maliciously and willfully disturbing the peace or quiet of any neighborhood or person … by … offensive conduct."[251] When this case was ruled on by the Supreme Court of the United States, Justice John Harlan wrote one of the most famous majority opinions in the courts history stating, "while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. … The Constitution leaves matters of taste and style so largely to the individual."[252] As demonstrated by the strong opinion written by Justice Harlan, California had no good reason to enforce this statute, given that the statement on Paul Cohen's jacket was speech, California did not have a *compelling state interest* that was threatened by his use of explicit terminology.[253] This case is demonstrative of the many differences in the legal interpretations of free speech in the United States versus Europe. Given this difference in the levels of speech protections, it is clear that fundamental cultural, constitutional, and legal differences exist between the US and EU countries. These divisions would make any attempted implementation of the DSA, within the opinion of *Murthy v. Missouri,* to go against the court's established precedent on this issue. This is due to the First Amendment concerns that would make any implementation of the DSA not only controversial, but also raise additional constitutional questions, given the

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[250] Vietnam Lotteries, Selective Service System, https://www.sss.gov/history-and-records/vietnam-lotteries/ (last visited Apr 3, 2024).
[251] Cohen v. California, Global Freedom of Expression, https://globalfreedomofexpression.columbia.edu/cases/cohen-v-california/ (last visited Apr 3, 2024).
[252] Cohen v. California, *supra* note 249.
[253] Strict scrutiny, *supra* note 246.

high level of scrutiny the Supreme Court takes regarding regulations of speech, especially ones that are content based.

Third, the issue of misinformation being spread via social media, and particularly the power of large tech companies in the United States, is a topic that is discussed often in Congress.[254] Many hearings have taken place between members of Congress and the Chief Executive Officers' of major tech companies. Many Members of Congress have also advocated in favor of many ideas to curb the power of Big Tech, including the targeting of misinformation to vulnerable users.[255] If the Supreme Court were to rule in the case of *Murthy v. Missouri* based on the principles of the DSA, they would severely limit the ability for members of Congress to impose regulations on Big Tech. This would be due to the court implementing the principles of the European DSA in a manner that would likely interfere with the ability of American legislators to pass legislation which best serves the American public.

III. Counter Argument to this Method of Jurisprudence?

While freedom of speech is one of the most fundamental rights in the United States, many point to the rise of hate online hate speech and misinformation such as foreign adversaries attempts to influence the American electorate through digital means, as a rationale for why the United States government should implement a European-style approach to

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[254] A. B. C. News, *Congress Grills Tech CEOs in Wide-Ranging Hearing on Monopoly, Political Bias, China and More*, ABC News, https://abcnews.go.com/Technology/ceos-amazon-apple-facebook-google-face-congressional-antitrust/story?id=72034939 (last visited Jan 9, 2024).

[255] House approves antitrust bill targeting Big Tech dominance | AP News, https://apnews.com/article/2022-midterm-elections-technology-business-lobbying-congress-6e49cfc65668b99c633647898d114a8b (last visited Jan 9, 2024).

combating misinformation online.[256] Furthermore, concerned citizens may conclude that if the legislative and executive branches of government cannot figure out how to combat these issues, the Supreme Court ought to do it unilaterally. The government has a duty to target misinformation online; the country does not benefit from external actors posting misinformation during elections and times of national emergencies.[257] This is a major issue that requires major government action in order to promote the public good. However, the public good must be weighed against individuals' civil liberties in regards to the First Amendment. This issue must be treated appropriately under our current system of government, in accordance with current precedent concerning government regulations regarding speech. The fact that Congress has not acted in a major way regarding the rise in misinformation online, is indicative of the fact that no general consensus has formed in regards to the best way to target the problems associated with misinformation.[258]

It is not the role of the judicial system to impose upon the American people a solution to a problem of which other branches of government have not solved yet. This would be vastly in contradiction with the democratic process. Instead,

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[256] Russian Interference In 2016 U.S. Elections, Federal Bureau of Investigation, https://www.fbi.gov/wanted/cyber/russian-interference-in-2016-u-s-elections (last visited Mar 30, 2024).

[257] OECD, *Transparency, Communication and Trust: The Role of Public Communication in Responding to the Wave of Disinformation about the New Coronavirus*, OECD, https://www.oecd.org/coronavirus/policy-responses/transparency-communication-and-trust-the-role-of-public-communication-in-responding-to-the-wave-of-disinformation-about-the-new-coronavirus-bef7ad6e/ (last visited Mar 30, 2024).

[258] Gabriel Sanchez & Keesha Middlemass, *Misinformation Is Eroding the Public's Confidence in Democracy*, Brookings, https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/ (last visited Mar 30, 2024).

Congress must be the one that passes a bill into law which addresses the issues of misinformation online, which the President must then sign. If Congress chooses to implement a European-styled DSA approach to that legislation, that is entirely permissible, as Congress is free to derive ideas from a variety of sources, including other nations. Additionally, the issue regarding misinformation on social media, especially during elections and public health emergencies, is a complex political issue. In times of emergency, Congress and the Executive Branch, which unlike the federal courts is directly answerable to the American people, must take the lead over the judicial branch of government in solving this complex issue.

The role of Congress is to identify problems, research the best ways to solve the problems, and build a consensus strong enough to allow the passage of a bill to deal with the problems.[259] This process is purely political and must take into account the views of citizens throughout the nation through their representatives in order to build a consensus and step forward. In contrast, the Supreme Court's role is to review laws and balance them with constitutional principles in order to make sure that the law does not conflict with the civil liberties and rights afforded to the American people by the Constitution.[260] The Supreme Court's role is not to engage in the political process, and therefore, the court should not apply the laws and doctrines of other nations, in what would effectively be a legislative capacity, by implementing the DSA and the European principles of free speech through their ruling in *Murthy v. Missouri.* Even if one were to assert that the

[259] About Congress | U.S. Capitol - Visitor Center, https://www.visitthecapitol.gov/explore/about-congress# (last visited Mar 30, 2024).

[260] About the Supreme Court | United States Courts, https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Mar 30, 2024).

implementation of a DSA type law in the United States would bring more public good than harm, its enactment must go through proper channels of government via the people's representatives, not forced through by an unelected assortment of nine Justices. The act of balancing goods and harms is a classic legislative function and as the nine justices of the Court are not tasked with the political process of legislating bills into law, the issue of combating misinformation online is a political issue that requires a legislative solution, not a judicial one.[261]

Those who support the DSA may argue that countries within the EU such as Germany are strong democracies, often with less polarized electorates than the United States; therefore, given the polarized nature of the United States, a court should step in to implement a DSA-styled approach to regulate free speech protections in order to guard against misinformation and the dangers that can come from it. It is important to note that from speech comes power, and power has the possibility of leading to tyranny and abuse. Free speech, by nature, is a double-edged sword, which at times it can be used for good in order to defend the rights of the minority and offer necessary criticism to individuals in power without fear of prosecution.[262] On the other hand, the allowance of absolute free speech can lead to rhetoric designed to enthrall hate groups, leading towards violence.[263] While the dark side of free speech may be dangerous and one may not like what someone else says, the law must protect the other person’s right to speak freely and if the roles were reversed, the

[261] The Court and Constitutional Interpretation - Supreme Court of the United States, https://www.supremecourt.gov/about/constitutional.aspx (last visited Feb 5, 2024).
[262] Genevieve Lakier, *The First Amendment’s Real Lochner Problem*, Univ. Chic. Law Rev.
[263] Daniel Byman, *How Hateful Rhetoric Connects to Real-World Violence*, Brookings, https://www.brookings.edu/articles/how-hateful-rhetoric-connects-to-real-world-violence/ (last visited Mar 30, 2024).

same dynamics would apply.

In conclusion, the Supreme Court should not utilize the laws of other nations in their jurisprudence of cases in the United States, with the exception of the accepted use of such laws and cases in order to establish legislative intent when relevant. Additionally, in the case of *Murthy v. Missouri,* The Supreme Court should not diffuse the principles of the DSA within their jurisprudence of the case. By doing such, the Court would impede the separation of powers between the judicial and legislative branches of government, severely impacting the legislature's ability to create policy and law tackling misinformation online, as the court would be forcing laws upon the American people that they did not put in place on themselves, through their elected representatives. In summary, the Supreme Court should decide the case of *Murthy v. Missouri* based upon current precedent regarding the First Amendment, including relevant US case law, and the close nexus test.[264]

[264] State Action Doctrine and Free Speech, LII / Legal Information Institute, https://www.law.cornell.edu/constitution-conan/amendment-1/state-action-doctrine-and-free-speech (last visited Apr 3, 2024).