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VOLUME 16

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THE MEDIA'S DEFINITION OF FAKE NEWS VS. DONALD TRUMP'S

Angie Holan*

When PolitiFact fact-checks fake news, we are calling out fabricated content that intentionally masquerades as news coverage of actual events.

When President Donald Trump talks about fake news, he means something else entirely.

Instead of referring to fabricated content, Trump uses the term to describe news coverage that is unsympathetic to his administration and his performance, even when the news reports are accurate.

Trump is so taken with the phrase "fake news," that he's mentioned it at least 153 separate times between January and October, 2017, in interviews, on Twitter, and in speeches, according to a count compiled by PolitiFact.¹

Recently, Trump even took credit for inventing the term. "Look, the media is fake," Trump said in an interview with conservative pundit and former Arkansas Governor Mike Huckabee.² "The media is—really, the word, I think one of the greatest of all terms I've come up with—is fake. I guess other people have used it perhaps over the years, but I've never noticed it."³

In ten years of fact-checking, we here at PolitiFact have not seen such a yawning chasm between the meaning of words.

PolitiFact has devoted many hours to knocking down fake news: accounts of events that never happened, from the frightening to the frivolous.

We've fact-checked whether NASA said the earth would be plunged into darkness for fifteen days in November. (Pants on Fire).⁴ We've looked at whether HIV had been detected in

* Angie Drobnic Holan is the editor of PolitiFact. She previously was deputy editor, and before that a reporter for PolitiFact, helping launch the site in 2007. She was a member of the PolitiFact team that won the Pulitzer Prize for its coverage of the 2008 election. She has been with the *Tampa Bay Times* since 2005 and previously worked at newspapers in Florida, Alabama, Louisiana and New Mexico.

¹ Angie Drobnic Holan, *The Media's Definition of Fake News vs. Donald Trump's*, POLITIFACT (Oct. 18, 2017, 2:11 PM), <http://www.politifact.com/truth-o-meter/article/2017/oct/18/deciding-whats-fake-medias-definition-fake-news-vs/>.

² Huckabee, *Gov. Mike Huckabee's Full Interview with President Trump | TBN*, YOUTUBE (Oct. 7, 2017), <https://www.youtube.com/watch?v=hVQPVGPAUtc&feature=youtu.be&t=8m48s>.

³ *Id.*

⁴ Joshua Gillin, *It's Fake! NASA Never Said the Earth Will Go Dark for 15 Days in November 2017*, POLITIFACT (June 14, 2017, 12:33 PM),

bananas sold at Wal-Mart. (Pants on Fire.).⁵ And we looked at whether passers-by came to the aid of comedian Bill Murray when his car broke down in Rochester, N.H.—or Marion, Ohio; or Shakopee, Minn.; or many other cities. (All Pants on Fire.).⁶

We think it's worth diving into the differing definitions of fake news between the fact-checkers and the president. Our reporting found that it's a distinction that has solidified over the months of President Trump's tenure. And it has specific implications for language, for a free press, and for the First Amendment.

I. THE FACT-CHECKERS AND FAKE NEWS

If you define fake news as fabricated content, then 2016 was the year fake news came into its own. False reports ran rampant on social media sites, such as Facebook and Twitter, and they landed at the top of search results on Google and others.⁷ PolitiFact named fake news its Lie of the Year for 2016, citing fictitious Web posts that were the ultimate election-year clickbait, such as claims that Pope Francis endorsed Donald Trump, or that Hillary Clinton sold weapons to ISIS.⁸ (Neither of those things is true.).

Since the election, fact-checkers and the public have learned more about fake news. Some people create fake news to make a quick buck off automated advertising in a simple cash-for-clicks formula.⁹ Others use fake news for political mischief, such as liberal blogger Christopher Blair, who told PolitiFact he writes fake news to “mess with conservatives.”¹⁰ (A typical

<http://www.politifact.com/punditfact/statements/2017/jun/14/blog-posting/its-fake-nasa-never-said-earth-will-go-dark-15-day/>.

⁵ Joshua Gillin, *Fake News Claims that Walmart Bananas Have HIV Virus are Fruitless*, POLITIFACT (Feb. 6, 2017, 4:24 PM), <http://www.politifact.com/punditfact/statements/2017/feb/06/cnnews3com/fake-news-claims-walmart-bananas-have-hiv-virus-ar/>.

⁶ Joshua Gillin, *No, a Celebrity's Car Didn't Break Down in Your Hometown*, POLITIFACT (Jan. 6, 2017, 2:30 PM), <http://www.politifact.com/punditfact/statements/2017/jan/06/blog-posting/celebrity-praise-helpful-locals-are-fake-stories-c/>.

⁷ Angie Holan, *2016 Lie of the Year: Fake News*, POLITIFACT, (Dec. 13, 2016, 5:30 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news/>.

⁸ *Id.*

⁹ Joshua Gillin, *The More Outrageous the Better: How Clickbait Ads Make Money for Fake News Sites*, POLITIFACT (Oct. 4, 2017, 11:34 AM), <http://www.politifact.com/punditfact/article/2017/oct/04/more-outrageous-better-how-clickbait-ads-make-mone/>.

¹⁰ Joshua Gillin, *If You're Fooled by Fake News, This Man Probably Wrote It*, POLITIFACT (May. 31, 2017, 5:00 PM), <http://www.politifact.com/punditfact/article/2017/may/31/If-youre-fooled-by-fake-news-this-man-probably-wro/>.

report: pop star Lady Gaga was arrested for criticizing first lady Melania Trump. Pants on Fire.).¹¹

Federal investigators, though, have been looking into whether people working on behalf of the Russian government have published or promoted fake news via U.S.-based social media as part of an effort to sow division and undermine democracy.¹²

We don't know much about the specifics of these investigations, and it may be that investigators are looking at actions on social media that include but are not limited to fake news, especially political advertising.

Without discussing details, the Republican and Democratic leaders of the Senate Intelligence Committee held a press conference recently to warn that Russia had sought to undermine U.S. elections in 2016 and would likely try again.¹³

"What I will confirm is that the Russian Intelligence Service is determined, clever, and I recommend that every campaign and every election official take this very seriously as we move into this November's election. And as we move into preparation for the 2018 election," said Senator Richard Burr (R-N.C.) on October 4th.¹⁴

Burr and his Democratic counterpart, Senator Mark Warner of Virginia, said they intended to have a public hearing in November with representatives of the major platforms—Google, Facebook, and Twitter.¹⁵

Meanwhile, Facebook has engaged with independent fact-checkers—including PolitiFact—since December 2016 to fact-check content that users flag as suspicious.¹⁶

Facebook published its own report in April noting that the term "fake news" has come to refer to a wide variety of factually incorrect content, from inaccurate news to opinion

¹¹ John Kruzel, *No, Lady Gaga Was Not Arrested for Criticizing Melania Trump. That's Fake News*, POLITIFACT (Sep. 6, 2017, 3:20 PM)

<http://www.politifact.com/punditfact/statements/2017/sep/06/blog-posting/no-lady-gaga-was-not-arrested-criticizing-melania/>.

¹² Tom McCarthy, *How Russia used social media to divide Americans*, THE GUARDIAN (Oct. 14, 2017, 9:47 AM), <https://www.theguardian.com/us-news/2017/oct/14/russia-us-politics-social-media-facebook>.

¹³ Richard Burr & Mark Warner, Senate Select Intelligence Committee, Press Conference on Status of Russia Probe (Oct. 4, 2017), reprinted in Vanessa Sauter, *Video and Transcript: Press Conference by Senators Richard Burr and Mark Warner of SSCI on the Russia Probe*, LAWFARE (Oct. 4, 2017), <https://www.lawfareblog.com/video-and-transcript-press-conference-senators-richard-burr-and-mark-warner-ssci-russia-probe>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Aaron Sharockman, *We Started Fact-Checking in Partnership with Facebook a Year Ago Today. Here's What We've Learned*, POLITIFACT (Dec. 15, 2017, 12:07 PM), <http://www.politifact.com/truth-o-meter/article/2017/dec/15/we-started-fact-checking-partnership-facebook-year/>.

pieces, parodies, hoaxes, rumors, and simple misstatements.¹⁷ Facebook prefers the terms "false news" and "disinformation" for inaccurate content that is spread with intent to deceive.¹⁸

"In brief, we have had to expand our security focus from traditional abusive behavior, such as account hacking, malware, spam and financial scams, to include more subtle and insidious forms of misuse, including attempts to manipulate civic discourse and deceive people," the report concluded.¹⁹

II. DONALD TRUMP AND FAKE NEWS

Between January and October 2017, President Trump invoked the phrase "fake news" on 153 separate occasions.²⁰ Virtually every instance has been in response to critical news coverage.²¹

Trump has used it when he felt he wasn't getting enough credit for positive actions, such as helping Puerto Rico recover from Hurricane Maria. "We have done a great job with the almost impossible situation in Puerto Rico. Outside of the Fake News or politically motivated ingrates," he said on Twitter.²²

He's used the term after news channels simply reported what he said, such as his comments about white supremacists in Charlottesville, Virginia. "The only people giving a platform to these hate groups is the media itself, and the fake news," Trump said at a campaign-style rally in Phoenix.²³

And he's used the term repeatedly when news organizations have covered basic facts about the government's own investigations into Russia's influence on the 2016 election. "It is the same Fake News Media that said there is 'no path to victory for Trump' that is now pushing the phony Russia story. A total scam!" Trump said on Twitter.²⁴

¹⁷ Jen Weedon, William Nuland, & Alex Stamos, *Information Operations and Facebook*, FACEBOOK 2, 5 (Apr. 27, 2017), <https://fbnewsroomus.files.wordpress.com/2017/04/facebook-and-information-operations-v1.pdf>.

¹⁸ *Id.*

¹⁹ *Id.* at 3.

²⁰ @PolitiFact, TWITTER (Oct. 19, 2017, 7:45 AM), <https://twitter.com/PolitiFact/status/921024391458230273>.

²¹ Steve Coll, *Donald Trump's "Fake News" Tactics*, NEW YORKER (Dec. 11, 2017), <https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics>.

²² Donald Trump (@realDonaldTrump), TWITTER (Oct. 7, 2017, 5:22 AM), <https://twitter.com/realDonaldTrump/status/914465475777695744>.

²³ *President Trump Rally in Pheonix, Arizona*, C-SPAN (Aug. 11, 2017), <https://www.c-span.org/video/?432748-1/president-trump-criticizes-dishonest-media-defends-charlottesville-remarks-rally-phoenix&start=3351>.

²⁴ Donald Trump (@realDonaldTrump), Twitter (Apr. 1, 2017, 6:02 AM), <https://twitter.com/realDonaldTrump/status/848158641056362496>.

Most often, PolitiFact found, his targets have been CNN (twenty-three mentions in 2017) and NBC (nineteen mentions), followed by the *New York Times* (twelve mentions) and the *Washington Post* (eight mentions).²⁵ We found only one news outlet that had been singled out for praise during his discussions of fake news: Fox News.

Trump is particularly quick to label coverage "fake news" when the reports have unnamed sources, and unnamed sources seem to make Trump the most irate.²⁶

It's understandable that public figures get angry when they're accused of something but they don't know who the source is, said Aly Colón, the John S. and James L. Knight Professor of Media Ethics at Washington and Lee University.²⁷

"If President Trump doesn't believe what is said, then he would believe it is fake, because it doesn't fit into the reality that he accepts," Colón said.²⁸

When the media uses anonymous sources and Trump labels the stories as fake news, the public doesn't have much recourse for evaluating the evidence for themselves, Colón said.²⁹ That typically means they'll side with whomever they have the most sympathy with anyway.³⁰

"What becomes most prevalent is people are inclined to believe whoever they came to the dance with," Colón said.³¹ "Until something very obvious and visible contradicts that, they're not going to have a very strong basis for accepting things from people they don't trust."³²

Andrew Seaman, ethics chair for the Society of Professional Journalists, agreed that the use of unnamed sources "allows for people—from the president to the public—to sometimes easily wave away the information."³³

Nevertheless, that doesn't make the stories "fake."³⁴

²⁵ Holan, *supra* note 2.

²⁶ Jessica Estepa, *Trump Hates Anonymous Sources, Unless They're in Stories Favorable to Him*, USA TODAY (May 30, 2017, 12:01 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/05/30/trump-hates-anonymous-sources-unless-theyre-stories-favorable-him/102309400/>.

²⁷ Interview with Aly Colón, John S. and James L. Knight Professor of Media Ethics, Wash. & Lee Univ. (Oct. 17, 2017).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ Interview with Andrew Seaman, Ethics Chair, Soc'y of Prof'l Journalists (Oct. 17, 2017).

³⁴ Perry Bacon Jr., *When To Trust A Story That Uses Unnamed Sources*, FIVETHIRTYEIGHT (July 18, 2017), <https://fivethirtyeight.com/features/when-to-trust-a-story-that-uses-unnamed-sources/>.

"While I don't like the overuse of anonymous sources, I do have confidence in stories based on those sources from most large news organizations," Seaman said.³⁵ "My advice to the public is to always consider a news organization's history and track record. The *New York Times*, *Washington Post* and others all have scandals in their pasts, but the overwhelming weight of evidence shows their journalism to be reliable and trustworthy."³⁶

At times, Trump has seemed to advocate outright censorship in response to negative coverage,³⁷ as when he reacted to an NBC report based on anonymous sources that said Trump had wanted an unprecedented and likely impractical increase to the U.S. nuclear arsenal.³⁸ According to the report, Trump backed off when his advisers told him it was a bad idea.³⁹ (It was this incident that allegedly spurred Secretary of State Rex Tillerson to call Trump a moron—again, a report based on unnamed sources.).⁴⁰

The NBC report on the nuclear arsenal enraged Trump enough to threaten the network.⁴¹

"With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!" he tweeted the morning of October 11th.⁴²

Later that day, when asked about the report on the nuclear arsenal at a press conference, Trump said, "No, I never discussed increasing it. I want it in perfect shape. That was just fake news by NBC, which gives a lot of fake news, lately . . . It's frankly disgusting the way the press is able to write whatever they want to write. And people should look into it."⁴³

³⁵ Interview with Andrew Seaman, *supra* note 33.

³⁶ *Id.*

³⁷ Peter Baker & Cecilia King, *Trump Threatens NBC Over Nuclear Weapons Report*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/us/politics/trump-nbc-fcc-broadcast-license.html>.

³⁸ Courtney Kube, et al., *Trump Wanted Tenfold Increase in Nuclear Arsenal, Surprising Military*, NBC NEWS (Oct. 11, 2017, 7:23 AM), <https://www.nbcnews.com/news/all/trump-wanted-dramatic-increase-nuclear-arsenal-meeting-military-leaders-n809701>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Donald Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 6:55 AM), <https://twitter.com/realdonaldtrump/status/918112884630093825?lang=en>.

⁴³ Tim Hains, *Trump: NBC Prints "A Lot Of Fake News Lately"*, REAL CLEAR POLITICS (Oct. 11, 2017), https://www.realclearpolitics.com/video/2017/10/11/trump_nbc_gives_a_lot_of_fake_news_lately.html.

A. First Amendment Implications

Trump's comments on revoking licenses prompted one member of Trump's own party to question his commitment to the Constitution's First Amendment.

"Mr. President: Words spoken by the President of the United States matter," said Senator Ben Sasse (R-Neb.), in a prepared statement.⁴⁴ "Are you tonight recanting of the oath you took on January 20th to preserve, protect, and defend the First Amendment?"⁴⁵

Other First Amendment advocates described Trump's use of the term "fake news" as Orwellian, because it uses words to mean the opposite of their literal definition, as in George Orwell's dystopian novel *1984*.⁴⁶

"It is a characteristic of authoritarian leaders, whether Communist or Nazi, to appropriate ordinary words and declare them to mean the opposite," said Bruce Johnson, a Seattle-based media lawyer.⁴⁷ "Repressive regimes hold power by depriving their population of independent thinking and making the masses believe lies."⁴⁸

Trump's threats are "simply unprecedented," said Sonja R. West, the Otis Brumby Distinguished Professor of First Amendment Law at the University of Georgia School of Law.⁴⁹

"While other presidents have certainly had their disagreements with particular stories or journalists, they still showed a basic level respect to the press as an institution and acknowledged the important role it plays," West said.⁵⁰ "Having the president openly wage war on the press by trying to delegitimize it is extremely concerning."⁵¹

Finally, Trump's "fake news" attacks confuse ideas about what is accurate and what is newsworthy, said Ronnell Andersen Jones, a professor of law at the University of Utah who studies the First Amendment and media law.⁵²

⁴⁴ Press Release, Ben Sasse, U.S. Senator for Neb., Sasse to Trump: Are You Recanting of Your Oath? (Oct. 12, 2017), <https://www.sasse.senate.gov/public/index.cfm/press-releases?ID=A90374B7-44A6-4BC8-82E2-CE01A9418D6E>.

⁴⁵ *Id.*

⁴⁶ Brian Klass, *Trump Owes Orwell for '1984.' Big Brother is His Role Model*, USA TODAY (Oct. 9, 2017, 4:26 PM), <https://www.usatoday.com/story/opinion/2017/10/09/donald-trump-owes-george-orwell-for-1984-memory-hole-brian-klaas-column/746119001/>.

⁴⁷ Interview with Bruce Johnson, Partner, Davis Wright Tremaine LLP (Oct. 13, 2017).

⁴⁸ *Id.*

⁴⁹ Interview with Sonya West, Distinguished Professor of Law, Univ. of Ga. Sch. of Law (Oct. 16, 2017).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Interview with Ronnell Anderson Jones, Professor of Law, Univ. of Utah S.J. Quinney Coll. of Law (Oct. 14, 2017).

Trump's complaints tend to focus only on labeling the press as fake, rather than offering evidence to the contrary.⁵³ This flies in the face of norms that assume that political leaders will rebut incorrect news reports with better facts and evidence, she said.⁵⁴

"If mistakes are made, the president of the United States is better positioned than anyone in the world to clarify and correct the errors—to counter misinformation with actual, correct information," Jones said.⁵⁵ "Cases from the Supreme Court about media freedom envision that this will happen, and they protect the press even when it makes mistakes because of the expectation that government officials will counter any false information with clear, truthful information. Striking out at the press with nothing more than a bald label—'fake news'—undercuts this central feature of our democracy and places the larger First Amendment framework at risk."⁵⁶

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

ECOSYSTEM OF DISTRUST

Mark Verstraete & Derek E. Bambauer*

ABSTRACT

The Internet has famously democratized the information ecosystem. Online, everyone is a pundit: each participant can share news, analyze events, and opine. The analog system, by contrast, was one where incumbent intermediaries (frequently licensed by governments) performed a powerful, centralized gatekeeping function that largely regulated the creation and dissemination of news. Scholars have mostly welcomed the rise of the democratized, networked Fourth Estate. We argue that this transformation is not at all an unalloyed good. Moreover, in celebrating this technological revolution, commentators have neglected the role of cultural factors that tend to magnify the pernicious effects of a flattened information hierarchy.

Distrust in social institutions has been on the rise since the Watergate crisis in the 1970s. While government has been the most obvious target of falling confidence, media entities and subject matter experts have also been increasingly the focus of skepticism. The advent of the Internet has magnified this effect: gatekeepers such as CBS and the New York Times are vilified when wrong and invisible when correct. Many eyes make media errors shallow. Moreover, traditional journalistic norms that require forthright admission of mistakes help reinforce narratives that portray the “mainstream media” as biased, incompetent, and out of touch.

The current phenomenon labeled as “fake news,” and the older trend of conspiracy theories, are outgrowths of both the technological amplification of skeptical or nihilistic voices and the postmodern assault on information shibboleths. It is critical to realize that the Internet’s initial promise of disintermediation was illusory: gatekeepers have not been eliminated, but merely replaced. The new breed of intermediaries operates with radically different financial incentives and professional norms than their predecessors did. While Facebook moderates and removes information on its ubiquitous platform for violations of amorphous community standards, the company’s goal is not the production of truth, but rather the generation of increased traffic

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and interaction by users. Falsity can be profitable if it's popular. Both the old and new bosses curated content, but to vastly different ends.

We argue that the new architecture of networked information has a structurally corrosive effect. It is easier to generate doubt about narratives—even those produced by previously trusted sources—than it is to create trusted content. Previously, intermediaries served as choke points: they reacted to incentives that led them to filter unreliable material, in order to preserve their status as creators of the historical record. Now, authors and distributors attract attention (which they monetize) by casting doubt. The most pernicious feature of the Internet news ecosystem is that it leads to a cascade of cynicism: it reinforces not just skepticism about a particular course, but distrust for all media production.

Importantly, current scholarly accounts of fake news and conspiracy theories are technologically overdetermined. The democratization of information flows by networked computing cannot fully account for the spread of fake news and the distrust of established media more generally. We argue that cultural factors are neglected causes of these phenomena. First, the technological transformation of the public sphere is accompanied by a social shift toward pervasive distrust of experts. This anti-intellectual turn both constitutes and is constituted by the spread of fake news. Second, while fake news has taken a stronger hold in America than in Europe, the technical systems that undergird the information economy are nearly identical on both sides of the Atlantic. Thus, we explore the non-technical factors that make the United States particularly amenable to the spread of fake news and a culture of media distrust.

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INTRODUCTION

Online, no one knows that you're a dog, but many people may well think you're a journalist.¹

The dominant explanation for the rise of fake news places Internet technology—especially social media such as Facebook and Twitter—at the center of the narrative.² It is certainly correct that technology is not neutral. Science and Technology Studies (STS) demonstrate that different technical systems favor certain political and cultural arrangements.³ The technical underpinnings of fake news are no exception to this rule. Technical changes in news distribution are a piece of the origin story for the rapid proliferation of fake news in the media ecosystem. However, the recent turn toward news aggregation and dissemination on Internet platforms like Facebook and Twitter only provides part of that story. Technology and society are co-constitutive. While technology shapes society, our political and cultural systems also shape how technology develops and the social impacts of emerging technology.⁴ Technology and society inhabit a feedback loop through which they act on (and influence) each other.⁵

For the most part, legal scholars have concentrated on the role that technical changes in the news ecosystem play in the production and spread of fake news. Writing for this Symposium issue, for example, Richard Hasen details how Internet platforms have lowered the cost of speech, leading to the rise of fake news.⁶ Facebook and Twitter have largely displaced conventional news

¹ Peter Steiner's famous cartoon appeared in *The New Yorker* on July 5, 1993. See Michael Cavanaugh, *Nobody Knows You're a Dog: As Iconic Internet Cartoon Turns 20, Creator Peter Steiner Knows the Joke Rings as Relevant as Ever*, WASH. POST (July 31, 2013), https://www.washingtonpost.com/blogs/comic-riffs/post/nobody-knows-youre-a-dog-as-iconic-internet-cartoon-turns-20-creator-peter-steiner-knows-the-joke-rings-as-relevant-as-ever/2013/07/31/73372600-f98d-11e2-8e84-c56731a202fb_blog.html.

² See, e.g., Brian Resnick, *The Science Behind Why Fake News is so Hard to Wipe Out*, VOX (Oct. 31, 2017, 5:36 PM), <https://www.vox.com/science-and-health/2017/10/5/16410912/illusory-truth-fake-news-las-vegas-google-facebook>; see also David Pierson, *Facebook and Google Pledged to Stop Fake News. So Why Did They Promote Las Vegas-Shooting Hoaxes?*, L.A. TIMES (Oct. 2, 2017, 4:55 PM), <http://www.latimes.com/business/la-fi-tn-vegas-fake-news-20171002-story.html>.

³ See Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121 (1980).

⁴ See generally EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* (2011) (offering a critique of techno-utopianism).

⁵ See generally DONALD A. MACKENZIE & JUDY WACJMAN, *THE SOCIAL SHAPING OF TECHNOLOGY* (1999). As David Golumbia writes, "certain technologies tend to come with implicit politics, these have often been formed by the developers of the technology, and are almost always subject to the social matrices in which those technologies are embedded, and the technologies themselves are largely shaped by these social matrices." ROBERTO SIMANOWSKI, *DIGITAL HUMANITIES AND DIGITAL MEDIA: CONVERSATIONS ON CULTURE, AESTHETICS, AND LITERACY* 132 (2016).

⁶ See generally Richard Hasen, *Cheap Speech and What It Has Done (To American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2018).

gatekeepers who provided a baseline set of facts that helped shape national discussions.⁷ Hasen rightly argues that low-cost speech coupled with the waning power of traditional gatekeepers has undermined “stabilizing institutions of American democracy including newspapers and political parties.”⁸ The transition from carefully curated and contextualized media content to a “media firehose . . . has diluted trusted sources of information and led to the rise of ‘fake news.’”⁹

Critically, however, socio-cultural factors that also drive the production and efficacy of fake news are noticeably sidelined in this analysis. Fake news is not only a product of technical innovations that have transformed the public sphere, but also the result of a particular cultural moment. While technology has contributed to a general loss of faith in core democratic institutions, it is not alone in shaping our cultural attitudes that have led to widespread distrust and laid the groundwork for the rapid spread of fake news.¹⁰

In this Essay, we argue that fake news is the product of a unique socio-technical assemblage. In doing so, we demonstrate how technology combines with a set of cultural factors, which together create the conditions for the proliferation and effectiveness of fake news. This Essay proceeds in several further parts. Part I makes the case for incorporating cultural factors into the analysis of fake news by arguing that analyses that focus exclusively on technical changes are incomplete. Part II introduces a set of neglected cultural factors that—in concert with technical innovations—give rise to fake news. Part III shows how recent technical innovations and cultural attitudes create a feedback loop that drives fake news and other potential harms to democracy.

I. THE CASE FOR CULTURAL ANALYSIS

Technical explanations for fake news and its attendant social harms are incomplete. This Part offers two main reasons to examine cultural explanations for the fake news phenomenon. First, digital platforms have displaced traditional news gatekeepers on a global scale. Yet, the proliferation of fake news is particularly acute in the United States.¹¹ To some extent, fake

⁷ *Id.*

⁸ *Id.* at 202.

⁹ *Id.*

¹⁰ Fake news, in turn, feeds back into a general distrust of institutions.

¹¹ See, e.g., Andrew Rettman, *Oxford Study Raises Alarm on 'Junk' News in France*, EU OBSERVER (Aug. 21, 2017, 9:17 AM), <https://euobserver.com/elections/137636>; Scott Roxborough, *How Europe is Fighting Back Against Fake News*, HOLLYWOOD REPORTER (Aug. 21, 2017, 6:30 AM),

news is a uniquely American problem, suggesting that other factors (not merely technical ones) principally influence the rise and spread of fake news. Second, though Internet and social media use is consistent across the political spectrum, the American right-wing media ecosystem tends to be significantly more polarized than the left.¹² Again, this suggests that fake news and media polarization do not flow inexorably from the rise of Internet communication and social media platforms. Since the underlying technology of social media is largely similar across countries (even if the individual players differ from state to state), one would expect fake news to be consistent across those countries if the phenomenon is technologically determined. Similarly, liberals, conservatives, and moderates in America all use the same set of platforms, so one would expect fake news and media polarization to be much the same across the U.S. political spectrum.

A. Fake News Across the Globe

Fake news gained national attention immediately following the United States presidential election in 2016. Many commentators suggested that the spread of fake news in the run up to the election turned the election in favor of now-President Donald Trump.¹³ Recent empirical data shows that fake news made up a large percentage of news consumption prior to the election.¹⁴ For instance, Michigan voters consumed equal amounts of professional news content and junk news on Twitter in the days leading up to the election.¹⁵ By contrast, in the run

<https://www.hollywoodreporter.com/news/how-europe-is-fighting-back-fake-news-1030837>.

¹² See, e.g., Robert M. Faris et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y 1, 49 (Aug. 2017),

https://dash.harvard.edu/bitstream/handle/1/33759251/2017-08_electionReport_0.pdf?sequence=9.

¹³ Hannah Jane Parkinson, *Click And Elect: How Fake News Helped Donald Trump Win a Real Election*, THE GUARDIAN (Nov. 14, 2016, 11:27 AM),

<https://www.theguardian.com/commentisfree/2016/nov/14/fake-news-donald-trump-election-alt-right-social-media-tech-companies>; see also Callum Borchers, *This is a Real News Story About Fake News Stories*, WASH. POST (Nov. 7, 2016),

https://www.washingtonpost.com/news/the-fix/wp/2016/11/07/this-is-a-real-news-story-about-fake-news-stories/?utm_term=.f3844ecb0e94

¹⁴ See, e.g., Rettman, *supra* note 11; Faris et al., *supra* note 12.

¹⁵ Samantha Bradshaw et al., *Junk News and Bots During the French Presidential Election: What Are French Voters Sharing Over Twitter?*, COMPUTATIONAL PROPAGANDA PROJECT 1, 1 (Apr. 22, 2017), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/04/What-Are-French-Voters-Sharing-Over-Twitter-v10.pdf> ("In the days leading up the US election, we did a close of junk news consumption among Michigan voters and found a 1:1 ratio between professional news content and junk."). Researchers use "junk news" to designate "content [that] includes various forms of propaganda and ideologically extreme, hyper-partisan, or conspiratorial political news and information." *Research Design FAQ*,

up to the French election, junk news made up only 25 percent of news content shared on Twitter.¹⁶ Interestingly, the same study that examined sharing habits of Michigan voters also confirmed that German and French voters shared more high-quality news and less “junk news” content than their American counterparts.¹⁷

Another Oxford University report suggests several reasons why fake news is a uniquely American phenomenon.¹⁸ First, very few people can accurately recall having seen fake news¹⁹ except in the United States.²⁰ Second, German and French citizens often use the English term “fake news,” which suggests that fake news is “something that has been largely imported rather than a home-grown phenomenon.”²¹ Third, the United States’ online news media ecosystem is more polarized than in any country in Europe.²² The combination of these factors makes the United States particularly amenable to fake news and its attendant social harms.

In addition, fake news is largely spread on social media platforms that monetize popularity rather than credibility. Established, mainstream media institutions such as the Big Three networks²³ and newspapers including the *New York Times* and

COMPUTATIONAL PROPAGANDA PROJECT, <http://comprop.oii.ox.ac.uk/about-the-project/research-design-faq/> (last visited Feb. 22, 2018). “Much of this content is deliberately produced false reporting.” *Id.*

¹⁶ See Rettman, *supra* note 11.

¹⁷ Bradshaw et al., *supra* note 15; see also Mark Hosenball & Joseph Menn, *Experts Say Automated Accounts Sharing Fake News Ahead of French Election*, REUTERS INST. (Apr. 20, 2017, 7:42 PM), <https://www.reuters.com/article/us-france-election-socialmedia/experts-say-automated-accounts-sharing-fake-news-ahead-of-french-election-idUSKBN17M31G> (noting that Philip Howard, the lead author of the study, concluded that “[b]oth German and French voters are sharing smaller amounts of junk news”).

¹⁸ See Philip N. Howard et al., *Social Media, News and Political Information During the US Election: Was Polarizing Content Concentrated in Swing States?*, COMPUTATIONAL PROPAGANDA PROJECT (Sept. 28, 2017), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/09/Polarizing-Content-and-Swing-States.pdf>; Samantha Bradshaw & Philip N. Howard, *Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation*, COMPUTATIONAL PROPAGANDA PROJECT (July 14, 2017), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/07/Troops-Trolls-and-Troublemakers.pdf>.

¹⁹ Researchers defined “fake news” as “news that is ‘invented’ to make money or discredit others.” Nic Newman et al., *Reuters Institute Digital News Report 2017*, REUTERS INST. 1, 19, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/Digital%20News%20Report%202017%20web_0.pdf (last visited Feb. 22, 2018). Compare this with the definition of “hoax” from Verstraete, Bambauer, & Bambauer, *infra* note 104 (“A hoax is a news story with purposefully false content, is financially motivated, and is intended by its author to deceive readers.”).

²⁰ Newman et al. *supra* note 19, at 19.

²¹ *Id.*

²² *Id.* at 39.

²³ The “Big Three” refer to ABC, CBS, and NBC. Douglas Blanks Hindman & Kenneth Wiegand, *The Big Three’s Prime-Time Decline: A Technological and Social Context*, 52 J. BROADCASTING & ELECTRONIC MEDIA 119, 119 (2008).

Washington Post also depend upon popularity to an extent, since both circulation and advertising are key to revenues, but that popularity is significantly determined by these entities' reputations for producing reliable content. Facebook and Twitter are less overtly responsible for the information on their sites—virtually all of their content is user-generated.²⁴ We identify Facebook posts and Tweets with individual users, not with the platform that shares them. Thus, social media companies have less to gain or lose from reputational consequences than they do from maximizing viewership. This is not to suggest that these firms are indifferent to false or misleading content; rather, it is to make plain the point that their economic incentives align differently than traditional media gatekeepers. Critically, then, fake news is not a story about disintermediation.²⁵ It is a story about a changing of the guard among gatekeepers.

Polarized and sensational media contribute to widespread distrust in the media establishment, and fake news (and post-truth culture) leverages this distrust for its effectiveness. Media polarization in Europe is limited by major state-led media outlets that are trusted by citizens on both ends of the political spectrum.²⁶ As Simon Kuper notes, “state broadcasters, [] the Ansa news agency in Italy, [and] Germany’s centrist mass media” provide a source that is generally trusted and, as a result, “few western Europeans inhabit ideological ‘filter bubbles.’”²⁷ Like state broadcasters in other parts of Europe, the British Broadcasting Company (BBC) in the United Kingdom limits polarization by establishing a baseline set of accepted facts for national debates.²⁸

While trusted state media sources provide a bulwark against fake news in Europe, similar American media outlets are less effective in that role. Possible American analogs for state news sources in Europe would be National Public Radio (NPR) and Public Broadcasting Service (PBS). A 2011 Pew Project for Excellence in Journalism Report established that NPR and PBS “were more neutral towards President Obama in his first 100 days on the job in 2009 than were most news organizations,” yet

²⁴ See, e.g., Megan O’Neill, *How Much Do Facebook & YouTube Profit From User Generated Content?*, ADWEEK (July 1, 2011), <http://www.adweek.com/digital/user-generated-content-infographic/>.

²⁵ See, e.g., Robert Gellman, *Disintermediation and the Internet*, 13 GOV’T INFO. Q. 1 (1996).

²⁶ See Anya Schiffrin, *How Europe Fights Fake News*, COLUM. J. REV. (Oct. 26, 2017), <https://www.cjr.org/watchdog/europe-fights-fake-news-facebook-twitter-google.php>; see also Simon Kuper, *Why There Will Never Be A Trump In Today’s Europe*, FIN. TIMES (June 28, 2017), <https://www.ft.com/content/396f895c-5b87-11e7-b553-e2df1b0c3220>.

²⁷ Schiffrin, *supra* note 26.

²⁸ *Id.*

whether someone considers NPR and PBS trustworthy skews heavily along partisan lines.²⁹ Thus, American political polarization has spread to the media ecosystem, undercutting the ability of non-aligned news sources to act as honest brokers.

B. Media Polarization Across the U.S. Political Spectrum

Several commentators have suggested that social media and personalized news feeds fuel media polarization and create filter bubbles where people only see content that they already agree with.³⁰ Social media and personalized news dissemination contribute to media polarization, but analyses that focus mainly on the underlying technical architecture cut too broadly, for several reasons.

People across the American political spectrum get political information from social media at roughly similar rates,³¹ yet polarization is more extreme on the right.³² Yochai Benkler and his co-authors succinctly make this point in a recent study: “Our analysis challenges a simple narrative that the Internet *as a technology* is what fragments discourse and polarizes opinions, by allowing us to inhabit filter bubbles or just read ‘the daily me.’ If technology were the most important driver towards a ‘post-truth’ world, we would expect to see symmetric patterns [of media polarization] on the left and the right.”³³ The authors further conclude that, “[w]hile Facebook and Twitter certainly enabled right-wing media to circumvent the gatekeeping power of traditional media, the pattern was not symmetric.”³⁴

Another study suggests the Internet and social media play only a limited role in explaining the growth of polarization.³⁵ Here, researchers found “that the groups least likely to use the

²⁹ Alicia C. Shepherd, *Views of NPR’s Credibility Tend To Be Partisan-Based*, NPR (Apr. 28, 2011, 12:54 PM),

<https://www.npr.org/sections/ombudsman/2011/04/28/135775694/views-of-nprs-credibility-tend-to-be-partisan-based>.

³⁰ CASS SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017) (arguing that the Internet and social media have fueled political fragmentation and polarization); see also ELI PARISER, THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK (2012) (same).

³¹ Aaron Smith, *Cell Phones, Social Media and Campaigns 2014*, PEW RESEARCH CTR. (Nov. 3, 2014), <http://www.pewinternet.org/2014/11/03/cell-phones-social-media-and-campaign-2014/> (“Participation in the digital campaign does not have a clear partisan slant.”).

³² Yochai Benkler et al., *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. J. REV. (Mar. 3, 2017), <https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php>; see also Faris et al., *supra* note 12.

³³ Benkler et al., *supra* note 32.

³⁴ *Id.*

³⁵ See Levi Boxell, Matthew Gentzkow, & Jesse M. Shapiro, *Greater Internet Use is Not Associated With Faster Growth in Political Polarization Among US Demographic Groups*, 114 PROC. NAT’L ACAD. SCI. U.S. AM. 10612, 10612 (2017).

Internet experienced larger changes in polarization between 1996 and 2016 than the groups most likely to use the Internet.”³⁶ If the Internet and social media were largely responsible for driving polarization, groups who use these technologies more often should see more rapid polarization than groups who use them less frequently. Instead, researchers found the opposite effect, suggesting that the recent trend toward polarization cannot be wholly explained by reference to the underlying technology. Thus, polarization is *underdetermined* by Internet and/or social media usage.

C. *The Internet and the Decline of Traditional Media*

There is at least one structural effect of Internet technology on traditional media that has been largely neglected in the analysis of fake news. Scholars tend to view the online advertising market as a zero-sum game: the revenues earned by Facebook and Google come at the expense of potential advertising by newspapers and television stations. Ergo, the rise of digital platforms is a contributing factor, if not the principal cause, of the decline of newspapers (and, to a lesser extent, television stations).³⁷ This argument is almost perfectly wrong. As journalist Jack Shafer notes, newspapers have been in a state of gradual decline since the early twentieth century.³⁸ The most potent challenge to newspaper ad revenues is not social media—it’s the relatively low-tech Web site Craigslist.³⁹ Classified ad revenues were the life blood of most newspapers, particularly local ones. Craigslist absorbed much of this revenue by making classifieds cheap (or free) and easily searched.⁴⁰ And the plunge in newspaper classified ad revenues began in 2000, four years

³⁶ *Id.*

³⁷ See, e.g., Robert G. Kaiser, *The Bad News About the News*, BROOKINGS: THE BROOKINGS ESSAY (Oct. 16, 2014), <http://csweb.brookings.edu/content/research/essays/2014/bad-news.html#> (stating that “as newspaper revenues have plummeted, the ad revenue of Google has leapt upward year after year—from \$70 million in 2001 to an astonishing \$50.6 billion in 2013”).

³⁸ Jack Shafer, *Don’t Blame Craigslist for the Decline of Newspapers*, POLITICO: MAGAZINE (Dec. 13, 2016), <http://www.politico.com/magazine/story/2016/12/craigslist-newspapers-decline-classifieds-214525> (noting that “[n]ewspapers have been declining since the arrival of radio in the 1920s, with a steady attrition of total titles and per capita consumption over the years”).

³⁹ See Robert Seamans & Feng Zhu, *Responses to Entry in Multi-Sided Markets: The Impact of Craigslist on Local Newspapers*, 60 MGMT. SCI. 476, 490 (2014).

⁴⁰ See Shafer, *supra* note 38; Seamans & Zhu, *supra* note 39; Philip Weiss, *A Guy Named Craig*, N.Y. MAGAZINE, <http://nymag.com/nymetro/news/media/internet/15500/> (last visited Feb. 22, 2018).

before Facebook was founded and six years before Twitter was.⁴¹ (Craigslist launched in 1996.⁴²) It is strange to hear commentators complain that “Facebook and Google . . . exploit the work of traditional providers of news that create information useful to Facebook friends and Google searchers.”⁴³ The information is indeed useful, but as the same commentator notes, the new digital intermediaries “lead large numbers of readers to the journalism of the legacy media.”⁴⁴ Most content providers are delighted to have gatekeepers send traffic—and eyeballs—their way; after all, that is how they sell advertising. Most of these critiques fail to understand the economics of either newspapers or social media, and cannot establish a causal relationship between the rise of platforms and the decline of institutional media.

The rise of digital intermediaries does not occur in a cultural vacuum. At minimum, examining cultural factors that lend support to fake news and “post-truth” society offers a new point of reference to make sense of our time. The next section examines a set of neglected cultural factors that—together with the technical structure of the digital media ecosystem—construct the fake news phenomenon.

II. FAKE NEWS AND OUR UNPREDICTABLE FUTURE

Upon reflection, it should be no surprise that fake news and post-truth politics are emerging at this particular cultural moment. These phenomena rely on a general sense of uncertainty about the future—something that the present situation provides in abundance.⁴⁵ At the highest level of abstraction, fake news and post-truth society—and their newfound effectiveness—are largely determined by the loss of faith in a stable future, driven in part by the 2008 financial crisis and climate change. More specifically, our financial and

⁴¹ See Sydney Jones, *Online Classifieds*, PEW RESEARCH CTR. (May 22, 2009), <http://www.pewinternet.org/2009/05/22/online-classifieds/>; Mark J. Perry, *Creative Destruction: Newspaper Ad Revenue Continued its Precipitous Free Fall in 2014, and it's Likely to Continue*, AEI IDEAS (Apr. 30, 2015, 11:24 AM), <https://www.aei.org/publication/creative-destruction-newspaper-ad-revenue-continued-its-precipitous-free-fall-in-2014-and-its-likely-to-continue/>; Jay Yarow, *Why The Newspaper Industry Collapsed*, BUS. INSIDER (Mar. 14, 2011, 4:02 PM), <http://www.businessinsider.com/chart-of-the-day-newspapers-classified-ads-revenue-2011-3>.

⁴² Jones, *supra* note 41.

⁴³ Kaiser, *supra* note 37.

⁴⁴ *Id.*

⁴⁵ See, e.g., Stuart Jeffries, *Welcome to the New Age of Uncertainty*, THE GUARDIAN (July 26, 2016, 12:51 PM), <https://www.theguardian.com/world/2016/jul/26/new-age-of-uncertainty-brex-it-trump-future-world-flux>.

ecological crises⁴⁶ have cleared the ground for widespread distrust of experts and the surge of populist sentiment in the United States and abroad. Fake news and the larger phenomenon of post-truth culture have been built on this framework.

The rise of fake news is both a symptom and an effect of a widespread decline in America's public trust in institutions and experts.⁴⁷ Since the Watergate era, people have lost faith—sometimes overwhelmingly—in nearly every major American institution.⁴⁸ For the purposes of this Essay, the two most important entities that have suffered a loss in prestige are government (particularly the federal government) and major media institutions, such as the three principal broadcast television networks and national newspapers.⁴⁹ These two institutions were arguably the country's most important newsmakers: the government, by formulating and implementing policy; and the media, by curating and transmitting information about those policies. The two frequently formed an odd and uncomfortable partnership. When Walter Cronkite, previously a supporter of the Vietnam War, issued a critical three-minute statement on the nightly *CBS News* broadcast in February 1968 in the wake of the Tet offensive, it was widely perceived as a key turning point in American perceptions.⁵⁰ The government generated events (and the concomitant information), but it was principally the purview of the media to determine what constituted “news.”⁵¹

⁴⁶ In many ways, this separation between financial and ecological crisis is artificial. For instance, climate change is exacerbated capitalism and the prioritization of profit, rather than sustainability. Benjamin Y. Fong, *The Climate Crisis? It's Capitalism, Stupid*, N.Y. TIMES (November 20, 2017), <https://www.nytimes.com/2017/11/20/opinion/climate-capitalism-crisis.html>.

⁴⁷ See Ethan Zuckerman, *Mistrust, Efficacy and the New Civics: Understanding the Deep Roots of the Crisis of Faith in Journalism*, ASPEN INST. 1, 4 (July 2017), https://assets.aspeninstitute.org/content/uploads/2017/07/zuckerman.whitepaper.FINAL_.pdf.

⁴⁸ See, e.g., *Confidence in Institutions*, GALLUP, <http://news.gallup.com/poll/1597/confidence-institutions.aspx> (last visited Feb. 22, 2018); Bill Bishop, *Americans Have Lost Faith in Institutions. That's Not Because of Trump or 'Fake News'*, WASH. POST (Mar. 3, 2017), <https://www.washingtonpost.com/posteverything/wp/2017/03/03/americans-have-lost-faith-in-institutions-thats-not-because-of-trump-or-fake-news/>.

⁴⁹ See *Confidence in Institutions*, supra note 48 (revealing that the major exception to this trend of distrust is the military).

⁵⁰ See *Final Words: Cronkite's Vietnam Commentary*, NPR (July 18, 2009, 4:00 PM), <http://www.npr.org/templates/story/story.php?storyId=106775685>.

⁵¹ Information, however, did not necessarily have to be verifiably true to be deemed news. See Christopher Woolf, *Back in the 1890s, Fake News Helped start a War*, PRI (Dec. 8, 2016, 3:00 PM), <https://www.pri.org/stories/2016-12-08/long-and-tawdry-history-yellow-journalism-america> (noting that the Hearst newspaper chain reported the sinking of the U.S.S. Maine in 1898 as the fault of Spain, helping to start a war); see also Elisabeth Goodridge, *Front-Runner Ed Muskie's Tears (or Melted Snow?) Hurt His Presidential Bid*, U.S. NEWS & WORLD REP. (Jan. 17, 2008, 5:00 PM),

The crux of the problem, then, was not that false information was difficult to come by or unpopular. Fake news has a long and seedy history in American politics and culture. Benjamin Franklin invented lies about murders by Native Americans purportedly working with the British during the Revolutionary War.⁵² In 1835, the *New York Sun*, anxious to increase circulation, published a series of stories claiming that a new telescope had revealed inhabitants on the moon.⁵³ When a competitor revealed the fiction, the *Sun* nonetheless maintained its newfound popularity.⁵⁴ The Hearst chain of newspapers spread lies about conditions in Cuba to sell copies, including the assertion that Spain was responsible for the sinking of the American battleship *U.S.S. Maine*.⁵⁵ When the Federal Communications Commission shut down Dr. John Brinkley's broadcasts advertising a fraudulent male impotence cure in 1930, he set up a radio station just across the border in Mexico—and continued to have America's most popular radio show.⁵⁶ Alex Jones ranted on a small Austin radio station for four years before transitioning completely to his *InfoWars* Web site.⁵⁷ Timothy McVeigh read the hate novel *The Turner Diaries* in print before deciding to launch a terrorist attack in Oklahoma City in 1995; half a million other readers also purchased the book in paper form.⁵⁸ The *National Enquirer* has trafficked in Elvis sightings and alien babies for decades, averaging five- to six-million copies sold per year in the 1970s and 1980s.⁵⁹ Few, however, believed that

<https://www.usnews.com/news/articles/2008/01/17/72-front-runners-tears-hurt> (noting that the media reported that a Democratic presidential candidate cried during a speech in New Hampshire, which captured the headlines and was ultimately fatal to his campaign).

⁵² See Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <http://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535>.

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ See Woolf, *supra* note 51; see also Robert Love, *Before Jon Stewart*, 45 COLUM. J. REV. 33, 35 (2007).

⁵⁶ See Andrew Lapin, *The Bizarre History of a Bogus Doctor Who Prescribed Goat Gonads*, NAT'L GEOGRAPHIC (July 15, 2016), <http://news.nationalgeographic.com/2016/07/documentary-interview-medicine-science/>; see also Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 613 (1998).

⁵⁷ Alexander Zaitchik, *Meet Alex Jones*, ROLLING STONE (Mar. 2, 2011), <https://www.rollingstone.com/politics/news/talk-radios-alex-jones-the-most-paranoid-man-in-america-20110302>.

⁵⁸ See Julie Salamon, *The Web As Home for Racism and Hate*, N.Y. TIMES (Oct. 23, 2000), <http://www.nytimes.com/2000/10/23/arts/television-review-the-web-as-home-for-racism-and-hate.html>; see also Jo Thomas, *Behind a Book That Inspired McVeigh*, N.Y. TIMES (June 9, 2001), <http://www.nytimes.com/2001/06/09/us/behind-a-book-that-inspired-mcveigh.html>.

⁵⁹ Iver Peterson, *The National Enquirer Cuts Back on Sensationalism, but is Still Haunted by Its Past*, N.Y. TIMES (Sept. 8, 1997),

Senator Ted Kennedy had fathered an illegitimate child, or that Bigfoot had been spotted. The *Enquirer* was simply not treated as a reputable source, even though the paper did occasionally break stories, such as infidelity by then-Presidential candidate Senator Gary Hart in 1988, or a photo showing that accused murderer O.J. Simpson did in fact own a pair of Bruno Magli shoes, contradicting his testimony under oath.⁶⁰ News did not qualify as such until and unless one of the major media gatekeepers deemed it such.

Distrust of the media is compounded by an ironic mismatch between the set of journalistic norms and practices that enabled major media entities to earn their reputations for legitimacy, and the current information ecosystem of distrust. Journalism is, in the first instance, self-policing: reporters, editors, and ombudspersons are expected to verify stories and to investigate inaccuracies, even after publication.⁶¹ Thus, the *New York Times* and *Washington Post* both launched major efforts to ascertain why they published as fact claims by the administration of President George W. Bush that Iraq possessed weapons of mass destruction.⁶² After external pressure and an internal investigation, *CBS News* admitted that it was duped into reporting on documents that purported to show that President Bush had failed to complete his service in the Air National Guard.⁶³ And *The New Republic* was forced to retract a series of stories written by then-prodigy Stephen Glass that were entirely fiction.⁶⁴ For mainline media, self-assessment and disclosure of mistakes are core components of professional normative commitments.

<http://www.nytimes.com/1997/09/08/business/national-enquirer-cuts-back-sensationalism-but-still-haunted-its-past.html> ("The Enquirer, the market leader in dishing dirt on celebrities, has seen its circulation tumble nearly 55 percent from a peak of 6 million a week in the late 1970's to 2.7 million today.").

⁶⁰ David Phillips, *Printing the Truth Hasn't Kept Readership From Fleeing the National Enquirer*, CBSNEWS.COM (May 10, 2010), <https://www.cbsnews.com/news/printing-the-truth-hasnt-kept-readership-from-fleeing-the-national-enquirer/>.

⁶¹ See, e.g., *SPJ Code of Ethics*, SOC'Y OF PROF'L JOURNALISTS, <https://www.spj.org/ethicscode.asp> (last revised Sept. 6, 2014) (calling on journalists to "Acknowledge mistakes and correct them promptly and prominently. Explain corrections and clarifications carefully and clearly.").

⁶² See Franklin Foer, *The Source of the Trouble*, N.Y. MAG., <http://nymag.com/nymetro/news/media/features/9226/>; see also Gary Younge, *Washington Post Apologises for Underplaying WMD Skepticism*, THE GUARDIAN (Aug. 12, 2004, 9:28 PM), <https://www.theguardian.com/world/2004/aug/13/pressandpublishing.usa>.

⁶³ See Jarrett Murphy, *CBS Ousts 4 For Bush Guard Story*, CBS NEWS (Jan. 10, 2005, 6:48 PM), <https://www.cbsnews.com/news/cbs-ousts-4-for-bush-guard-story-10-01-2005/>.

⁶⁴ Buzz Bissinger, *Shattered Glass*, VANITY FAIR (Sept. 1998), <https://www.vanityfair.com/magazine/1998/09/bissinger199809>.

Increasingly, though, admissions of error are treated as admissions of guilt by media consumers. For example, when CNN decided to retract a story about ties between the administration of President Donald Trump and Russia, the choice to pull the piece tarnished the network's reputation rather than bolstering it.⁶⁵ Significant errors by large mainline media entities remain relatively rare. However, each one provides a telling example of salience bias for many consumers.⁶⁶ Errors that are disclosed by media outlets themselves demonstrate incompetence, while those that are caught by outsiders prove malfeasance. While this approach resonates across the American political spectrum,⁶⁷ it is dominant among political conservatives, for whom innate suspicion of the "lamestream media" is an article of established faith.⁶⁸ This generates effects even more pernicious than bipartisan attacks on the media, who are increasingly seen not as muckrakers, but as politically motivated operatives. The journalistic imperative to question governmental action is thus seen not as useful skepticism, but as thinly disguised bias.

Loss of trust in established media sources is just one aspect of a more generalized sense of distrust of traditional institutions. Earlier this year, *The Atlantic* examined the origins of widespread loss of faith in institutions and how this change powers the populist surge in American politics.⁶⁹ Uri Friedman—writing for *The Atlantic*—highlighted a multi-year study⁷⁰ by Edelman (a global communications firm) tracking citizens' faith in four key institutions: government, business, NGOs, and media. He noted that "[t]he report theorized that trust levels began declining as a result of the 2008 financial crisis

⁶⁵ See Sydney Ember & Michael M. Grynbaum, *At CNN, Retracted Story Leaves an Elite Reporting Team Bruised*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/business/media/cnn-retraction-trump-scaramucci.html>.

⁶⁶ On salience, see generally Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 692-94 (2006); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE 24-26, 33-34 (2008).

⁶⁷ See, e.g., Bernie Sanders, *How Corporate Media Threatens Our Democracy*, IN THESE TIMES (Jan. 26, 2017), <http://inthesetimes.com/features/bernie-sanders-corporate-media-threatens-our-democracy.html>; Michael Corcoran, *Twenty Years of Media Consolidation Has Not Been Good For Our Democracy*, MOYERS & CO. (Mar. 30, 2016), <http://billmoyers.com/story/twenty-years-of-media-consolidation-has-not-been-good-for-our-democracy/>.

⁶⁸ See Andy Barr, *Palin Trashes "Lamestream Media"*, POLITICO (Nov. 18, 2009), <http://www.politico.com/story/2009/11/palin-trashes-lamestream-media-029693>.

⁶⁹ Uri Friedman, *Why Trump is Thriving in an Age of Distrust*, THE ATLANTIC (Jan. 20, 2017), <https://www.theatlantic.com/international/archive/2017/01/trump-edelman-trust-crisis/513350/>.

⁷⁰ *2017 Edelman Trust Barometer*, EDELMAN, <https://www.edelman.com/trust2017/> (last visited Mar. 15, 2018).

and have continued to suffer as globalization and new technologies increase people's concern about their job security and future economic and social status."⁷¹ Here, too, attacks on expertise have been launched from both sides of the political aisle. Critics on the American political left believe that experts are covering up the harmful effects of vaccines⁷² or genetically modified foods,⁷³ despite the utter absence of reliable scientific data to support such claims.⁷⁴ (Indeed, the principal study cited in support for the claim that vaccines cause autism was revealed to have been invented by its author.)⁷⁵ Critics on the right doubt that the planet is warming,⁷⁶ or that human actions play an important role in climate change,⁷⁷ or reject evolution in favor of creationism.⁷⁸ The scientific method is respected only when its results conform to critics' prior commitments, rational or not.

Accompanying the loss of faith in experts is a distrust of their tools (data and statistics). Will Davies points to this loss of faith in statistics as a defining feature of fake news. Davies suggests that "[t]he declining authority of statistics and the experts who analyze them—is at the heart of the crisis that has become known as 'post-truth.'"⁷⁹ The distrust of statistics signals increasing polarization and problems for democracy more

⁷¹ Friedman, *supra* note 69.

⁷² See, e.g., Sarah Kaplan, *The Truth About Vaccines, Autism and Robert F. Kennedy Jr.'s Conspiracy Theory*, WASH. POST (Jan. 10, 2017), https://www.washingtonpost.com/news/speaking-of-science/wp/2017/01/10/the-facts-about-vaccines-autism-and-robert-f-kennedy-jr-s-conspiracy-theory/?utm_term=.f35d35c13357.

⁷³ See, e.g., Jeffrey Smith, *10 Reasons to Avoid GMOs*, INST. RESPONSIBLE TECH. (Aug. 25, 2011), <http://responsibletechnology.org/10-reasons-to-avoid-gmos/>.

⁷⁴ See, e.g., *Genetically Engineered Crops: Experiences and Prospects*, NAT'L ACAD. SCIS. (2016), <https://www.nap.edu/catalog/23395/genetically-engineered-crops-experiences-and-prospects>; Stanley Plotkin, Jeffrey S. Gerber, & Paul A. Offit, *Vaccines and Autism: A Tale of Shifting Hypotheses*, 48 CLINICAL INFECTIOUS DISEASES 456, 460 (2009).

⁷⁵ Laura Eggertson, *Lancet Retracts 12-Year-Old Article Linking Autism to MMR Vaccines*, 182 CAN. MED. ASS'N J. E199–200 (2010).

⁷⁶ See, e.g., Justin Haskins, *The 6 Biggest Reasons I'm a Climate-Change Skeptic — and Why You Should be a Skeptic Too*, THE BLAZE (July 23, 2017, 6:30 PM), <http://www.theblaze.com/news/2017/07/23/commentary-the-6-biggest-reasons-im-a-climate-change-skeptic-and-why-you-should-be-a-skeptic-too>.

⁷⁷ See, e.g., Steven Mufson, *Rick Perry Just Denied That Humans are the Main Cause of Climate Change*, WASH. POST (June 19, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/06/19/trumps-energy-secretary-just-denied-that-man-made-carbon-dioxide-is-the-main-driver-for-climate-change/?utm_term=.37367ef7089a.

⁷⁸ See, e.g., CREATION MUSEUM, <https://creationmuseum.org/creation-science/>; Ronald Bailey, *How Do the Republican Candidates Score On Science?*, NEWSWEEK (Apr. 9, 2015, 12:08 PM), <http://www.newsweek.com/how-do-republican-candidates-score-science-321020>.

⁷⁹ William Davies, *How Statistics Lost Their Power—And Why We Should Fear What Comes Next*, THE GUARDIAN (Jan. 19, 2017, 1:00 PM), <https://www.theguardian.com/politics/2017/jan/19/crisis-of-statistics-big-data-democracy>.

generally. Trust in data and statistics is a precondition to being able to resolve disputes about the world—they allow participants in policy debates to operate at least from a shared reality. Instead of resolving competing claims about the world, “statistics may actually be stoking them.”⁸⁰ Merely introducing empirical evidence can alienate people who have come to view statistics as elitist.

While total loss of faith in statistics may be unwarranted, the pall of uncertainty that surrounds our future has cast doubt on the legitimacy of some forms of reasoning (and their capacity to predict “true” facts about the world) and the experts who deploy them. Philosophers—since the Pyrrhonian skeptics of Ancient Greece—have questioned inductive reasoning’s ability to predict true facts about the world. David Hume famously critiqued inductive reasoning by claiming that induction relies on a “principle of uniformity of nature” which assumes that laws and processes governing nature have operated and will continue to operate in the same way. Because the uniformity of nature cannot be proven without reference to induction, inductive reasoning itself is suspect. The uncertain future created by financial crisis and climate change has undermined the predictive power of models that rely on historical data and assumptions about features of the world that once had the force of law. Our current crises have upended these fundamental assumptions leading us to wonder if the principle of uniformity still holds (and whether induction is still valid)

This idea is not entirely new—at least for climate change. Academics in both the humanities and sciences have suggested that we are living in an entirely new ecological epoch called the Anthropocene.⁸¹ “Dipesh Chakrabarty, a theory-minded historian at the University of Chicago, proposes that the Anthropocene throws into question all received accounts of human history, from Whiggish optimism to his own post-colonial postmodernism.”⁸² Whether or not we believe the Anthropocene is a useful theoretical concept or rightly indicates a radical break marking a new ecological era, our models have been thrown into question. Consider, for example, how recent super-storms like Sandy in 2012, or Hurricanes Harvey, Irma, and Maria in 2017, were incredibly low-probability events that nonetheless occurred. A *Washington Post* article examines this link:

⁸⁰ *Id.*

⁸¹ See Jedediah Purdy, *Anthropocene Fever*, AEON (Mar. 31, 2015), <https://aeon.co/essays/should-we-be-suspicious-of-the-anthropocene-idea>.

⁸² *Id.*

In the case of Superstorm Sandy in 2012, the storm's particular path—a beeline toward New Jersey, rather than out to sea—was abnormal. Atlantic hurricanes often “recurve” and flow away from the United States as they travel farther northward. Sandy did the opposite.

In one analysis, NASA's Timothy Hall and Columbia University's Adam Sobel found that Sandy's sharp turn toward New Jersey is expected to happen only once every 714 years, based on the history of Atlantic storms.

The result “implies either that the New York-New Jersey area simply experienced a very rare event (with climate change playing no significant role), or that a climate-change influence increased the probability of its occurrence,” they wrote in a 2013 study on Sandy's angle of approach.⁸³

A. Postmodernism and Pyrrhic Victories

The decline in respect for institutions and experts, and the concomitant rise of fake news, represents in part a counterrevolution against postmodernism. Simplifying greatly, the postmodern trend in assessing scientific and empirical methods, such as that exemplified by the sociology of scientific knowledge movement, sought (largely successfully) to undercut the traditional, positivist account of how we generate factual information about the world.⁸⁴ In the nineteenth and early twentieth centuries, science was seen as an unbiased method for interrogating the natural world. Observation by ever-improving instruments brought scientists continually closer—even if in halting fashion—to truth. One example is Imre Lakatos's work on the philosophy of mathematics.⁸⁵ For Lakatos, mathematics advanced through a gradual progression of proof, counterexample, and adjustment.⁸⁶ While mathematical theorems might never be complete, their history was one of ever-increasing accuracy. On this standard account, scientific

⁸³ Chris Mooney, *Karina. Sandy. Harvey. The Debate Over Climate and Hurricanes is Getting Louder and Louder.*, WASH. POST (Aug. 30, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/08/30/katrina-sandy-harvey-the-debate-over-climate-and-hurricanes-is-getting-louder-and-louder/?utm_term=.a07fd40b81b0.

⁸⁴ See generally Steven Shapin, *Here and Everywhere: Sociology of Scientific Knowledge*, 21 ANN. REV. SOC. 289 (1995).

⁸⁵ IMRE LAKATOS, PROOFS AND REFUTATIONS: THE LOGIC OF MATHEMATICAL DISCOVERY (1976).

⁸⁶ *Id.*

knowledge might be wrong or mistaken, but it always had a clear referent: knowledge could be compared to the hard facts of the universe.⁸⁷ Issues such as culture or societal structure were irrelevant to scientific pursuits.⁸⁸

The sociology of scientific knowledge sought to debunk this view of scientific practice, which it regarded as hopelessly (perhaps even deliberately) naïve. As sociologist Steven Epstein describes it, this work “revealed the cultural shaping of that which came to be called scientific fact.”⁸⁹ Bruno Latour and Steve Woolgar, whose study of research at the Salk Institute for Biological Studies is a classic in the field, rejected a firm distinction between social and technical aspects of science, treating the divide as something to explain rather than an explanation.⁹⁰ The larger goal was to drag scientific conclusions off a positivistic pedestal and to subject them to the same sociological and cultural analysis that other forms of knowledge undergo.⁹¹ Latour and Woolgar set out a bold claim: “the very act of perception is constituted by prevalent social forces.”⁹² David Bloor, one of the founders of the Strong Programme in the discipline, took a correspondingly strong position: knowledge “consists of those beliefs which men confidently hold to and live by . . . [particularly] beliefs which are taken for granted or institutionalised, or invested with authority by groups of men.”⁹³ Scholars in this area sought to understand not only how scientists arrived at judgments regarding competing claims to truth, but also how they gained wider societal acceptance of those judgments.⁹⁴

The work of the sociology of scientific knowledge is easily misunderstood as a sort of complete relativism. Some of its adherents are not helpful on this score. For example, Paul Feyerabend wrote that “a unified theory of the physical world simply does not exist,”⁹⁵ and famously defended witchcraft.⁹⁶

⁸⁷ See Steven Epstein, *Rethinking Knowledge, Power, Materiality, and Nature*, 619 ANNALS 165, 167–68 (2008).

⁸⁸ See generally ROBERT K. MERTON, *THE SOCIOLOGY OF SCIENCE* (1973); BRUNO LATOUR & STEVE WOOLGAR, *LABORATORY LIFE: THE CONSTRUCTION OF SCIENTIFIC FACTS* 23 (2d ed. 1986) (describing how “the procedures and achievements central to scientists’ work become largely immune from sociological explanation”).

⁸⁹ Epstein, *supra* note 87, at 168.

⁹⁰ LATOUR & WOOLGAR, *supra* note 88, at 23–27.

⁹¹ See *id.* at 31 (stating that scientific creativity “does not refer to the special abilities of certain individuals to obtain greater access to a body of previously unrevealed truths; rather it reflects our premise that scientific activity is just one social arena in which knowledge is constructed”).

⁹² *Id.* at 33 (describing factors affecting discovery of pulsars).

⁹³ DAVID BLOOR, *KNOWLEDGE AND SOCIAL IMAGERY* 2–3 (1976).

⁹⁴ See, e.g., Epstein, *supra* note 87, at 168–69; BRUNO LATOUR, *SCIENCE IN ACTION: HOW TO FOLLOW SCIENTISTS AND ENGINEERS THROUGH SOCIETY* (1987).

⁹⁵ PAUL K. FEYERABEND, *FAREWELL TO REASON* 100 (1987).

⁹⁶ See ERIC OBERHEIM, *FEYERABEND’S PHILOSOPHY* 280 (2006).

However, scientific knowledge is not arbitrary, even for sociologists in this tradition. Rather, it is the culmination of a process in which the distinctions between sound observation and irrelevant error, between failed attempt and heroic advance, and between valid and invalid arguments are governed not merely by the data, but by science as a socially organized activity. What the sociology of scientific knowledge and similar disciplines seek to do is to focus attention on how the acceptance of certain information as accurate for scientists depends upon a social consensus in that community.

Postmodern critics have been surprised and then displeased to see their approach co-opted for causes of which they do not approve, such as climate change skepticism.⁹⁷ If knowledge is socially constructed, then climate scientists need not have the last word on whether the planet is warming, and indeed the data and theory used to show climate change can be attacked as biased.⁹⁸ Inconvenient facts do not have to be explained away; instead, they can be ignored or simply controverted. This approach can be employed as a stalling tactic, to undercut a scientific consensus, or as a counterattack, by constructing alternative claims and data.⁹⁹ Both sides of America's political spectrum bear responsibility for nourishing the postmodern challenge to empiricism, though it has become established much more firmly among political conservatives.¹⁰⁰ This assault on the construction of data about the world inherently undercuts gatekeepers: there is no longer hegemony for experts—or indeed anyone—about what constitutes a fact.

III. A CAUTIONARY NOTE ON INTERVENTIONS

Everybody complains about the weather, but nobody does anything about it.

– Charles Dudley Warner

⁹⁷ The anger is sometimes palpable. See, e.g., Chris Mooney, *Once and For All: Climate Denial is Not Postmodern*, DISCOVER (Feb. 28, 2011, 1:25 PM), <http://blogs.discovermagazine.com/intersection/2011/02/28/once-and-for-all-climate-denial-is-not-postmodern/>.

⁹⁸ See Bruno Latour, *Why Has Critique Run Out of Steam? From Matters of Fact to Matters of Concern*, 30 CRITICAL INQUIRY 225, 226–27, 231–32 (2004).

⁹⁹ See generally, e.g., Marcel Kuntz, *The Postmodern Assault on Science*, 13 EMBO REP. 885 (2012) (documenting controversy over genetically modified organisms).

¹⁰⁰ See, e.g., Shawn Otto, *A Plan to Defend Against the War on Science*, SCI. AM. (Oct. 9, 2016), <https://www.scientificamerican.com/article/a-plan-to-defend-against-the-war-on-science/>; Judith Warner, *Fact-Free Science*, N.Y. TIMES MAG. (Feb. 25, 2011), http://www.nytimes.com/2011/02/27/magazine/27FOB-WWLN-t.html?_r=2&ref=magazine.

Sometimes things should be left undone. This Essay seeks to prove that the problem of fake news is far more complex than typically portrayed; it is grounded in long-term political and sociological changes in America rather than in very recent technological or jurisprudential changes. Complex problems typically lack simple answers, and fake news is no exception. The last service this Essay hopes to provide is to throw some sand into the gears of reform, because fast or straightforward fixes will likely make matters worse.

A. Platform Problems

Changing social media platforms—via legal mandates, alterations to code, or both—cannot solve larger issues around distrust of gatekeepers and experts. But even if it could, critics of Facebook and Twitter and other currently popular platforms are long on rhetoric and short on practical advice. First, they rarely offer a principled approach to defining “fake news,” other than that it is whatever runs counter to their own beliefs. Evaluating the problem as “fake news for thee but not for me” does not help much; there is too much data uploaded to Facebook and its ilk for human referees to evaluate more than a miniscule fraction of it, and individual judgments are hard to reduce to a set of algorithmic rules.¹⁰¹ My views on the risk of brain cancer from cellular phones are grounded in science, whereas yours about the uncertainty of anthropogenic climate change are bunk.¹⁰² Everyone from President Trump to Denver Broncos general manager John Elway has their own opinion of what constitutes fake news, and that makes it impossible for platforms to craft a fix that will satisfy all comers.¹⁰³

Second, even if one can elucidate a workably concise definition of fake news, it is not clear how platforms can practically implement changes to how they handle

¹⁰¹ Cf. NAT HENTOFF, *FREE SPEECH FOR ME—BUT NOT FOR THEE* (1992). Facebook alone gets more than 600TB of new data uploaded to its servers each day. Pamela Vagata & Kevin Wilfong, *Scaling the Facebook Data Warehouse to 300 PB*, FACEBOOK: CODE (Apr. 10, 2014), <https://code.facebook.com/posts/229861827208629/scaling-the-facebook-data-warehouse-to-300-pb/>.

¹⁰² SEE BOB EGELKO, *BERKELEY CELL PHONE WARNING LAW UPHELD BY FEDERAL APPEALS COURT*, SFGATE (APR. 21, 2017, 4:41 PM), <http://www.sfgate.com/bayarea/article/Berkeley-cell-phone-warning-law-upheld-by-federal-11090621.php>; see generally Jane Bambauer, Jonathan Loe, & D. Alex Winkelman, *A Bad Education*, 2017 U. ILL. L. REV. 109 (2017).

¹⁰³ See, e.g., David Jackson & Donovan Slack, *Trump Slams “Fake News” and “Politically Motivated Ingrates” for Criticizing Puerto Rico Aid Efforts*, USA TODAY (Oct. 1, 2017, 8:55 AM), <https://www.usatoday.com/story/news/politics/2017/10/01/trump-resumes-defense-puerto-rico-disaster-response-apparent-attack-san-juan-mayor/720922001/>; *Broncos’ John Elway Refutes QB Trade Rumor with “Fake News” Tweet*, DENV. POST (Aug. 9, 2017, 9:32 AM), <http://www.denverpost.com/2017/08/09/john-elway-fake-news-tweet/>.

information—or, indeed, what those changes ought to be. As we argue elsewhere, the rubric “fake news” covers a number of species of false information.¹⁰⁴ To separate satirical *The Onion* articles from political hoaxes by Macedonian teenagers, one must assess inchoate, subjective concepts such as intent and motivation.¹⁰⁵ Software code is poor at this type of subjective analysis; indeed, there is a cottage industry that revolves around criticizing algorithms along precisely these lines.¹⁰⁶ Platforms that try to purge fake news will inevitably generate both false positive and false negative results, which will irritate users and empower critics. Removing erroneous stories can disempower users, particularly ones from marginalized communities.¹⁰⁷ Adding context, such as by tagging stories as fake news, may not affect new readers and may reinforce existing beliefs of adherents. Either course risks the loss of viewers and concomitant advertising revenues—an unattractive option for publicly-traded companies with shareholders to satisfy. Thus, it is not clear how companies ought to evaluate new information programmatically, nor how they should handle data deemed unreliable.

B. First Amendment Fears

Many critics argue that if diplomacy does not work to force platforms and others to fix fake news, government ought to be allowed to have recourse to the whip hand of legal regulation to force them to do so.¹⁰⁸ The obvious barrier is the First Amendment and its attendant statutes that protect expression against governmental intervention. While scholars still joust over whether search engines and social media sites should enjoy free speech protection, the reality is that the current Supreme Court is, and will likely continue to be, highly skeptical of regulation of expression. And, online publishers are immune from most civil and state criminal liability for content created by others based on

¹⁰⁴ See Mark Verstraete, Derek E. Bambauer, & Jane R. Bambauer, *Identifying and Countering Fake News* 5–8 (Ariz. Legal Studies Discussion Paper No. 17-15, 2017), <https://ssrn.com/abstract=3007971>.

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION* (2016); FRANK PASQUALE, *THE BLACK BOX SOCIETY* (2015); Solon Barocas & Andrew D. Selbst, *Big Data’s Disparate Impact*, 104 CAL. L. REV. 671 (2016); Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014).

¹⁰⁷ See, e.g., Julia Angwin & Hannes Grassegger, *Facebook’s Secret Censorship Rules Protect White Men From Hate Speech But Not Black Children*, PROPUBLICA (June 28, 2017), <https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms>.

¹⁰⁸ Cf. John Herrman, *What if Platforms Like Facebook Are Too Big to Regulate?*, N.Y. TIMES MAG. (Oct. 4, 2017), <https://www.nytimes.com/2017/10/04/magazine/what-if-platforms-like-facebook-are-too-big-to-regulate.html>.

federal telecommunications law.¹⁰⁹ While the political right is beginning to warm to the idea of regulating Internet intermediaries, creating the potential for an alliance of convenience with critics from the left, legislative changes that put platforms at greater risk of liability still face a difficult path.¹¹⁰

The solution for some critics, such as Richard Hasen (in this volume), is to reconfigure First Amendment jurisprudence. Hasen is suitably cautious about advancing the particulars of this renovation,¹¹¹ but we are skeptical about such tinkering, for a number of reasons. The first is that speech regulation has an ugly history; it tends to be deployed to suppress minority and marginalized communities, rather than to defend them against abuses.¹¹² It is a dangerous weapon to deploy; today's pressing necessity may seem far less urgent in retrospect, and governments may take advantage of those seeming needs to forcibly quiet critics.¹¹³ Second, the anti-subordination approach to the First Amendment rests upon a number of assumptions that are practically and logically questionable.¹¹⁴ It posits that political actors (the legislature and the executive) will act to reduce the speech of politically powerful groups and to increase the speech of marginalized ones. The risk, then, comes from a

¹⁰⁹ 47 U.S.C. § 230 (2012); see also David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOYOLA L.A. L. REV. 373, 453, 456 (2010).

¹¹⁰ See generally April Glaser, *The Internet of Hate*, SLATE (Aug. 30, 2017), <https://slate.com/technology/2017/08/the-alt-right-wants-to-build-its-own-internet.html> (describing calls from conservative leaders to regulate intermediaries); see also Eric Goldman, *Senate's "Stop Enabling Sex Traffickers Act of 2017"—and Section 230's Imminent Evisceration*, TECH. & MKTG. LAW BLOG (July 31, 2017), <http://blog.ericgoldman.org/archives/2017/07/senates-stop-enabling-sex-traffickers-act-of-2017-and-section-230s-imminent-evisceration.htm>.

¹¹¹ Hasen, *supra* note 6, at 222 (recognizing potential First Amendment challenges to laws combatting fake news, yet also arguing that the First Amendment doctrine should not bar “carefully drawn laws which would require social media and search companies such as Facebook and Google, to provide certain information to let consumers judge the veracity of posted details”). However, with free speech jurisprudence, the devil is definitely in the details. See William Safire, *On Language: Who's in Those Details*, N.Y. TIMES (July 30, 1989), <http://www.nytimes.com/1989/07/30/magazine/on-language-who-s-in-those-details.html> (tracing etymology of phrase); see also Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335 (2017).

¹¹² See Bambauer & Bambauer, *supra* note 111, at 343–44.

¹¹³ See Derek E. Bambauer, *Backwards and Forwards*, in Ronald K.L. Collins, *FAN 156 (First Amendment News) Special Post: The Espionage Act at the 100 Year Mark: Commentaries by Bambauer, Chemerinsky, Stone & Vladeck*, CONCURRING OPS. (June 15, 2017), <https://concurringopinions.com/archives/2017/06/fan-156-first-amendment-news-special-post-the-espionage-act-at-the-100-year-mark-commentaries-by-bambauer-chemerinsky-stone-vladeck.html>.

¹¹⁴ On the anti-subordination approach, see Charles R. Lawrence III, *Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment*, 37 VILL. L. REV. 787 (1992); Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010); Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).

judiciary that could invalidate these speech regulations based on First Amendment doctrine—even though the judiciary is generally viewed as a countermajoritarian check.¹¹⁵ This prediction is bizarrely anti-majoritarian: it posits that majority political groups will intentionally work to benefit minority ones—a prediction that runs counter to logic and experience. Anti-subordination concentrates on the wrong actors and reaches the wrong conclusions. It holds that if judges, especially federal judges, would only see the light, then desirable information regimes become possible. This at once proves too much and too little: too much, because it assumes that admittedly marginalized groups will have success in achieving legislation that advances their interests (which seems particularly implausible for progressives at present in light of the structural disadvantages they face in national politics); and too little, because if these groups can influence the political process, then presumably that process will produce like-minded judges in time, so the need for anti-subordination evaporates. Moreover, even strict scrutiny analysis allows sufficiently well-justified and well-tailored speech rules to survive; anti-subordination goals might prove to be a compelling interest that warrants governmental intervention.¹¹⁶ And, this approach has to assume that judges can and do see through unwarranted attempts to claim the mantle of a subordinated group. Political conservatives have begun to do exactly this—in Silicon Valley, in Washington D.C., and elsewhere.¹¹⁷ Climate change skeptics are a minority, but hardly a subordinated one. If any of these assumptions founder, the anti-subordination approach runs the risk of generating results that undercut its goals.

Finally, widening the ambit of governmental regulation of information could generate adverse consequences internationally. American rules that restrict speech reduce the country's ability to combat censorship by other nations, even

¹¹⁵ See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1986).

¹¹⁶ Cf. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969) (upholding FCC Fairness Doctrine's equal times requirement for radio broadcasters); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 40 (2010) (upholding restriction on material support to designated terrorist groups, including via speech, under strict scrutiny); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1665 (2015) (“A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.”).

¹¹⁷ See Kate Conger, *Exclusive: Here's The Full 10-Page Anti-Diversity Screed Circulating Internally at Google [Updated]*, GIZMODO (Aug. 5, 2017, 4:30 PM), <https://gizmodo.com/exclusive-heres-the-full-10-page-anti-diversity-screed-1797564320>; Hans Bader, *Another Court Ruling Confirms IRS Illegally Targeted Tea Party and Conservative Groups*, COMPETITIVE ENTER. INST. (Nov. 21, 2016), <https://cei.org/blog/another-court-ruling-confirms-irs-illegally-targeted-tea-party-and-conservative-groups>.

when other states' efforts are far more heavy-handed and wide-ranging.¹¹⁸ Efforts to coordinate an international cybersecurity regime have foundered in part on Russia's insistence that such a compact address "information war," which that country defines to include threats from unwanted political messages.¹¹⁹

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¹¹⁸ See Derek E. Bambauer, *Orwell's Armchair*, 79 U. CHI. L. REV. 863, 897–98; Derek E. Bambauer, *Conundrum*, 96 MINN. L. REV. 584, 672 (2011).

¹¹⁹ Tom Gjelten, *Seeing the Internet as an "Information Weapon"*, NPR (Sept. 23, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=130052701>.

FILTERING FAKE NEWS THROUGH A LENS OF SUPREME COURT OBSERVATIONS AND ADAGES

Clay Calvert[⊗] & Austin Vining[∇]

ABSTRACT

This Essay analyzes multiple issues affecting fake news. It does so through a prism of seven observations by the U.S. Supreme Court concerning the First Amendment, free speech, and other matters. The Court's wisdom in these quotations provides propitious points of entrée for exploring how to address and remedy problems many fear fake news causes. The Essay concludes that because fake news will never be eradicated from the metaphorical marketplace of ideas, greater effort must be spent making real news—fake news's constructive flipside—more appetizing to the public.

INTRODUCTION

Gallons of ink flooded the popular press in 2016 and 2017 regarding the supposed scourge of a nebulous, moving-target phenomenon dubbed fake news.¹ President Donald J. Trump unabashedly adopted—perhaps, co-opted—the moniker

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¹ See, e.g., Diane Carman, *When Times Are Too Scary, It's Time to Make Merry*, DENV. POST, Dec. 25, 2016, at 4D (“Fake news makes us think twice about the real stuff. When leaders convince us all news is a lie, it's easy to trick us and even defy the rules and traditions on which we depend to make sure no one brings our laws to an end.”); Jessica Guynn, *Facebook Users Are Fed Up With Fake News*, USA TODAY, Dec. 19, 2016, at 3B (asserting that “[f]ake news creates significant public confusion about current events”); Neil Irwin, *Fake News? Welcome to 'False Remembering'*, N.Y. TIMES, Jan. 26, 2017, at A3 (citing a study suggesting “that the most straightforwardly fraudulent forms of fake news are a small part of what is shaping how people understand the world”); Deepa Seetharaman, *Facebook Commits to 'News Literacy'*, WALL ST. J., Jan. 12, 2017, at B3 (reporting that “Facebook said it would aim to curb fake news through partnerships with fact-checking organizations and tweaks to its algorithm”); Mike Snider, *Fake News Spread by 23% of Americans, Study Says; More Than 1 in 10 Said They Shared a Story Knowing It Was Fake*, USA TODAY, Dec. 16, 2016, at 4B (explaining how “[f]ake stories and information” became “real news stories . . . as they permeated the . . . U.S. presidential election cycle”).

to relentlessly tar and feather entire news organizations that don't support his views or share his agenda.²

Trump's take is profoundly ironic. That's because some liberals blamed fake news for Hillary Clinton's stunning November 2016 loss to Trump,³ while Clinton claimed fake news needed government action.⁴ Isolated anecdotes, such as a shooting at a pizzeria in Washington, D.C.,⁵ fueled panic and ostensibly demonstrated fake news's supposedly direct, powerful, and immediate effects on the easily fooled, unenlightened masses.⁶ Fake news became a deceitful digital

² See, e.g., The Times Editorial Bd., Editorial, *The Problem with Trump: The War on Journalism*, L.A. TIMES, Apr. 6, 2017, at A12 (asserting that Trump "has regularly condemned legitimate reporting as 'fake news'"); Paul Farhi, *President Trump and the Media, From A to Z*, WASH. POST, July 21, 2017, at C1 ("Trump's demonization of reporters and news organizations – fake news! failing media! failing fake news media! – has become as routine as a morning coffee."); Paul Farhi, *At News Conference, Trump Calls BuzzFeed 'Garbage' and CNN 'Fake News'*, WASH. POST, Jan. 12, 2017, at C3 (quoting National Press Club in Washington President Thomas Burr saying that it's "dangerous and unhealthy to declare a news item as 'fake news' to distract from facts that you may not like or don't favor your perspective"); Laura King, *Democrats Pounce on Trump Jr.; President's Opponents See a Potential Turning Point in the Russia Inquiry, and Sinking Polls Add to His Woes.*, L.A. TIMES, July 17, 2017, at A1 (quoting a tweet by President Trump in which he wrote that "my son Don is being scorned by the Fake News Media"); Linda Qui, *After Denouncing 'Fake News,' a Catalog of Falsehoods*, N.Y. TIMES, Feb. 25, 2017, at A12 (quoting President Donald Trump saying "I want you all to know that we are fighting the fake news" and "[t]hey have a professional obligation as members of the press to report honestly").

³ See John Herrman, *Fixation on Fake News Obscures a Waning Trust in Real Reporting*, N.Y. TIMES, Nov. 19, 2016, at B1 ("For many people, and especially opponents of President-elect Donald J. Trump, the attention paid to fake news and its role in the election has provided a small relief, the discovery of the error that explains everything."); Stacy Washington, *Current Refrain from Election Result Deniers: 'Blame the Russians'*, ST. LOUIS POST-DISPATCH, Dec. 16, 2016, at A17 (writing that "Democrats have offered *fake news*, misogyny, sexism, racism and now those dastardly Russians as reasons for their candidate's loss") (emphasis added).

⁴ See Paul Kane, *Hillary Clinton Attacks 'Fake News' in Post-Election Appearance on Capitol Hill*, WASH. POST (Dec. 8, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/12/08/hillary-clinton-attacks-fake-news-in-post-election-appearance-on-capitol-hill> (reporting that during a December, 2016, speech, "Clinton voiced support for some federal legislation to address the 'fake news' issue").

⁵ See generally Jessica Gresko, *Suspect in D.C. Pizzeria*, BALT. SUN, Dec. 14, 2016, at A10 (noting that Edgar Maddison Welch had been jailed "since the Dec. 4 shooting at Comet Ping Pong, which has been targeted by purveyors and consumers of fake news who spread false rumors that it's the site of a child sex trafficking ring run by prominent Democrats"); Michelle Hackman, *Trump Transition Team: Gen. Flynn's Son No Longer Involved*, WALL. ST. J., Dec. 7, 2016, at A4 (reporting that "[d]iscredited online conspiracy theories had alleged the Comet Ping Pong pizza restaurant in Washington was at the center of a child sex-trafficking ring tied to Hillary Clinton").

⁶ See Peter Hermann et al., *Deluded into a D.C. 'Hero Mission'?*, WASH. POST, Dec. 6, 2016, at A1 (noting that "[f]amily and friends said they are struggling to understand how [Edgar Maddison] Welch apparently became so fixated on a fake news story that he drove from North Carolina with a Colt long rifle, a .38-caliber revolver and a shotgun, determined to take action"); Cecelia Kang & Adam Goldman, *Fake News Brought Real Guns in Washington Pizzeria Attack*, N.Y. TIMES, Dec. 6, 2016, at A1 (asserting that "[t]he shooting underscores the stubborn lasting power of fake news

bogeyman, problematically prowling a political playing field pockmarked by partisanship and lurking whenever a falsehood spread like wildfire on Facebook or went viral on Twitter.

This Essay examines fake news and possible ways to combat it. Seven quotations by the United States Supreme Court—sentiments drawn from opinions spanning nearly a century—guide the analysis. Each quote supplies an entry point for analyzing either a different facet of fake news or possible responses to it. Those responses, in turn, may or may not jibe with traditional conceptions of the First Amendment⁷ and free expression embraced by the nation's high court. Ultimately, turning to the logic and reasoning of the justices embodied in these quotations offers a tidy framework for systematically addressing a fret-provoking subject.

I. “[O]NE MAN’S VULGARITY IS ANOTHER’S LYRIC.”⁸

This statement flows from the Court’s 1971 ruling in the “fuck-the-draft” case of *Cohen v. California*.⁹ There, the quotation tapped directly into the vagueness issues and definitional difficulties afflicting the statutory phrase “offensive conduct”¹⁰ and whether, in turn, “fuck” fell within that

and how hard it is to stamp out,” and adding that “[d]ebunking false news articles can sometimes stoke the outrage of the believers, leading fake news purveyors to feed that appetite with more misinformation”). The notion that media messages have direct, powerful and uniform effects on relatively passive audiences evokes the simplistic and outdated “hypodermic needle” or “magic bullet” theory of communication effects. See JENNINGS BRYANT ET AL., *FUNDAMENTALS OF MEDIA EFFECTS* 52 (2d ed. 2012) (observing that in “the early years of scientific effects studies in the 20th century, powerful effects were assumed by many. The powerful impact of media messages on audiences was likened to firing a bullet or injecting a drug, which gave rise to the bullet theory or hypodermic needle theory of mass communication.”).

⁷ The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated more than ninety years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁸ *Cohen v. California*, 403 U.S. 15, 25 (1971).

⁹ *Id.*

¹⁰ CAL. PENAL CODE § 415(3). The current version of the statute uses the phrase “offensive words” instead of “offensive conduct,” and it only restricts “offensive words” in fighting-words scenarios when they “are inherently likely to provoke an immediate violent reaction.” CAL. PENAL CODE § 415 (Deering 2017). Fighting words are one of the few categories of speech not safeguarded by the First Amendment. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). The U.S. Supreme Court opined seventy-five years ago that:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or

definition.¹¹ More than forty-five years later, the quotation affords an ideal starting point for tackling fake news, forcing one to precisely define what comprises this invasive, inchoate commodity.

One person's fake news, after all, is another's entertainment. Or another's satire¹² or bias or spin or lie or libel¹³ or . . . maybe just, in the weaselly words of White House senior adviser Kellyanne Conway in January 2017, "alternative facts."¹⁴ Is fake news, then, even a useful term, or is it a non-starter for discussing a pox purportedly plaguing politics and victimizing vapid, vacuous voters?

For example, Dave Itzkoff asserted in the *New York Times* that "[t]he phrase 'fake news' has now been used so liberally, it's meaningless."¹⁵ That's partly the situation because, as another column in that paper notes, "Trump and his allies in the right media have already turned the term 'fake news' against its critics, essentially draining it of any meaning."¹⁶ In legal parlance, the term fake news is ripe for a void-for-vagueness challenge unless a precise definition accompanies it.¹⁷

At the most rudimentary level, fake news is a speech-based phenomenon. It typically features words and may involve images. The First Amendment, thus, is relevant to the extent that curtailing fake news entails government action targeting its producers and/or disseminators. The possibility of such government regulation is more than speculative. For instance,

"fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571–72.

¹¹ *Cohen*, 403 U.S. at 17.

¹² See Meital Balmas, *When Fake News Becomes Real: Combined Exposure to Multiple News Sources and Political Attitudes of Inefficacy, Alienation, and Cynicism*, 41 COMM. RES. 430, 431 (2014) (noting that "satirical news-programs" have been referred to as "fake news" in the literature of media-effects scholars).

¹³ See Steven Seidenberg, *Lies and Libel: Fake News is Just False, But Its Cure May Not Be So Simple*, A.B.A. J., July 2017, at 48 (addressing libel lawsuits as one potential remedy for fake news).

¹⁴ Jim Rutenberg, *The Costs of Trump's Brand of Reality*, N.Y. TIMES, Jan. 23, 2017, at B1.

¹⁵ Dave Itzkoff, *The Same Show, But a Changed World*, N.Y. TIMES, Feb. 8, 2017, at C1.

¹⁶ Charles J. Sykes, Opinion, *The Right that Cried Wolf*, N.Y. TIMES, Feb. 5, 2017, at SR1.

¹⁷ See *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (observing that "it is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined" such that they fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 987 (5th ed. 2015) ("A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted.").

California Assembly Bill 1104—as originally introduced in February 2017—would have made it:

unlawful for a person to knowingly and willingly make, publish or circulate on an Internet Web site, or cause to be made, published, or circulated in any writing posted on an Internet Web site, a false or deceptive statement designed to influence the vote on either of the following: (A) any issue submitted to voters at an election. (B) Any candidate for election to public office.¹⁸

This language was later eliminated when the bill was amended in April 2017.¹⁹ But before even considering such a drastic remedial step that surely would face a steep, uphill constitutional battle—political speech lies at the core of the First Amendment,²⁰ the Supreme Court safeguards lies without

¹⁸ A.B. 1104, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (as introduced by Assembly Member Chau, Feb. 17, 2017).

¹⁹ *Id.* (as amended by Assembly Member Chau, April 19, 2017). The bill was amended to remove the above-quoted text, but it retained language extending the state’s “political cyberfraud” law to protect political candidates. The new bill defines “political cyberfraud” as:

a knowing and willful act concerning a political Web site that is committed with the intent to deny a person access to a political Web site, deny a person the opportunity to register a domain name for a political Web site, or cause a person reasonably to believe that a political Web site has been posted by a person other than the person who posted the Internet Web site, and would cause a reasonable person, after reading the Internet Web site, to believe the site actually represents the views of the proponent or opponent of a ballot measure or of a candidate for public office.

Id. (emphasis added). See *The California Political Cyberfraud Abatement Act: Hearing on A.B. 1104 Before the Assemb. Comm. on Privacy & Consumer Prot.*, 2017–2018 Reg. Sess. (Cal. 2017) (noting opposition from the American Civil Liberties Union of California); *The California Political Cyberfraud Abatement Act: Hearing on A.B. 1104 Before the Assemb. Comm. on Elections & Redistricting*, 2017–2018 Reg. Sess. (Cal. 2017) (noting opposition to the prior version of the bill from the California Newspaper Publishers Association); Dave Maass, *California Bill To Ban “Fake News” Would be Disastrous for Political Speech*, ELEC. FRONTIER FOUND. (Mar. 27, 2017), <https://www.eff.org/deeplinks/2017/03/california-bill-ban-fake-news-would-be-disastrous-political-speech> (writing that the bill’s prior language would “fuel a chaotic free-for-all of mudslinging with candidates and others being accused of crimes at the slightest hint of hyperbole, exaggeration, poetic license, or common error,” and asserting that “[a]t a time when political leaders are promoting ‘alternative facts’ and branding unflattering reporting as ‘fake news,’ we don’t think it’s a good idea to give the government more power to punish speech”).

²⁰ See, e.g., *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1448 (2014) (observing that “the First Amendment safeguards an individual’s right to participate in the public debate through political expression and political association”); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 349 (2010) (“If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was

direct causal proof of harm,²¹ and content-based statutes must pass strict scrutiny²²—one first needs to define the facet of fake news one strives to combat.

The following is a possible definition that the authors of this essay, along with two colleagues, propose in a forthcoming article in another law review.²³ Specifically, we narrowly define fake news as encompassing “only articles that suggest, by both their appearance and content,²⁴ the conveyance of real news,²⁵ but also knowingly include at least one material²⁶ factual

fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

²¹ See *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (observing that there is no “general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.”).

²² See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) (observing that “strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based”).

²³ Clay Calvert et al., *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. (forthcoming 2018).

²⁴ This definition incorporates a reasonable reader standard, akin to that in defamation law, to determine whether an article’s appearance and content suggest it is real news. See, e.g., *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 515 (1991) (concluding that the meaning of a statement in defamation law must be made “by reference to the meaning a statement conveys to a reasonable reader”); *Lynch v. New Jersey Educ. Ass’n*, 735 A.2d 1129, 1136–37 (N.J. 1999) (“If a statement has more than a literal meaning, the critical consideration is what a reasonable reader would understand the statement to mean.”). Variables that might reasonably lead a reader to believe content constitutes a real news article include the presence of a byline, a dateline, short paragraphs, quotations from seemingly authoritative sources, the appearance of objectivity and a layout/presentation format akin to that found on websites of legitimate news websites such as those of the *New York Times*, *Washington Post*, and *Los Angeles Times*. See Eugene Kiely & Lori Robertson, *How to Spot Fake News*, FACTCHECK.ORG (Nov. 18, 2016), <http://www.factcheck.org/2016/11/how-to-spot-fake-news/>.

²⁵ Defining “news” as a stand-alone concept is itself difficult. See, e.g., Robert M. Entman, *The Nature and Sources of News*, in *THE PRESS* 48, 51 (Geneva Overholser & Kathleen Hall Jamieson eds. 2005) (“Journalists, scholars, and the educated public have long thought of news as a more or less self-evident category of media product—the stuff that appears in newspapers, newsmagazines, or on TV shows that have the word ‘news’ in their titles.”); KATHLEEN HALL JAMIESON & KARLYN KOHRS CAMPBELL, *THE INTERPLAY OF INFLUENCE: NEWS, ADVERTISING, POLITICS AND THE INTERNET* 40 (6th ed. 2006) (“Just what is news? Despite many efforts, no neat, satisfactory answer to that question can be given.”). A complete discussion of what constitutes news falls beyond the scope of this essay.

²⁶ The idea that fake news, under this definition, must involve “material” falsity—rather than minor falsity—borrows partly from a recent U.S. Supreme Court decision affecting defamation law. See *Air Wis. Airlines Corp. v. Hooper*, 134 S. Ct. 852, 861 (2014) (“Indeed, we have required more than mere falsity to establish actual malice: The falsity must be ‘material.’”). Additionally, the Federal Trade Commission uses a materiality standard in considering if a misrepresentation or omission of a fact is actionable. See *Fanning v. Fed. Trade Comm’n*, 821 F.3d 164, 172 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 627 (2017) (“The FTC Act imposes liability for misrepresentations only if they are material.”); *Kraft, Inc. v. Fed. Trade Comm’n*, 970 F.2d 311, 322 (7th Cir. 1992) (“A claim is considered material if it ‘involves information that is important to consumers and, hence, likely to affect their choice

assertion that is empirically verifiable as false and that is not otherwise protected by the fair report privilege.”²⁷

Unpacking this definition reveals its narrowness. First, inclusion of the word “articles” is strategic. “Articles” taps into the noun *news* in the term *fake news*. The definition, in turn, applies only to what appear, at least to reasonable readers, to be real news articles. This limitation is important because it correlates with the notion that fake news, as Angie Drobnic Holan of PolitiFact explains, is “masterfully manipulated to look like credible journalistic reports.”²⁸

This definition therefore encompasses content that conveys the impression of being a real news article in print or, more relevantly here, on the Internet. In other words, the definition initially focuses on the noun-based *news* aspect of fake news as much as it does on the adjectival *fake* facet.

The definition thus does not apply to any and all falsehoods regarding timely matters or to any information posted by private individuals or entities to Twitter or Facebook. Certainly, a factually inaccurate tweet by a non-journalist can spawn misguided news stories in the mainstream press,²⁹ but

of, or conduct regarding a product.” (quoting *Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 165 (1984))).

²⁷ Calvert et al., *supra* note 23. Exempting falsities that fall within the scope of the fair report privilege from this definition of fake news is both strategic and crucial. That’s because the fair report privilege—in stark contrast to fake news—actually “promotes our system of self-governance by serving the public’s interest in official proceedings.” *Solaia Tech., LLC v. Specialty Publ’g Co.*, 852 N.E.2d 825, 842 (Ill. 2006). As Dean Rodney Smolla explains, “[t]he rationale for the privilege is of considerable vintage, but remains as relevant as ever: The reporter is a surrogate for the public, permitting it to observe through the reporter’s eyes how the business of government is being conducted.” RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* § 8:67 (2d ed. 2012). Put differently, the fair report privilege exists to enlighten voters, not to confuse them. *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977) (“The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.”); *see also* Richard J. Peltz, *Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm*, 34 Ohio N.U. L. REV. 717, 725 (2008) (noting that the fair report privilege protects “the republication of a defamatory falsehood in certain circumstances” and, in particular, when the “falsity is uttered in the course of a public proceeding” and is “clearly attributed” as arising in that proceeding); Samuel A. Terilli et al., *Lowering the Bar: Privileged Court Filings as Substitutes for Press Releases in the Court Of Public Opinion*, 12 COMM. L. & POL’Y 143, 158 (2007) (pointing out that “the fair report privilege is qualified or conditioned upon some showing, generally the fairness and accuracy of the republication of the underlying official action,” and adding that its “protection may be lost if the speaker fails to fairly and accurately report the allegations or events transpiring in the official action, proceeding or meeting”).

²⁸ Angie Drobnic Holan, *2016 Lie of the Year: Fake News*, POLITIFACT (Dec. 13, 2016, 5:30 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/2016-lie-year-fake-news>.

²⁹ *See* Sapna Maheshwari, *The Journey of a Fake News Story That Begins With a Single Tweet*, N.Y. TIMES, Nov. 21, 2016, at B1 (providing a real-life example of such a situation).

such a tweet does not purport to be a real news article and therefore does not fall within the definition of fake news as discussed here. The definition targets, instead, only information masquerading in a form and manner that purports to be a real news article.

Second, the definition requires that an article include at least one material—one important, in other words—factual assertion that is objectively verifiable as false. In other words, fake news deals with falsity of facts, not statements of opinion, and those falsities must be of a certain threshold of gravitas, significance, and importance.

Third, the definition includes a scienter requirement via the phrase “knowingly include.” Thus, the individuals targeted by this definition of fake news are those who intentionally fabricate falsities about important matters. Put slightly differently, fake news involves only deliberate falsities, not accidental errors or innocent mistakes. This is akin to the knowledge-of-falsity prong of the Supreme Court’s two-part explication of actual malice.³⁰

This definition, of course, is by no means the only possible one for fake news. But for purposes of this essay and for possible regulatory efforts affecting fake news, it provides a starting point. It probably is better to begin small, as it were, especially when a term like fake news is so liberally bandied about and expansively misused and abused. A broader definition—perhaps one defining fake news as any publication of a knowing falsity on a matter of public concern that is intended to deceive—renders nugatory the noun *news* in fake news. As a compound concept, both the adjective (fake) and the noun (news) must carry significance. Otherwise, the problem is simply falsity and fakery, and one might as well substitute for “fake news” the unwieldy “Falsehoods That Keep Us Up at Night Worrying About People Who Might be Fooled.”

II. “MEN FEARED WITCHES AND BURNT WOMEN.”³¹

This quotation, a snippet from a famous passage in Justice Louis Brandeis’s ninety-year-old concurrence in *Whitney v. California*,³² compels examination of two facets of fake news.

³⁰ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (holding that a public official seeking damages for a defamatory falsehood relating to his official conduct must demonstrate “that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not”).

³¹ *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

³² 274 U.S. 357 (1927).

First and foremost, we must pinpoint precisely what it is we fear about fake news. In other words, what is the harm—what is the injury—we fear fake news causes? The *First Amendment Law Review*, after all, certainly would not devote an entire symposium to fake news if we considered it benign or nonthreatening.

John Stuart Mill's harm principle suggests 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."³³ As encapsulated by Professor Frederick Schauer, this means "that society may proceed only against genuine harms and not against other forms of individual or social discomfort."³⁴ What then, in Millian terms, is the "harm to others"³⁵ caused by fake news?

Identifying the harm or harms that we fear fake news produces is a condition precedent for any effective remedial action, be it through legal or private channels. As the lead author of this essay recently asserted elsewhere, the first step that lawmakers seeking to regulate any speech-based phenomenon must take is to "identify, with precision and specificity, the actual problem that the speech caught in the legislative crosshairs allegedly causes."³⁶ In other words, when it comes to fake news, one must "pinpoint the precise harm, not just some generalized, indistinct worry."³⁷

So, what is it that we fear about fake news? There are several possibilities. Is it, on the one hand, a macro-level political worry that the outcome of elections will be unfairly influenced and, in fact, changed as a direct result of fake news? In other words, do we fear that fake news jeopardizes democracy,³⁸ casting a pall over what philosopher-educator Alexander Meiklejohn nearly seventy years ago called "the voting of wise decisions"?³⁹

Meiklejohn seemingly would not afford First Amendment protection to fake news as defined earlier.⁴⁰ Why? Because for Meiklejohn, the First Amendment was "not the

³³ JOHN STUART MILL, ON LIBERTY 80 (David Bromwich & George Kateb eds., Yale Univ. Press 2003).

³⁴ Frederick Schauer, *On the Relation Between Chapters One and Two of John Stuart Mill's On Liberty*, 39 CAP. U. L. REV. 571, 574 (2011).

³⁵ MILL, *supra* note 33, at 80.

³⁶ Clay Calvert, *Legislating the First Amendment: A Trio of Recommendations for Lawmakers Targeting Free Expression*, 35 CARDOZO ARTS & ENT. L.J. 279, 287 (2017).

³⁷ *Id.* at 290.

³⁸ See Rory Van Loo, *The Rise of the Digital Regulator*, 66 DUKE L.J. 1267, 1328 (2017) (citing "the threat of fake news to the democratic process").

³⁹ ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25 (1948).

⁴⁰ See *supra* notes 24–27 and accompanying text (providing one possible definition of fake news).

guardian of unregulated talkativeness.”⁴¹ Instead, what was essential was “that everything worth saying shall be said.”⁴² Fake news therefore could be jettisoned from the cloak of First Amendment protection because it simply is *not* worth saying. Permitting its circulation may harm what Meiklejohn called “the minds of the hearers,”⁴³ which collectively represent “the point of ultimate interest”⁴⁴ in the “method of political self-government.”⁴⁵

Or is our fear, on the other hand, a micro-level, human-dignity concern that people should not be led astray and preyed upon by profiteering and nefarious fake-news mongers? Put slightly differently, is our concern driven by a paternalistic desire to shield the easily duped from their own follies and foibles? And if that, in fact, is the worry, then should the Federal Trade Commission step in to protect individuals from politically oriented fake news stories the same way it currently does when fake-news websites are created to sell products?⁴⁶ Expanding the FTC’s jurisdiction from packaged food items to packaged candidates might just do the trick.

Or is our fear stoked by some combination of macro-level and micro-level harms or, perhaps, by something else entirely different? In other words, what is the proper level of analysis for pinpointing the harm(s)?

One thing, at this stage, is definitely clear—we fear that *others* will be more detrimentally affected by fake news than *ourselves*. As the lead author of this essay wrote elsewhere in early 2017, survey data gathered by the Pew Research Center in December 2016 suggest that people tend to believe they are less likely to be hoodwinked by fake news than others.⁴⁷ That article explains that this finding comports with what communication researchers call the third-person effect.⁴⁸

Originally postulated by W. Phillips Davison in 1983, the third-person effect boils down to this: “in the view of those trying to evaluate the effects of a communication, its greatest impact will not be on ‘me’ or ‘you,’ but on ‘them’—the third

⁴¹ MEIKLEJOHN, *supra* note 39, at 25.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See Press Release, Fed. Trade Comm’n, FTC Seeks to Halt 10 Operators of Fake News Sites from Making Deceptive Claims About Acai Berry Weight Loss Products (Apr. 19, 2011), <https://www.ftc.gov/news-events/press-releases/2011/04/ftc-seeks-halt-10-operators-fake-news-sites-making-deceptive>.

⁴⁷ Clay Calvert, *Fake News, Free Speech, & the Third-Person Effect: I’m No Fool, But Others Are*, 7 WAKE FOREST L. REV. ONLINE 53 (Feb. 8, 2017), <http://wakeforestlawreview.com/2017/02/fake-news-free-speech-the-third-person-effect-im-no-fool-but-others-are/>.

⁴⁸ *Id.*

persons.”⁴⁹ Parsed differently, people tend to believe “that others are more likely to be affected by mediated messages than the self.”⁵⁰

Nearly two decades ago, in one of the earliest law journal articles tackling the third-person effect and its relationship to government censorship, the lead author of this essay argued that a vast body of research confirming the third-person effect “has disturbing ramifications for extant and future First Amendment jurisprudence. It suggests the government may be unnecessarily censoring speech based on a perceptual bias about its effects on others.”⁵¹ Lawmakers should keep that in mind when proposing measures targeting people who create and transmit fake news.

Our fears about fake news may also be overblown. One study suggests “the fake news audience is tiny compared to the real news audience—about 10 times smaller on average.”⁵² Another report finds “that social media have become an important but not dominant source of political news and information. Television remains more important by a large margin.”⁵³

The second reason Justice Brandeis’s observation in *Whitney* is important relates to its burning-witches facet. Are we, perhaps, acting somewhat hysterically today regarding fake news because of President Trump’s surprising election? If Hillary Clinton had prevailed, would we be so fearful and preoccupied by fake news? It is a question to which, of course, we will never know the answer, but one worth pondering to the extent that a person’s political perspective may affect just how concerned he or she is with fake news. The idiomatic elephant in the fake newsroom, as it were, is whether left-leaning academics would care so much if Clinton had triumphed.

Similarly, one might query whether fake news is just another technology-driven moral panic—one in which people increasingly receive information from non-traditional, Internet-driven sources rather than from legacy media such as print, radio, and television—that will fade from journalistic and

⁴⁹ W. Phillips Davison, *The Third-Person Effect in Communication*, 47 PUB. OPINION Q. 1, 3 (1983).

⁵⁰ Brett Sherrick, *The Effects of Media Effects: Third-Person Effects, the Influence of Presumed Media Influence, and Evaluations of Media Companies*, 93 JOURNALISM & MASS COMM. Q. 906, 907 (2016).

⁵¹ Clay Calvert, *The First Amendment and the Third Person: Perceptual Biases of Media Harms & Cries for Government Censorship*, 6 COMMLAW CONSPECTUS 165, 166 (1998).

⁵² Jacob L. Nelson, *Is ‘Fake News’ a Fake Problem?*, COLUM. J. REV. (Jan. 31, 2017), <https://www.cjr.org/analysis/fake-news-facebook-audience-drudge-breitbart-study.php>.

⁵³ Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 223 (2017).

public radar screens as other issues pop up.⁵⁴ Is fake news, in other words, the panic de jour that floats like flotsam in the wake of the weird, wacky world of Trump?

And ultimately, if the government takes legal action against fake news purveyors, will we burn the First Amendment freedom of expression in the process? Justice Brandeis's sentiment in *Whitney*, in brief, must not be forgotten today.

**III. "THERE MUST BE A DIRECT CAUSAL LINK BETWEEN
THE RESTRICTION IMPOSED AND THE INJURY TO BE
PREVENTED."⁵⁵**

This principle regarding causation of harm, drawn from Justice Anthony Kennedy's plurality opinion in *United States v. Alvarez*,⁵⁶ becomes most relevant if the government attempts to regulate fake news. The *Alvarez* rule that proof of causation of harm must be demonstrated to uphold a content-based restriction on speech under strict scrutiny⁵⁷ springs from the Court's 2011 decision in the violent video game case of *Brown v. Entertainment Merchants Association*.⁵⁸

The Court in *Brown* struck down a California statute limiting minors' access to such games because the Golden State could not "show a direct causal link between violent video games and harm to minors."⁵⁹ Writing for the majority, the late Justice Antonin Scalia reasoned that the social science studies on which California relied to support its law "do not prove that violent video games cause minors to act aggressively (which would at least be a beginning). Instead, '[n]early all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in

⁵⁴ Nicholas Bowman, *Banning Smartphones for Kids is Just Another Technology-Fearing Moral Panic*, CONVERSATION (July 10, 2015, 9:05 PM), <http://theconversation.com/banning-smartphones-for-kids-is-just-another-technology-fearing-moral-panic-74485> (providing a concise review of moral panics fueled by new technologies).

⁵⁵ *United States v. Alvarez*, 567 U.S. 709, 725 (2012).

⁵⁶ *Id.*

⁵⁷ See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (noting that "content-based restrictions on speech" are permissible "only if they survive strict scrutiny," and adding that strict scrutiny requires the government to prove that the regulation in question "furthers a *compelling governmental interest* and is narrowly tailored to achieve that interest") (emphasis added); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011) (asserting that because a California law limiting minors' access to violent video games "imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a *compelling government interest* and is narrowly drawn to serve that interest") (emphasis added).

⁵⁸ 564 U.S. 786 (2011).

⁵⁹ *Id.* at 799.

methodology.”⁶⁰ In a nutshell, a mere association won’t pass constitutional muster; only causation suffices.⁶¹

Some people blamed Hillary Clinton’s loss to Donald Trump on fake news,⁶² but there is no empirical causal link proving Clinton lost because of fake news. A July 2017 article, premised on the findings of a *Wall Street Journal*/NBC News poll, asserted that “many of the themes that led” to Trump’s victory included “the resonance of his call to protect U.S. jobs and the unfavorable view that many voters took of Democratic presidential nominee Hillary Clinton.”⁶³ And, of course, James Comey’s eleventh-hour decision to further investigate private-server email questions swirling around Clinton allegedly contributed to her electoral demise.⁶⁴ In brief, multiple factors may influence a person’s decision to vote for a candidate.

Consider the infamous shooting at a pizzeria spawned by fake news.⁶⁵ It constitutes anecdotal evidence of one variety of harm caused by fake news. Out of the likely tens of thousands of people who read the same fake news involved in that incident and who actually may have believed it, only one person took potentially deadly action as a direct result. To regulate fake news because of one incident is akin to restricting violent video games based on a few shootings by minors, despite the fact that millions of people play such games yet commit no crimes. And *Brown v. Entertainment Merchants*

⁶⁰ *Id.* at 800 (quoting *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950, 964 (9th Cir. 2009)).

⁶¹ See Clay Calvert & Matthew D. Bunker, *An “Actual Problem” in First Amendment Jurisprudence? Examining the Immediate Impact of Brown’s Proof-of-Causation Doctrine on Free Speech and Its Compatibility with the Marketplace Theory*, 35 HASTINGS COMM. & ENT. L.J. 391, 395–97 (2013) (providing a synopsis of this logic from *Brown* and referring to *Brown*’s “proof-of-causation doctrine” as “demanding”).

⁶² See Deepa Seetharaman, *Zuckerberg Refutes Election Criticism*, WALL ST. J., Nov. 14, 2016, at B4 (observing that there was “criticism that fake news and misinformation on the social-media site [Facebook] may have swayed the outcome of the presidential election”); Nausicaa Renner, *The Media Today: Is Fake News Here to Stay?*, COLUM. J. REV. (July 19, 2017), https://www.cjr.org/the_media_today/the-media-today-is-fake-news-here-to-stay.php (remarking that “Trump’s win was partly attributed to the popularity of fake stories denigrating Hillary Clinton”).

⁶³ Michael C. Bender, *Poll: Trump’s Supporters Have His Back*, WALL ST. J., July 19, 2017, at A6.

⁶⁴ See Matt Apuzzo et al., *Trying to Avoid Politics, Comey Shaped Election*, DAYTON DAILY NEWS, Apr. 23, 2017, at A6 (asserting that FBI Director James Comey “upended the 2016 election” and contending that his plan “to tell Congress that the FBI had received new evidence and was reopening its investigation into Hillary Clinton” violated “the policies of an agency that does not reveal its investigations or do anything that may influence an election”); Kevin Johnson, *FBI Head ‘Mildly Nauseous’ About Any Election Impact: Comey Defends Revealing Email Matter So Close to November Vote*, USA TODAY, May 4, 2017, at A3 (noting that “[Hillary] Clinton has blamed Comey as recently as Tuesday for torpedoing her campaign as the Democratic presidential nominee” and quoting James Comey as saying, “It makes me mildly nauseous that we would have had an impact on the election”).

⁶⁵ Gresko, *supra* note 5, at 4 and accompanying text.

Association tells us that such regulation of video games is, indeed, misguided and unjustified in the absence of a direct causal link of harm.⁶⁶

Yes, people may believe fake news; let's stipulate to that fact.⁶⁷ But believing something that is objectively verifiable as false is not a legally cognizable harm. If the government could regulate people's false beliefs, it would be a truly scary moment.

All of this ties back to the earlier question of precisely what it is that we fear about fake news. Once we identify the specific harm about which we are concerned, then courts will require proof that the harm is directly caused by fake news in order for a government regulation to pass constitutional muster.

IV. "IT IS ALWAYS SOMEWHAT COUNTERINTUITIVE TO ARGUE THAT A LAW VIOLATES THE FIRST AMENDMENT BY ABRIDGING TOO LITTLE SPEECH."⁶⁸

This quotation, drawn from the five-justice majority opinion penned by Chief Justice John Roberts in *Williams-Yulee v. Florida Bar*,⁶⁹ taps directly into the notion that a statute can be unconstitutional because it is underinclusive. Roberts added that "[u]nderinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way."⁷⁰

This logic forces consideration of whether fake news is the real problem or, instead, whether it is merely one facet of the much larger problem that is today's news media ecosystem. In brief, fake news may simply be the tip of a vast informational iceberg—a visible manifestation or overt indicator of a more immense challenge regarding news consumption that has festered for years as citizens turned away from reading daily

⁶⁶ *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011); see also *Calvert & Bunker*, *supra* note 61, at 395 ("[I]n *Brown*, Justice Antonin Scalia wrote that the strict scrutiny standard of judicial review to which content-based laws are subject demands proof of a 'direct causal link' between the speech in question and an 'actual problem' allegedly resulting from it.").

⁶⁷ See Allcott & Gentzkow, *supra* note 53, at 212 (citing a study by Ipsos Public Affairs that found that "many people [75 percent] who see fake news stories report that they believe them"); Balmas, *supra* note 12, at 446 (finding that "the extent to which fake news is perceived as realistic is greater among individuals with *high* exposure to fake news and *low* exposure to hard news than among individuals with *high* exposure to both hard and fake news"); Brendan Nyhan & Jason Reifler, *Displacing Misinformation About Events: An Experimental Test of Causal Corrections*, 2 J. EXPERIMENTAL POL. SCI. 81, 90 (2015) (asserting that "corrections of misinformation are frequently ineffective").

⁶⁸ *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (emphasis added).

⁶⁹ 135 S. Ct. 1656 (2015).

⁷⁰ *Id.* at 1670.

newspapers⁷¹ and watching the evening news.⁷² As Professor Anthony Gaughan recently observed, “[t]raditional news journalism has shrunk dramatically both in terms of consumers and profitability.”⁷³ He noted that one 2016 study demonstrates “that television news audiences are shrinking just as fast as newspaper readership, especially among younger viewers.”⁷⁴

For instance, estimated weekday newspaper readership has fallen by more than 25 million since 1987.⁷⁵ One recent study reveals that:

total weekday circulation for U.S. daily newspapers—both print and digital—fell 8% in 2016, marking the 28th consecutive year of declines. (Sunday circulation also fell 8%.) The overall decline includes a 10% decrease in weekday print circulation (9% for Sundays) and a 1% decline in weekday digital circulation (1% rise for Sundays).⁷⁶

Similarly, audience size for local television newscasts has decreased.⁷⁷ Additionally, many people simply do not trust the news media.⁷⁸ For instance, a 2016 Gallup poll found that

⁷¹ See *infra* notes 75–76 and accompanying text (providing data on declining newspaper readership over time in the United States).

⁷² See Frank C.S. Lui, *Declining News Media Viewership and the Survival of Political Disagreement*, 29 INT’L J. PUB. OPINION RES. 240, 241 (2017) (observing that “[i]n 2005, six broadcast networks, with the exception of ABC and Fox, suffered a 13% decline in their viewership” and that “[i]n 2010, cable news viewership for CNN, MSNBC, and Fox News also continued to fall precipitously”).

⁷³ Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL’Y 57, 64 (2017).

⁷⁴ *Id.* at 65.

⁷⁵ See *Newspaper Fact Sheet: Data*, PEW RESEARCH CTR. (June 1, 2017) <http://www.journalism.org/fact-sheet/newspapers/> (finding that weekday newspaper readership has been continuously falling from a high of 62,826,000 in 1987 to an estimated 34,657,199 in 2016).

⁷⁶ Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RESEARCH CTR. (June 1, 2017) <http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/>.

⁷⁷ See *Local TV News Fact Sheet*, PEW RESEARCH CTR. (July 13, 2017) <http://www.journalism.org/fact-sheet/local-tv-news/> (reporting that “[i]n 2016, viewership for network local affiliate news stations (ABC, CBS, Fox, and NBC) declined in key time slots—morning, early evening and late night, according to Pew Research Center analysis of Nielsen Media Research data” and adding that “[s]ince 2007, the average audience for late night newscasts has declined 31%, while morning audience declined 12% and early evening audience fell 19%”).

⁷⁸ See *Attitudes Towards the Mainstream Media Take an Unconstitutional Turn*, ECONOMIST (Aug. 2, 2017), <https://www.economist.com/blogs/graphicdetail/2017/08/daily-chart-0> (reporting that “[w]hen Republicans were asked whether they trusted Mr[.] Trump more than the *New York Times*, the *Washington Post* or CNN, at least 70% sided with the

Americans' level of trust in the mass media to fairly and accurately report the news had "dropped to its lowest level in Gallup polling history, with 32% saying they have a great deal or fair amount of trust in the media. This is down eight percentage points from last year."⁷⁹ By comparison, "Americans' trust and confidence hit its highest point in 1976, at 72%, in the wake of widely lauded examples of investigative journalism regarding Vietnam and the Watergate scandal."⁸⁰ That, sadly, was more than forty years ago.

Furthermore, the number of daily newspapers in the United States is shrinking.⁸¹ It is an ecosystem in which people turn to online social media and Google for news, while Google and Facebook turn to algorithms to ferret out bogus stories.⁸²

In terms of addressing fake news, it ultimately may be that our efforts—be they through education,⁸³ counter speech,⁸⁴ legislation,⁸⁵ or something else—will do far too little to cure a much larger systemic problem.

V. "[T]HE ULTIMATE GOOD DESIRED IS BETTER REACHED BY FREE TRADE IN IDEAS—THAT THE BEST TEST OF TRUTH IS THE POWER OF THE THOUGHT TO GET ITSELF ACCEPTED IN THE COMPETITION OF THE MARKET"⁸⁶

president each time" and that when "asked whether courts should be allowed to 'shut down news media outlets for publishing or broadcasting stories that are biased and inaccurate', 45% of Republicans were in favour, compared with 20% who opposed the measure" and "[m]ore than half thought it acceptable to fine an offending news outlet); *The State of the First Amendment: 2016*, NEWSEUM INST. 1, 4–5, http://www.newseuminstitute.org/wp-content/uploads/2016/06/FAC_SoFA16_report.pdf (last visited Feb. 26, 2018) (finding that "a record low percentage [74%] of Americans . . . agree that the media are unbiased" and that "[t]he majority of Americans, 51%, stated that the news media has been very (23%) or somewhat (28%) inaccurate in reporting on the 2016 presidential campaign").

⁷⁹ Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx>.

⁸⁰ *Id.*

⁸¹ See *Newspapers: Number of Daily Newspapers*, PEW RESEARCH CTR. (last visited Oct. 21, 2017), <http://www.journalism.org/media-indicators/newspapers-number-of-daily-newspapers/> (providing that the total number of daily newspapers fell from 1457 in 2004 to 1331 in 2014).

⁸² See Associated Press, *Google is Taking Steps to Block Fake News*, L.A. TIMES, Apr. 26, 2017, at C2 (noting that Google "began revising the closely guarded algorithms that generate its search with the help of 10,000 people who rate the quality and reliability of the recommendations during tests" and that "Google also rewrote its 140-page book of rating guidelines that help the quality-control evaluators make their assessments").

⁸³ *Infra* notes 101–08 and accompanying text (addressing education and digital literacy).

⁸⁴ See *infra* Part VI.

⁸⁵ See *supra* notes 18–19 and text accompanying note 19 (noting a California bill that was initially drafted to address fake news).

⁸⁶ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

This quotation from Justice Oliver Wendell Holmes, Jr.'s dissent in *Abrams v. United States*⁸⁷ nearly 100 years ago imported the marketplace of ideas theory of free expression into First Amendment jurisprudence.⁸⁸ The marketplace theory, Dean Rodney Smolla points out, “is perhaps the most powerful metaphor in the free speech tradition.”⁸⁹

As former Yale Law School Dean Robert Post summarizes it, “in *Abrams*, Holmes explicitly oriented his theory of the First Amendment toward the value of truth.”⁹⁰ The Supreme Court in *Hustler Magazine v. Falwell*⁹¹ reiterated decades later the importance of “the truth-seeking function of the marketplace of ideas.”⁹²

Holmes's sentiment in *Abrams* built upon the works of both John Milton and John Stuart Mill.⁹³ Milton famously asserted that governments, rather than engaging in censorship and licensing to protect the truth, should let truth “and falsehood grapple; whoever knew truth put to the worse in free and open encounter?”⁹⁴

In 2017, it seems clear that marketplace competition forces, standing alone, will not drive fake news from the field of expression. For some people, truth may be put to the worse when grappling—more likely, passively accepting—fake news.

What's more, to the extent that one defines fake news as encompassing empirically disprovable falsehoods, the marketplace of ideas—in other words, the marketplace of *opinions* rather than *facts*—has no relevance. As Professor

⁸⁷ 250 U.S. 616 (1919).

⁸⁸ See Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 823–25 (2008) (observing that Justice Holmes' passage in *Abrams* “conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech,” noting that the “metaphor he employed was the ‘marketplace of ideas,’” and adding that “[n]ever before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law”).

⁸⁹ RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 6 (1992); see also MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY* 2 (2001) (calling the marketplace of ideas “one of the most powerful images of free speech, both for legal thinkers and for laypersons”).

⁹⁰ Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153, 158 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

⁹¹ *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁹² *Id.* at 52 (discussing the impact that false statements of fact have on the marketplace of ideas).

⁹³ See Christoph Bezemek, *The Epistemic Neutrality of the “Marketplace of Ideas”*: Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech, 14 FIRST AMEND. L. REV. 159, 173 (2015) (asserting that “[t]he influence Milton and Mill had on Holmes's thought cannot be denied”).

⁹⁴ JOHN MILTON, *AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* 45 (H.B. Cotterill, ed., MacMillan & Co, Ltd. 1959) (1644).

Christoph Bezemek notes, neither Milton nor Mill had in mind factual statements, but rather, respectively, “competing ideological convictions”⁹⁵ and “[t]rue ideas, rather than factual truth.”⁹⁶ The metaphor, after all, is the marketplace of ideas, not the marketplace of facts.

Indeed, the late Professor Steven Gey observed that the marketplace of ideas only provides strong justification for protecting speech concerning “normative questions”⁹⁷—ones that “are highly contestable,”⁹⁸ such as matters of “social morality [and] political policy.”⁹⁹ In contrast, he asserted that:

[t]he marketplace of ideas justification for free speech provides a much weaker footing for protecting expression that can be readily disproved than it does for normative advocacy. If the determination of truth is the objective of the entire marketplace mechanism, there is no point in permitting the further dissemination of proven falsehoods.¹⁰⁰

There may, however, be some benefit to having fake news circulate in the metaphorical marketplace of ideas. Specifically, if one knows fake news exists, then it should make one a more thoughtful, active, and inquisitive news consumer. People who understand fake news as a reality should rightfully be more skeptical about the veracity of what they read rather than accepting it blindly or at face value. They should, in turn, seek out confirmation from credible mainstream news sources such as the *New York Times*, *Washington Post*, *Wall Street Journal* and *USA Today*. Certainly, these news organizations may have their own biases and make journalistic mistakes, but they nonetheless possess mainstream credibility that other news sources may lack.

This, of course, is where enhanced media literacy efforts in public schools come into play. Such endeavors should not only raise awareness about the mere existence of fake news in the marketplace of ideas but also strive to teach minors ways of detecting it.

California lawmakers in 2017 considered a bill that called on the state’s Instructional Quality Commission to

⁹⁵ Bezemek, *supra* note 93, at 165.

⁹⁶ *Id.* at 166.

⁹⁷ Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 8 (2008).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 9.

develop “a model curriculum for pupils in kindergarten and in grades 1 to 12, inclusive, in media literacy, . . . for voluntary use by educators.”¹⁰¹ The measure defined media literacy as “the ability to access, analyze, evaluate, develop, produce, and interpret media, and involves a diverse set of foundational skills related to current technology and social media use and includes the norms of appropriate, responsible, and healthy behavior.”¹⁰² The bill’s sponsor, Jimmy Gomez of Los Angeles, said the goal was to prepare students to distinguish “between news intended to inform and fake news intended to mislead.”¹⁰³ This is a laudable mission.

Gomez’s bill died in the Assembly Appropriations Committee in May 2017,¹⁰⁴ but a similar measure in the California Senate was still alive in July 2017.¹⁰⁵ Bill Dodd, sponsor of California Senate Bill 135, contends that:

Developing a comprehensive media literacy curriculum is critical to combating fake news While information has become more accessible than ever, many lack the tools to identify fake or misleading news and information. By giving students the proper tools to analyze the media they consume, we can empower them to make informed decisions.¹⁰⁶

Education clearly is one important way to combat fake news. As Mac McKerral, former national president of the Society of Professional Journalists notes, “[s]ome wise people years ago recognized the need for media literacy in curriculum, and it got some ‘buzz’ for a while. But as is often the case, those things that catch journalism education’s fancy quickly get replaced with the next great idea.”¹⁰⁷ Such efforts must be reinvigorated immediately.

¹⁰¹ A.B. 155, 2017–18 Leg., Reg. Sess. (Cal. 2017).

¹⁰² *Id.*

¹⁰³ Melanie Mason, *Fake News 101? Lawmakers Want California Schools to Teach Students How to Evaluate What They Read on the Web*, L.A. TIMES (Jan. 11, 2017, 5:42 PM), <http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-los-angeles-assemblyman-proposes-bill-1484182108-htmllstory.html>.

¹⁰⁴ *Fake News Curriculum Bill Dies in California Legislature*, NBC L.A., <http://www.nbcalosangeles.com/news/national-international/Fake-News-Curriculum-Bill-Dies-in-California-Legislature-424813563.html> (last updated May 27, 2017, 12:14 PM).

¹⁰⁵ S.B. 135, 2017–18 Leg., Reg. Sess. (Cal. 2017).

¹⁰⁶ Rachel Raskin-Zrihen, *Dodd Bill to Teach Media Literacy Clears Initial Hurdle*, VALLEJO TIMES HERALD (Cal.), Apr. 21, 2017, at A2.

¹⁰⁷ Mac McKerral, *Tips for Digging Out of the ‘Fake News’ Sinkhole*, SOC’Y. OF PROF’L JOURNALISTS: QUILL (Apr. 13, 2017), https://www.spj.org/quill_issue.asp?REF=2287.

Furthermore, digital media literacy should also be infused into college-level curricula. As Professor Tom Kelleher recently wrote:

Those of us working in media and communication programs in colleges and universities need to up our game when it comes to digital literacy. We can't expect K-12 educators to bear all the responsibility, and we shouldn't be lulled into assumptions that digital literacy is mostly a matter of remedial education by the time students reach college.¹⁰⁸

In summary, fake news likely will always circulate in the marketplace of ideas. Educating people how to ferret it out is key.

VI. "THE REMEDY FOR SPEECH THAT IS FALSE IS SPEECH THAT IS TRUE . . . THE RESPONSE TO THE UNREASONED IS THE RATIONAL; TO THE UNINFORMED, THE ENLIGHTENED; TO THE STRAIGHT-OUT LIE, THE SIMPLE TRUTH." ¹⁰⁹

Justice Anthony Kennedy's statement from *United States v. Alvarez*,¹¹⁰ in which a fractured Court struck down a federal statute that made it a crime to lie about having won a Congressional Medal of Honor, taps into the long-standing doctrine of counter speech. Kennedy's words track Justice Brandeis's more famous maxim from *Whitney* that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."¹¹¹

The insights of both Kennedy and Brandeis counsel that the remedy for fake news is not censorship, but rather accurate news that rebuts and refutes it. Counter speech, in the form of correcting falsities spread via fake news, surely is a great and noble endeavor. Websites like PolitiFact¹¹² perform an amazing

¹⁰⁸ Tom Kelleher, *What Universities Can Do About Digital Literacy in the Age of Fake News*, MEDIASHIFT (May 30, 2017), <http://mediashift.org/2017/05/what-universities-can-do-about-digital-literacy-in-the-age-of-fake-news>.

¹⁰⁹ *United States v. Alvarez*, 567 U.S. 709, 727 (2012).

¹¹⁰ 567 U.S. 709.

¹¹¹ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

¹¹² PolitiFact describes itself as:

a fact-checking website that rates the accuracy of claims by elected officials and others who speak up in American politics. PolitiFact is run by editors and reporters from the *Tampa Bay Times*, an independent newspaper in Florida. . . . The PolitiFact state sites are

service—at least for those individuals who care enough to take the time to seek them out. But who are the individuals paying attention to the growing number of credible sources that offer truth to counter fake news? Are these websites, in other words, reaching their target audience—the people about whom those concerned with the proliferation of fake news are most worried? Or are they simply attracting already well-informed citizens who want confirmation of their already on-point understanding, much like the undergraduates who come to my office hours already carrying an “A” average and simply want to go over their notes and outlines to maintain that mark? The failing students, of course, only come in when it is far too late in the semester, seeking mercy rather than answers.

An equine adage has it that you can lead a horse to water, but you can’t make it drink. When it comes to fake news, how can we both lead people to websites that offer counter speech and, once there, make them drink (and believe) the truth? That is a difficult question to answer.

Again, this is not to dismiss the importance of counter speech, teaching people how to spot fake news and efforts like First Draft.¹¹³ It simply raises the issue of whether fact-checking websites actually reach the audience befuddled by fake news with which we are most concerned.

VII. “THREE GENERATIONS OF IMBECILES ARE ENOUGH.”¹¹⁴

While First Amendment scholars generally associate Justice Oliver Wendell Holmes, Jr. with the optimistic marketplace of ideas metaphor addressed earlier,¹¹⁵ they may forget his views about eugenics and government-imposed sterilization of the feeble minded in *Buck v. Bell*.¹¹⁶ But as Justice David Souter observed in 2004, the Court in *Buck*, with Holmes

run by news organizations that have partnered with the *Times*. The state sites . . . follow the same principles as the national site.

Bill Adair, *Principles of PolitiFact*, POLITIFACT (May 31, 2013, 9:41 AM), <http://www.politifact.com/truth-o-meter/article/2013/may/31/principles-politifact/>.

¹¹³ See *About*, FIRST DRAFT, <https://firstdraftnews.com/about/> (last visited Mar. 3, 2018) (“First Draft grew out of a collaboration between nine founding organizations in June 2015 to raise awareness, perform research, and address challenges relating to trust and truth in media in the digital age. . . . In September 2016, First Draft began coordinating with a community of newsrooms, technology companies, human rights organizations and universities across the globe to help inform and scale its work, and to champion collaboration.”).

¹¹⁴ *Buck v. Bell*, 274 U.S. 200, 207 (1927).

¹¹⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹¹⁶ *Buck*, 274 U.S. at 200–08.

penning the majority opinion, “was not grudging in sustaining the constitutionality of the once-pervasive practice of involuntarily sterilizing those with mental disabilities.”¹¹⁷ Indeed, Holmes suggested that it was but very small sacrifice for individuals like Carrie Buck, who “already sap the strength of the State,”¹¹⁸ to be sterilized by Virginia “in order to prevent our being swamped with incompetence.”¹¹⁹

Buck, of course, has nothing to do with the First Amendment. Yet the quotation should give us pause to realize that some people inevitably will be duped by fake news, no matter how much education they receive about it and how many digital-media literacy classes schools offer. As a modern-day, Midwestern sage named John Mellencamp once sang, “people believe what they want to believe when it makes no sense at all.”¹²⁰ In turn, we should not take drastic measures against them to protect the rest of society from their ignorance even if their erroneous beliefs stemming from fake news might lead to some type of harm.

So if the government cannot give modern-day Carrie Bucks, cast adrift in a fake-news world, a magical shot that suddenly transforms them into savvy news consumers and regular readers of the Sunday *New York Times*, should the government at least tell them what the truth is? The answer is a resounding no.

We don’t want the government to play the role of truth arbiter, providing people with its official version of the truth. This would turn citizens into passive receivers of information, and the Orwellian overtones of a government-sanctioned Ministry of Truth are clear and don’t need belaboring here.

The work of Professor Steven Gey, instead, better explains the dangers of this scenario. He argued that the “government has no paternalistic role over matters of the intellect, just as it has no paternalistic role over matters of the soul. It is up to individual citizens alone to sort out truth from

¹¹⁷ *Tennessee v. Lane*, 541 U.S. 509, 534 (2004) (Souter, J., concurring).

¹¹⁸ *Buck*, 274 U.S. at 207.

¹¹⁹ *Id.* Whether Carrie Buck was really feeble-minded was called into serious question by Professor Paul Lombardo, who asserts that:

Throughout Carrie’s adult life she regularly displayed intelligence and kindness that belied the “feeble-mindedness” and “immorality” that were used as an excuse to sterilize her. She was an avid reader, and even in her last weeks was able to converse lucidly, recalling events from her childhood. Branded by Holmes as a second generation imbecile, Carrie provided no support for his glib epithet throughout her life.

Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 61 (1985).

¹²⁰ JOHN MELLENCAMP, *Walk Tall, on WORDS & MUSIC: JOHN MELLENCAMP’S GREATEST HITS* (Island Records 2004).

falsehood.”¹²¹ Noting that “[w]e instinctively assume that the government does everything for a political reason,”¹²² Gey elaborated that:

Politicians are not scholars, and politicians’ claims of factual veracity should never be taken at face value—even when there is independent evidence that the government is actually correct. This is not to say that the politicians are always wrong; it is to say that determinations of right and wrong should not be in the hands of politicians.¹²³

Ultimately, we should resign ourselves to the fact that some people will continue to be fooled by fake news and it is not the government’s role to tell them what the truth is. The government can’t cure the deep-seated cognitive biases that influence the sources of information people seek out and what they choose to believe.¹²⁴ And, in turn, we cannot treat those people like the Commonwealth of Virginia—with the esteemed Justice Holmes’s memorable blessing—treated Carrie Buck.

VIII. CONCLUSION

This Essay offered a septet of Supreme Court quotations to provide a framework for addressing, in orderly fashion, some of the many complicated issues wrought by fake news. The Essay, of course, does not purport to resolve the problems currently blamed on fake news. But perhaps one facet of what

¹²¹ Gey, *supra* note 97, at 21.

¹²² *Id.*

¹²³ *Id.* at 22.

¹²⁴ Among other variables, three factors that influence the way people obtain, process and internalize news include selective attention, selective perception, and selective interpretation. See Toby Bolsen & Thomas J. Leeper, *Self-Interest and Attention to News Among Issue Publics*, 30 POL. COMM. 329, 330, 342 (2013) (noting that “individuals pay close attention only to a small number of political issues they care about a great deal” and “that individuals are more likely to follow news that affects their self-interest”); Lauren Feldman, *Learning About Politics From The Daily Show: The Role of Viewer Orientation and Processing Motivations*, 16 MASS COMM. & SOC’Y 586, 590–91 (2013) (writing that the existing body of research and theory propose a “sequence of relationships whereby viewers’ message orientation, which is conceptualized here as a reaction to or perception of a media stimulus, influences the effort an individual devotes to processing the stimulus, which, in turn, influences learning”); Silvia Knobloch-Westerwick et al., *Political Online Information Searching in Germany and the United States: Confirmation Bias, Source Credibility, and Attitude Impacts*, 65 J. COMM. 489, 489 (2015) (asserting that selective exposure “has often been used to describe the phenomenon that information users prefer attitude-consistent messages over attitude-discrepant messages” and that “[a] more specific term for this pattern is *confirmation bias*”).

surely must be a multi-pronged attack on fake news involves shifting part of our efforts from fake news to real news.

Consider a food-centric analogy. Fake news is junk food—it's not good for your informational diet, and it fills your head with mush. Conversely, real news is health food—it promotes an informed citizenry and improves your understanding of the world.

Yet, when it comes to health, getting a certain percentage of people to improve their diet or to exercise more is nearly impossible. As a July 2017 story in the *Wall Street Journal* reported:

Finding ways to encourage healthy behavior, such as exercise and eating a nutritious diet, is a big challenge facing the U.S. health system. More than a third of U.S. adults are obese, driving health problems and deaths from heart disease and other causes. But . . . it isn't a simple matter to nudge Americans to adopt healthier habits like regular workouts.¹²⁵

Maybe a sliver of the answer—clearly not the sole solution, for there is no magic bullet remedy for fake news—is to focus on real news and, specifically, ways to make it more appealing to the massive number of Americans who bypass reading traditional daily newspapers and watching local television newscasts produced by reputable organizations. In other words, part of the answer to fake news requires concentrating on real news.

Imagine, for instance, if people found reading real news equally as appealing as taking narcissistic selfies and posting them on Instagram and Twitter. Or envision people willing to pay \$4 for a weekday copy of the *Wall Street Journal* in the same way they willingly shell out \$4 for a latte during the workday. Or picture them willing to spend thirty minutes more of their day viewing a network newscast on ABC, CBS, or NBC rather than binge-watching trendy fictional dramas on Netflix or Hulu. All of that is hard to fathom. If anything, it should temper our expectations about curing fake news.

The truth is that quality journalism exists, but many people simply don't attend to it. As Joshua Benton, director of Nieman Lab, wrote in Fall 2016, "[t]here was an enormous amount of good journalism done on Trump and this entire election cycle. For anyone who wanted to take it in, the

¹²⁵ Ben Leubsdorf, *Are Gym Incentives Exercise in Futility?*, WALL ST. J., July 19, 2017, at A2.

pickings were rich.”¹²⁶ The trouble, Benton asserts, “is that not enough people sought it out. And of those who did, not enough of them trusted it to inform their political decisions.”¹²⁷

Those last two sentences tap into two issues that journalists must tackle: how to make real news stories capture greater attention and, in turn, how to gain greater trust from readers and viewers in those stories. It’s a matter of attention plus trust. Additionally, as Leonard Downie Jr., former executive editor of the *Washington Post*, observed in early 2017, “[t]he news media must separate in the public mind responsible journalism from recklessly inaccurate and purposely false information disguised as news for profit or influence by charlatans.”¹²⁸

Ultimately, as journalist Cathal Sheerin explains, “we must accept that lies and fabricated or inaccurate stories are the inevitable price that we have to pay to be able to enjoy our right to communicate freely. Attempts by governments to determine and regulate what is (or what isn’t) fake news should be rejected.”¹²⁹ And as Professor Bonnie Brennan writes, “false information has always existed and fake news has been a part of online news since it began.”¹³⁰ This is not to say we must capitulate in the battle against fake news. Rather, it is to recognize limits on what we can accomplish, be it through education, counter speech, or—least desirable—laws criminalizing its creation and dissemination.

¹²⁶ Joshua Benton, *Get Serious About Getting Rid of Fake News*, NIEMAN REPS., Fall 2016, at 38, 39.

¹²⁷ *Id.*

¹²⁸ Leonard Downie Jr., *Trump’s Undermining of the Press*, N.Y. TIMES, Jan. 14, 2017, at A19.

¹²⁹ Cathal Sheerin, *Regulations are a Bigger Threat Than Fake News*, 64 MEDIA DEV., no. 2, 33, 35 (2017).

¹³⁰ Bonnie Brennan, *Making Sense of Lies, Deceptive Propaganda, and Fake News*, 32 J. MEDIA ETHICS 179, 180 (2017).

CONSPIRACY THEORIES AND THE MARKETPLACE OF FACTS

David S. Han*

The world is awash in conspiracy theories. Some are relatively benign, with stakes rarely rising above idle barroom chatter; for example, the NBA rigged the 1985 draft lottery via a “frozen envelope” to ensure that the New York Knicks would draft superstar center Patrick Ewing.¹ Some, on the other hand, can lead to staggering social harm; for example, some have estimated that the South African government’s embrace of AIDS denialism theories in the early 2000s led to the preventable deaths of over 300,000 people.² And some are simply bewildering, such as assertions that the earth is flat³ or that the fluoridation of water was part of a sinister Communist plot.⁴

These sorts of conspiracy theories—which can broadly be described as patently false statements of empirical fact regarding issues of public concern—raise interesting questions regarding First Amendment theory and doctrine. As Frederick Schauer has observed, free speech theory has traditionally centered around ideological speech—questions of opinion, advocacy, and broad

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¹ See Chris Ballard, The Ewing Conspiracy, *SPORTS ILLUSTRATED*, <https://www.si.com/longform/2015/1985/ewing/index.html> (last visited Oct. 16, 2017).

² See Celia W. Dugger, *Study Cites Toll of AIDS Policy in South Africa*, *N.Y. TIMES* (Nov. 25, 2008), <http://www.nytimes.com/2008/11/26/world/africa/26aids.html> (discussing “President Thabo Mbeki’s denial of the well-established scientific consensus about the viral cause of AIDS and the essential role of antiretroviral drugs in treating it” and citing a Harvard study noting that “the South African government would have prevented the premature deaths of 365,000 people earlier this decade if it had provided antiretroviral drugs to AIDS patients and widely administered drugs to help prevent pregnant women from infecting their babies”).

³ See THE FLAT EARTH WIKI, https://wiki.tfes.org/The_Flat_Earth_Wiki (last modified Aug. 16, 2017) (“This website is dedicated to unraveling the true mysteries of the universe and demonstrating that the earth is flat and that Round Earth doctrine is little more than an elaborate hoax.”). The first question on the Flat Earth Society’s frequently asked questions page is: “Is this site a joke?” See *Frequently Asked Questions*, FLAT EARTH SOC’Y https://wiki.tfes.org/Frequently_Asked_Questions (last modified Sept. 7, 2017) (answering the question: “This site is not a joke. We are actively promoting the Flat Earth Movement worldwide. There are, admittedly, several non-serious flat earth posters, but they are fairly easy to identify.”).

⁴ See Jesse Hicks, *Pipe Dreams: America’s Fluoride Controversy*, *SCI. HISTORY INST.: DISTILLATIONS* (2011), <https://www.chemheritage.org/distillations/magazine/pipe-dreams-americas-fluoride-controversy> (describing conspiracy theories that fluoridation of water is “known to Communists as a method of Red Warfare” and observing that such theories were sufficiently well-known to be parodied by the figure of General Jack Ripper in the 1964 film *Dr. Strangelove*).

political, religious, and social “truths” not readily subject to empirical verification—but has relatively little to say regarding these sorts of factual assertions.⁵ On the one hand, there is a strong common-sense intuition that the government should have significantly more leeway to regulate, for example, a patently false statement that antiretrovirals are useless in treating AIDS patients as compared to, say, ideological advocacy of capitalism or proletarian revolution. On the other hand, even socially worthless false statements of fact can carry strong ideological undercurrents or associations, such that regulation would raise significant concerns regarding government abuse and manipulation of public discourse.

In this Essay, I examine the constitutional boundaries surrounding such speech. As I observe, a significant aspect of this inquiry is the recognition that *any* patently false statement of fact on an issue of public concern—even matters as apparently mundane and ideologically neutral as the shape of the Earth—can take on an ideological resonance, such that direct regulation of the speech would raise substantial concerns regarding government abuse. This strongly suggests that the government’s capacity to regulate any such speech—whether overtly ideological on its face or not—is highly limited, given the strongly anti-paternalist nature of the American free speech tradition.

It goes too far, however, to say that such falsehoods are therefore completely indistinguishable from purely ideological advocacy for constitutional purposes. Although any patently false statement of fact on an issue of public concern is *capable* of becoming the subject of an ideologically inflected conspiracy theory, this does not mean that all such falsehoods are therefore subject to full First Amendment protection in all circumstances. There are limits to such protection, as indicated by the Court’s recognition of particular contexts—such as defamation, perjury, and lying to government officials—within which such falsehoods can clearly be regulated. Thus, where the potential for government abuse has been significantly circumscribed and the social harms produced by such falsehoods are particularly acute, the government may retain some constitutional latitude to regulate such speech. I survey a few potential factors that might be relevant to this inquiry—the type and degree of harm associated with the speech, the means by which the speech is disseminated, and the type of patent falsity in question—before offering a few closing observations.

⁵ See Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 901–08 (2010).

I. CONSPIRACY THEORIES AND THEIR PLACE WITHIN FIRST AMENDMENT THEORY AND DOCTRINE

A. *Patently False Statements of Fact Regarding Issues of Public Concern*

Conspiracy theories abound as to all sorts of different subjects, whether politics, sports, religion, or science. Some of these theories are relatively mundane, like the theory that the spectacular failure of “New Coke” in the 1980s was in fact an intentional strategy by the Coca Cola Company to rekindle interest in the original formulation.⁶ Some are highly politicized in nature—for example, assertions that Barack Obama was born in Kenya,⁷ or that 9/11 was an inside job,⁸ or that the Clintons are surreptitiously dispatching those who hold damaging information about them.⁹ Some are downright bizarre—for example, theories that airplane contrails contain chemicals used for nefarious purposes,¹⁰ or that many prominent world figures are shapeshifting reptilians.¹¹

Many of these theories can cause significant social harm. This harm might take the form of systemic discrimination or dignitary harm to a particular group, such as that produced by Holocaust denialism or the lies contained in the fabricated

⁶ See *New Coke Origins*, SNOPEs, <http://www.snopes.com/cokelore/newcoke.asp> (last updated May 19, 2011).

⁷ See, e.g., Anthony Zurcher, *The Birth of the Obama “Birther” Conspiracy*, BBC NEWS (Sept. 16, 2016), <http://www.bbc.com/news/election-us-2016-37391652> (describing the origins of the conspiracy theory).

⁸ See, e.g., Michael Powell, *The Disbelievers*, WASH. POST (Sept. 8, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/07/AR2006090701669.html> (describing a Scripps Howard/Ohio University poll of 1010 Americans in which 36% “suspect[ed] the U.S. government promoted the attacks or intentionally sat on its hands, while 16% “believe[d] explosives brought down the towers”).

⁹ See, e.g., *Clinton Body Bags*, SNOPEs (July 7, 2016), <http://www.snopes.com/politics/clintons/bodycount.asp>; *‘Clinton Death List’: 33 Spine-Tingling Cases*, WORLDNETDAILY (Aug. 21, 2016), <http://www.wnd.com/2016/08/clinton-death-list-33-most-intriguing-cases/> (cataloguing the “33 people associated with the Clintons who have died the most mysterious and often violent deaths”).

¹⁰ See, e.g., *Democrats and Republicans Differ on Conspiracy Theory Beliefs*, PUB. POLICY POLLING (April 2, 2013), http://www.publicpolicypolling.com/pdf/2011/PPP_Release_National_Conspiracy_Theories_040213.pdf (finding, in a poll of 1247 Americans, that 5% “believe that the exhaust seen in the sky behind airplanes is actually chemicals sprayed by the government for sinister reasons”).

¹¹ See, e.g., *Conspiracy Theories: The Reptilian Elite*, TIME, http://content.time.com/time/specials/packages/article/0,28804,1860871_1860876_1861029,00.html (describing the theory, set forth by David Icke, that major world figures, including Queen Elizabeth, the Clintons, and Bob Hope, are actually shape-shifting reptilian humanoids that “have controlled humankind since ancient times”).

Protocols of the Elders of Zion.¹² Conspiracy theories might also cause concrete, physical harm on a broad scale—for example, as noted above, the South African government’s endorsement of the theory that AIDS is not caused by the HIV virus is estimated to have led to 300,000 preventable deaths.¹³ Or such theories may cause targeted physical or dignitary harm to specific individuals or businesses. For example, the “Pizzagate” conspiracy theory—that Democratic operatives were running a child sex ring out of the Comet Ping Pong pizzeria¹⁴—ultimately led to a self-styled “investigator” firing a gun inside of the restaurant,¹⁵ and Sandy Hook denialists¹⁶ have harassed and threatened parents of the shooting victims based on their belief that the incident was a “false flag” operation planned by the government.¹⁷ There are thus often strong reasons for the government to regulate such speech.

These sorts of assertions share a number of characteristics. First, they are purely factual in nature. These statements are not direct ideological advocacy arguing for or against various political, religious, or social views—rather, they are simply assertions of empirical fact.

Second, these are assertions regarding issues of public concern—the sort of speech that the Court has broadly deemed to garner the most stringent First Amendment protection.¹⁸

¹² See, e.g., Lyrrisa Barnett Lidsky, *Where’s the Harm? Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1093–94 (2008); Brian Handwerk, *Anti-Semitic “Protocols of Zion” Endure Despite Debunking*, NAT’L GEOGRAPHIC (Sept. 11, 2006), <http://news.nationalgeographic.com/news/2006/09/060911-zion.html>.

¹³ Dugger, *supra* note 2.

¹⁴ See generally Gregor Aisch, Jon Huang, & Cecilia Kang, *Dissecting the #PizzaGate Conspiracy Theories*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/interactive/2016/12/10/business/media/pizzagate.html?mcubz=0>.

¹⁵ See Faiz Siddiqui & Susan Svrluga, *N.C. Man Told Police He Went to D.C. Pizzeria with Gun to Investigate Conspiracy Theory*, WASH. POST (Dec. 5, 2016), https://www.washingtonpost.com/news/local/wp/2016/12/04/d-c-police-respond-to-report-of-a-man-with-a-gun-at-comet-ping-pong-restaurant/?utm_term=.dd1423421939.

¹⁶ See Hunter Stuart, *Sandy Hook Hoax Theories Explained: Why Newtown “Truther” Arguments Don’t Hold Up*, HUFFPOST (Feb. 11, 2013, 10:25 AM), http://www.huffingtonpost.com/2013/02/11/sandy-hook-hoax-theories-explained-debunking-newtown-truther_n_2627233.html (discussing the conspiracy theories surrounding the 2012 school shooting at Sandy Hook Elementary School, including the theory that the shootings were “a joint government-media operation to shore up support for a federal assault weapons ban”).

¹⁷ See Frances Robles, *Florida Woman Is Charged with Threatening Sandy Hook Parent*, N.Y. TIMES (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/us/florida-woman-is-charged-with-threatening-sandy-hook-parent.html?mcubz=0> (reporting that “a Tampa woman who thinks the Sandy Hook school massacre in Newtown, Conn., was staged has been charged with threatening a parent of one of the slain children”).

¹⁸ See *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (observing that “where matters of purely private significance are at issue, First Amendment protections are often less

Although the Court has observed that “the boundaries of the public concern test are not well defined,”¹⁹ it has stated that “[s]peech deals with matters of public concern when it can ‘be fairly considered as relating to any matter of political, social, or other concern to the community,’ or when it ‘is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.’”²⁰ It is certainly of legitimate public concern whether, for example, political operatives are running a child sex ring out of a pizza parlor, or Barack Obama was born in Kenya, or 9/11 was an inside job. And the same can be said for less overtly political conspiracy theories: it is of clear public concern whether the earth is round, or whether the NBA rigged the 1985 draft lottery, or whether the world is governed by shape-shifting reptilians.

Third, the sorts of factual assertions that I focus on here can be described as patently false—that is, they are easily and objectively provable as false under whatever practical standard a reasonable person can demand.²¹ This is therefore not the realm of factual assertions that are empirical in nature but difficult (or impossible) to prove, like the exact number of civilian casualties in the Iraq War, or whether Lee Harvey Oswald acted alone in assassinating John F. Kennedy, or the validity of string theory.²² This is the realm of easily demonstrable falsity—statements that, for all practical purposes, are clearly and objectively false.²³

rigorous, . . . because restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest”).

¹⁹ *Id.*

²⁰ *Id.* at 453.

²¹ See Mark Tushnet, “*Telling Me Lies*”: *The Constitutionality of Regulating False Statements of Fact* 17 (Harv. L. Sch. Pub. Law & Legal Theory, Working Paper No. 11-02, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1737930 (describing facts “established through the application of however high a standard of assurance a reasonable person can demand”). This is of course a purely practical judgment; on a metaphysical level, philosophers have long debated the extent to which *anything* is truly knowable with certainty. See, e.g., Thomas Edmund Jessop & Maurice Cranston, *David Hume: Scottish Philosopher*, ENCYC. BRITANNICA (July 26, 1999), <https://www.britannica.com/biography/David-Hume> (describing David Hume’s argument that “natural beliefs are not obtained from, and cannot be demonstrated by, either empirical observation or reason, whether intuitive or inferential”).

²² See Ethan Siegel, *What Every Layperson Should Know About String Theory*, FORBES (Nov. 25, 2016), <https://www.forbes.com/sites/startswithabang/2016/11/25/what-every-layperson-should-know-about-string-theory/#4eaf41935a53>.

²³ Of course, what exactly counts as a patent falsehood may be disputed. Some may argue, for example, that an assertion that the CIA played an active role in the Kennedy assassination is a patent falsehood, while others may argue that it is reasonably plausible. And some conspiracy theories may turn out to be true; for example, the CIA did indeed conduct clandestine experiments on unwitting human subjects by dosing them with mind-altering drugs such as LSD. See, e.g., Tim Weiner, *Sidney Gottlieb, 80, Dies: Took LSD to C.I.A.*, N.Y. TIMES (March 10, 1999), <http://www.nytimes.com/1999/03/10/us/sidney-gottlieb-80-dies-took-lsd-to-cia.html>. My focus here, however, is not on these line-drawing issues, but rather on

B. Theoretical Considerations

Why might we want to protect these sorts of patently false statements of fact regarding issues of public concern? Among the standard litany of First Amendment theories, the “pursuit of truth” rationale for protecting speech—that is, that unfettered speech is necessary because the truth is best revealed through an open marketplace of ideas²⁴—provides the most direct instrumental justification for protecting such statements.²⁵ Under this rationale, even patently false factual assertions may be protected because, as John Stuart Mill put it, allowing such speech may produce “the clearer perception and livelier impression of truth, produced by its collision with error.”²⁶ In other words, the marketplace of ideas would weed out such false statements of fact, and in doing so, reinforce the truth of the matter asserted.

As Schauer has observed, however, the most notable expositors of the “pursuit of truth” theory of free speech—from Mill to John Milton to Oliver Wendell Holmes—were primarily concerned with the *ideological* “truth” produced by the marketplace of ideas rather than factual truth.²⁷ That is, they were primarily concerned with “debatable matters of religious, moral, and political truth”—like the merits of Communism or the ways in which one should live one’s life—rather than assertions of hard fact.²⁸

the treatment of clear patent falsehoods like, for example, assertions that the earth is flat.

²⁴ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”); JOHN STUART MILL, *ON LIBERTY* 87 (David Bromwich & George Kateb eds., 2003).

²⁵ See Schauer, *supra* note 5, at 911. As Steven Gey has noted, democracy-based arguments “would not logically encompass the protection of those seeking to disseminate empirically disprovable falsehoods,” as disseminators of such falsehoods “can in no way be viewed as acting in good faith with their fellow citizens.” Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 10 (2008). Furthermore, there would be no justification for protecting such lies under an autonomy-based argument for protecting speech, at least under the traditional Kantian account of autonomy. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991) (“If the capacity to decide upon a plan of life and to determine one’s own objectives is integral to human nature, lies that are designed to manipulate people are a uniquely severe offense against human autonomy.”). That being said, such theories might justify some protection of false speech on the margins “as a price worth paying in order that people may express themselves or in order that democratic decisionmaking may remain unfettered.” Schauer, *supra* note 5, at 911.

²⁶ MILL, *supra* note 24, at 87.

²⁷ Schauer, *supra* note 5, at 902–08.

²⁸ *Id.*; see also MILL, *supra* note 24, at 104 (distinguishing debatable subjects from mathematical truths, for which there is generally no room for debate).

With respect to such matters, “truth” is generally a matter of personal conviction or social consensus, and speech broadly operates by persuasion and advocacy. And as David Strauss has observed, the First Amendment offers its strongest protection to speech that operates in this manner.²⁹ Patent falsehoods regarding empirical facts, however, are intuitively different. Because the truth of such matters is both clear and objectively identifiable, such speech produces harm not by persuading listeners as to how the world ought to be, but rather by providing an empirically false impression of the state of objective reality.³⁰ Thus, as Steven Gey noted, “The marketplace of ideas justification for free speech provides a much weaker footing for protecting expression that can be readily disproved than it does for normative advocacy.”³¹

Furthermore, in most situations where the truth of a factual matter is patently clear, false statements produce little or no social value.³² Outside of the realm of abstract philosophy, there is little value in asserting that one plus one equals three rather than two. Nor is there any value in a patently false factual statement that political operatives are operating a child sex ring out of a pizza parlor. Although these sorts of false statements may produce attempts to reveal the actual truth of the matter asserted,³³ we would be better off if such statements were never made in the first place, given the time and resources wasted in dispelling a patent falsehood. There is thus a strong intuition that given the associated costs and benefits, the government should have greater freedom to regulate, for example, the patently false

²⁹ Strauss, *supra* note 25, at 334 (1991) (“Except, perhaps, in extraordinary circumstances, the government may not restrict speech because it fears, however justifiably, that the speech will persuade those who hear it to do something of which the government disapproves.”); *see also* Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (“[E]ven advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.”).

³⁰ *See* Gey, *supra* note 25, at 8–9 (“Disputes about facts do not involve interminable discussions about irreconcilable and unprovable normative judgments; rather, disputes about facts can be resolved through the use of ordinary resources available to assess objective reality.”).

³¹ *Id.* at 9; *see also* Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 139–40 (“[T]he counter-speech/marketplace of ideas notion is far more compelling when we deal with ideas and opinions than when we deal with facts than can objectively be proved true or false.”).

³² *See* Gey, *supra* note 25, at 2 (describing patent falsehoods like Holocaust denial as “socially worthless and dysfunctional nonsense”). This is not to say that all patent falsehoods, in all contexts, are devoid of meaningful value. In the realm of scientific research, for example, efforts to dispel even patently false or absurd factual claims might lead to deeper understanding of the truth. *See infra* note 37.

³³ *See, e.g.,* Aisch, Huang, & Kang, *supra* note 14.

factual statements underlying the Pizzagate scandal³⁴ as opposed to broad ideological advocacy of capitalism or proletarian revolution.

In addition, as many have observed, there are strong reasons to doubt that the marketplace of ideas actually works to identify “truth,” whether ideological or empirical in nature. “Winning” ideas or facts are often determined by factors independent of their truth value, such as the pervasiveness of the speaker’s message; the “charisma, authority, or persuasiveness” of the speaker; the extent to which listeners may want to believe the statement; and so forth.³⁵ And in the modern era of the internet and social media, the open marketplace may be compromised to the extent that people seek out and glean information solely from an echo chamber of like-minded media sources.³⁶ The marketplace of ideas theory broadly assumes a degree of rational detachment on the part of speakers and listeners that is often not reflected in the real world.³⁷

³⁴ See Gey, *supra* note 25, at 2 (“If this type of speech is judged by a clear-minded measure of costs and benefits, the costs of allowing the speech to occur seem to far outweigh the benefits of adding a small quantum of total nonsense to public discourse.”).

³⁵ Schauer, *supra* note 5, at 908–10; see also Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17 (“Due to developed legal doctrine and the inevitable effects of socialization processes, mass communication technology, and unequal allocations of resources, ideas that support an entrenched power structure or ideology are most likely to gain acceptance within our current market.”); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1281 (1983) (observing that the marketplace of ideas theory “calls up the picture of a rational individual making informed choices, and downplays the extent to which the inputs in a culture influence the beliefs of the persons within that culture”); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1041 (describing the theory’s failure to account for “the different access speakers have to means for influencing truth seeking discourse”).

³⁶ See Farhad Manjoo, *How the Internet is Loosening Our Grip on the Truth*, N.Y. TIMES (Nov. 2, 2016), <https://www.nytimes.com/2016/11/03/technology/how-the-internet-is-loosening-our-grip-on-the-truth.html> (describing the echo chamber effect and its dangers).

³⁷ This is not to say that the marketplace of ideas theory is completely incapable of doing any work in the area of facts. As is often seen within academic discourse, false speech might serve as a mechanism for revealing truth: speech that initially appears to be false can unsettle longstanding truths, and truthful propositions may sometimes be strengthened by false assertions. See, e.g., Matt Simon, *Fantastically Wrong: Why People Once Thought Mice Grew Out of Wheat and Sweaty Shirts*, WIRED (June 4, 2014, 6:30 AM), <https://www.wired.com/2014/06/fantastically-wrong-how-to-grow-a-mouse-out-of-wheat-and-sweaty-shirts/> (describing how a series of scientific experiments eventually disproved the widely accepted and long-held “truth” that life could arise spontaneously from non-living materials); see also Aziz Huq, *Easterbrook on Academic Freedom*, 77 U. CHI. L. REV. 1055, 1071 (2010) (arguing that although “the conditions necessary for . . . successful operation” of the “marketplace of ideas” theory “are absent for most of society[,] [t]he academy does manifest the necessary properties to permit a functioning ‘marketplace’ of the kind valued by the First Amendment”). But in most contexts, this direct value is generally limited when it comes to patently false statements. At the very least, mere invocation of the

Why, then, extend constitutional protection to this sort of speech? As many have noted, the most compelling basis for extending such protection is the strong principle of government anti-paternalism and distrust within the American free speech tradition.³⁸ That is, regardless of whether the speech itself produces any instrumental benefits, the government should not interfere with the marketplace of ideas because such intervention raises the risk of government abuse and manipulation of public discourse. This broad anti-paternalism principle is uniquely strong within the American free speech tradition, and it has served as the basis for tolerating unquestionably harmful speech that other Western democracies have freely regulated.³⁹

Any constitutional protection afforded to patently false statements of fact on issues of public concern would therefore be rooted primarily in the principle of government distrust rather than any broad sense of the speech's instrumental value. As Geoffrey Stone has argued, although false statements "have no constitutional value" and are "destructive of public debate," prohibiting these statements would be "invalid because of the danger of putting government in the position routinely to decide the truth or falsity of all statements in public debate."⁴⁰ To afford the government such power would raise a profound risk of partisan abuse that would be highly damaging to public discourse.⁴¹ Thus, as Gey observed, "[i]t is up to individual citizens alone to sort out truth from falsehood," because we must "instinctively assume that the government does everything for a political reason."⁴²

C. Doctrinal Considerations

It is an overstatement, however, to say that the government is categorically prohibited from acting as an arbiter of factual truth. As the Court has recognized, the government constitutionally acts in this capacity in a wide range of contexts, such as in cases dealing with false commercial speech,⁴³ fraud,⁴⁴

marketplace of ideas principle is insufficient to broadly justify the protection of patently false statements of fact, as there are strong reasons to doubt the truth of this principle in practice and it produces limited utility in most cases where the truth of the matter asserted is beyond reasonable dispute.

³⁸ See, e.g., Gey, *supra* note 25, at 20; Lidsky, *supra* note 12, at 1097; Schauer, *supra* note 5, at 917.

³⁹ See Gey, *supra* note 25, at 2–3; Schauer, *supra* note 5, at 916.

⁴⁰ Stone, *supra* note 31, at 140.

⁴¹ See *id.*

⁴² Gey, *supra* note 25, at 21.

⁴³ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

⁴⁴ See *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud.").

perjury,⁴⁵ and defamation.⁴⁶ And there is little reason to doubt the constitutionality of, for example, prohibitions of false or misleading speech in marketing securities,⁴⁷ or lies told to federal officials,⁴⁸ or false claims about being a government official.⁴⁹

In *United States v. Alvarez*,⁵⁰ however, the Court made clear that false statements of fact are broadly entitled to some degree of First Amendment protection. In *Alvarez*, the Court struck down the Stolen Valor Act, which criminally punished anyone who “falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”⁵¹ In striking down the Act, the Court broadly deemed these sorts of false statements to be protected speech, at least where the government sought to punish such speech based solely on its falsity.⁵²

The splintered opinions in *Alvarez*, however, provided only limited doctrinal guidance. Regarding the standard of review, the four-Justice plurality—purporting to apply the purely historical *Stevens* test for identifying categories of low-value speech⁵³—deemed the speech in question to be fully protected and thus applied “exacting scrutiny” in striking down the Act.⁵⁴ By contrast, Justice Breyer’s concurrence in the judgment, which was joined by Justice Kagan, argued that intermediate scrutiny was the appropriate standard.⁵⁵ Both the plurality and the concurrence did appear to agree, however, that the Act’s lack of

⁴⁵ See *United States v. Grayson*, 438 U.S. 41, 54 (1978) (noting “the unquestioned constitutionality of perjury statutes”).

⁴⁶ With respect to defamation, the Court has produced a set of rules allocating different degrees of protection to different types of defamatory statements. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–48 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757–61 (1985).

⁴⁷ See *SEC v. Wall St. Publ’g Inst., Inc.*, 851 F.2d 365, 373 (D.C. Cir. 1988) (“If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible—and that result has long since been rejected.”).

⁴⁸ See 18 U.S.C. § 1001 (2012) (prohibiting the making of false statements “in any matter within the jurisdiction of the executive, legislative, or judicial branch”).

⁴⁹ See, e.g., 18 U.S.C. § 912 (2012) (criminally sanctioning anyone who “falsely assumes or pretends to be an officer or employee acting under the authority of the United States”).

⁵⁰ 567 U.S. 709 (2012).

⁵¹ *Id.* at 715–16 (plurality opinion).

⁵² *Id.* at 729–30.

⁵³ *Id.* at 717–22. Under this test, a category of speech is deemed to be low-value if it was amongst the “historic and traditional categories [of low-value expression] long familiar to the bar,” *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991) (Kennedy, J., concurring)), or if regulation of such speech was “part of a long (if heretofore unrecognized) tradition of proscription,” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 (2011).

⁵⁴ 567 U.S. at 724 (plurality opinion).

⁵⁵ *Id.* at 731 (Breyer, J., concurring).

a requirement for “material,”⁵⁶ “tangible,”⁵⁷ or “legally cognizable”⁵⁸ harm was particularly problematic. There also appeared to be some consensus across all of the opinions, including the dissent, that falsehoods regarding the most valuable speech—such as falsehoods regarding “philosophy, religion, history, the social sciences, the arts, and other matters of public concern”⁵⁹—are broadly entitled to substantial protection.⁶⁰ As I have discussed elsewhere, this general principle—which has since been embraced in post-*Alvarez* lower court decisions⁶¹—directly follows from the Court’s longstanding concern with chilling effects on the most valuable speech and the potential for government abuse.⁶²

II. IDEOLOGICALLY INFLECTED FACTUAL FALSEHOODS

If, as discussed above, the primary theoretical concern with the government regulating false statements of fact is not the value produced by such speech, but rather the extent to which such regulation might be the basis for government abuse, then one might argue that *patently false* factual statements regarding issues of public concern can be distinguished from other lies implicating high-value speech. It is one thing to regulate false statements of empirical fact that are difficult or impossible to prove (like the exact number of civilian casualties in the Iraq War). Any such regulation would surely chill speakers and provide the government with a powerful and far-reaching tool to manipulate public discourse.⁶³

But within the realm of patently false assertions like “The world is flat” or “Anti-retrovirals provide no medical benefit to AIDS patients,” such concerns may be more limited in scope, at least in the abstract.⁶⁴ Truthful speech is less likely to be chilled if speakers need only steer clear of *patent* falsehoods in order to avoid any risk of liability. Furthermore, any fear of government abuse would be diminished, as there is broadly less reason to suspect government mischief when patently false statements—which are particularly worthless as compared to truthful speech or difficult-to-prove falsehoods—are the sole focus of the

⁵⁶ *Id.* at 738.

⁵⁷ *Id.* at 734.

⁵⁸ *Id.* at 718–19 (plurality opinion).

⁵⁹ *Id.* at 751 (Alito, J., dissenting).

⁶⁰ See David S. Han, *Categorizing Lies*, 89 U. COLO. L. REV. (forthcoming 2018).

⁶¹ See *id.*

⁶² See *id.*

⁶³ See *id.*

⁶⁴ Cf. Lidsky, *supra* note 12, at 1098 (“If the State were only to punish the most obvious and egregious forms of Holocaust denial, very little valuable speech would be chilled.”).

regulation in question. And although there may be slippery slope concerns in play any time the government seeks to regulate patent falsehoods, it is by no means a foregone conclusion that careful and narrow regulation of such falsehoods will inevitably lead to wholesale government commandeering of all determinations of factual truth.⁶⁵

As Mark Tushnet has observed, however, this is all complicated to the extent that even valueless, patently false statements of fact can be deemed “ideologically inflected.”⁶⁶ That is, certain patent falsehoods are strongly associated with particular ideological viewpoints. Holocaust deniers, for example, will tend to be on the extreme right wing of the political spectrum,⁶⁷ while those asserting that George W. Bush had foreknowledge of the 9/11 attacks are unlikely to be Republicans.⁶⁸

The significant dangers of permitting government regulation of these sorts of ideologically inflected patent falsehoods are readily apparent. When the government decides which patent falsehoods to regulate, it can effectively filter out from public discourse particular political points of view or particular sets of cultural or religious beliefs. Indeed, even if the government is acting in good faith, any intervention into ideologically inflected falsehoods risks altering the balance within public discourse. There are, of course, compelling independent reasons, apart from ideological bias, to regulate patently false speech like Holocaust denialism, Obama birtherism, or Pizzagate-like fake news. But this does not change the fact that doing so gives the government a powerful tool to shape the ideological balance of public discourse to its own ends.

Thus, although the Court has never opined on this specific question, most scholars agree that these sorts of inherently political false statements of fact would be entitled to full First Amendment protection.⁶⁹ Even if such statements are

⁶⁵ See *id.* at 1099 (“[T]he European experience provides little evidence that punishment of Holocaust denial is the first step on the slippery slope to tyranny, though perhaps it is simply too early to tell where the path of punishing denial will lead.”).

⁶⁶ Tushnet, *supra* note 21, at 18.

⁶⁷ See *id.* (explaining that some false beliefs are “associated with wider [political] views”).

⁶⁸ See Alfred Moore, Joseph Parent, & Joseph Uscinski, *Conspiracy Theories Aren't Just for Conservatives*, WASH. POST (Aug. 21, 2014), https://www.washingtonpost.com/news/monkey-cage/wp/2014/08/21/conspiracy-theories-arent-just-for-conservatives/?utm_term=.c8483e8a82d0 (“Republicans were just as likely to believe that President Obama was born abroad as Democrats were likely to believe that 9/11 was an inside job.”).

⁶⁹ See, e.g., Gey, *supra* note 25, at 3 (“In the United States, . . . the nearly absolute protection of political speech under the First Amendment prevents the government

patently false and completely worthless, they are nevertheless so strongly and clearly associated with specific ideological points of view that direct government regulation would be particularly troublesome, as such regulation would effectively open the door to viewpoint-based targeting.⁷⁰

But how far does this reach? Conspiracy theories like Holocaust denialism, 9/11 truther theories, or Obama birtherism are quite clearly ideologically inflected: each is strongly associated with a particular political viewpoint, and this association is broadly understood by both the public and the government. But what about other types of patently false factual assertions? Take, for example, the assertion that the Earth is flat. One might reasonably view this assertion, in the abstract, as both patently false and independent of any ideological inflection—it is simply a clearly false statement regarding an ideologically neutral fact.

In the realm of conspiracy theories, however, nothing is ideologically neutral. There is ideological import in the very act of rejecting something that is so clearly and obviously deemed to be true by the general population. In other words, *all* conspiracy theories—even those that do not appear overtly ideological on their face—broadly share a singular ideological premise at their core: that the public is being manipulated by nefarious powers—that-be, whether the government, or the vast right-wing conspiracy, or the liberal media, or any other shadowy “they.”⁷¹ Thus, even purely factual assertions that, to most people, appear ideologically neutral and objectively provable as true or false—like the roundness of the Earth—carry a strong ideological tinge to conspiracy theorists. Whether the Earth is round becomes, in

from imposing . . . punishments on Holocaust deniers.”); Schauer, *supra* note 5, at 915 (“Whatever the harms of public noncommercial factual falsity (and it seems hard to deny that they are many and substantial), there is, in the United States, little basis for arguing that dealing with these harms through government restriction is constitutionally permissible.”).

⁷⁰ See Stone, *supra* note 31, at 140; see also Gey, *supra* note 25, at 21–22 (“If the government punishes the expression of factual falsehoods—such as Holocaust denial—it does so because the statement of such facts are bound up with political perspectives that the government seeks to undermine.”).

⁷¹ This is reflected in dictionary definitions of “conspiracy theory.” See *Conspiracy Theory*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/conspiracy%20theory> (last updated Mar. 4, 2018) (defining “conspiracy theory” as “a theory that explains an event or set of circumstances as the result of a secret plot by usually powerful conspirators”); *Conspiracy Theory*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/39766?redirectedFrom=conspiracy+theory#eid8383475> (last visited Oct. 16, 2017) (defining “conspiracy theory” as “a belief that some covert but influential agency (typically political in motivation and oppressive in intent) is responsible for an unexplained event”).

effect, a referendum on how much one should trust the powers-that-be.⁷²

These sorts of conspiracy theories thus tend to be attractive to the politically powerless—those seeking “an explanation for the hidden and seemingly mysterious workings of political power.”⁷³ To such adherents, patent falsity is, in fact, the central *allure* of these theories: the fact that the theories so directly reject what is obviously true to society at large fits an underlying ideological belief that society must wake up and challenge all of our trusted authorities—including any “truths” pronounced from such authorities—lest our apathy relegate us to the role of helpless and manipulable pawns. Indeed, as Lyrissa Lidsky noted, “denial of a conspiracy theory can often become proof that it exists, at least for its adherents,” such that government regulation of the patent falsehood in question may in fact lend it legitimacy in adherents’ eyes.⁷⁴

As a result, *any* patent falsehood on an issue of public concern can potentially be deemed ideologically inflected, no matter how ideologically neutral it may appear to be on its face. An assertion that the Earth revolves around the moon, that one plus one equals three, or that New York City does not actually exist is a purposeful departure from conventional and obvious truths held by society at large. As such, these sorts of assertions can be viewed as shorthand for an implicit ideological position that authorities cannot be trusted, that the public is inherently naïve and manipulable, and that even the most seemingly straightforward truths are actually the product of nefarious agendas and machinations. In essence, the marketplace of facts is inextricably linked to the marketplace of ideas: even if, on the surface, the matter in question is purely empirical in nature, any factual debate can effectively act as a stand-in for broader debates regarding ideological truth.

⁷² See Lidsky, *supra* note 12, at 1100 (“Conspiracy theories provide an explanation for the hidden and seemingly mysterious workings of political power, and they represent a populist response to government secrecy.”).

⁷³ *Id.*; see also MARK FENSTER, CONSPIRACY THEORIES: SECRECY AND POWER IN AMERICAN CULTURE 68–74 (1999); Cass R. Sunstein & Adrian Vermeule, *Conspiracy Theories: Causes and Cures*, 17 J. POL. PHIL. 202, 204 (2009) (“When civil rights and civil liberties are absent, people lack multiple information sources, and they are more likely to have reason to accept conspiracy theories.”).

⁷⁴ Lidsky, *supra* note 12, at 1100; see also Sunstein & Vermuele, *supra* note 73, at 210 (“[A] central feature of conspiracy theories is that they are extremely resistant to correction, certainly through direct denials or counterspeech by government officials; apparently contrary evidence can usually be shown to be a product of the conspiracy itself.”); Tushnet, *supra* note 21, at 19 (observing that counter-speech demonstrating the falsity of a conspiracy theory “will often be ineffective” because “[p]eople with [ideological] commitments may resist counter-evidence, come up with explanations for why the proffered counter-evidence is itself false, and the like”).

III. SOME THOUGHTS ON THE CONTOURS OF PERMISSIBLE REGULATION

All of this suggests that even patently false factual statements on matters of public concern—including assertions that are not overtly political or ideological on their face—are entitled to the same stringent protection afforded to direct ideological advocacy. In the abstract, this determination comes down to a judgment as to what represents the lesser evil: a public discourse infected by patent falsehoods that create substantial social harm, or a public discourse policed and “sanitized” by a likely self-interested government actor.⁷⁵ And the uniquely strong aversion to any government management of public discourse that is inherent to the American free speech tradition—even if it is well-intentioned and might produce substantial benefits—creates a strong baseline presumption of full constitutional protection with respect to any factual falsehoods regarding issues of public concern.⁷⁶

This presumption would likely hold true in most cases where the patent falsehood is disseminated by one who genuinely believes it to be true—that is, the person who truly believes the Pizzagate allegations, or that the Earth is flat, or that 9/11 was an inside job. As the Court recognized in the defamation context, concerns regarding government abuse and chilling effects increase as the degree of fault required by the regulation in question decreases.⁷⁷ Regulating patent falsehoods under a negligence or strict liability standard—that is, extending liability to falsehoods made without knowledge of their falsity—would expand the scope of potential liability, thus increasing chilling effects on speakers and opening the door for government abuse through selective enforcement or biased decision making. Conversely, regulating such assertions through an intent standard⁷⁸ would significantly limit the scope of liability,

⁷⁵ See Han, *supra* note 60.

⁷⁶ See *id.* (“[L]ies regarding the highest-value core speech . . . should carry a heavy presumption of full constitutional protection, such that any content-based restrictions of such lies are evaluated under strict scrutiny.”).

⁷⁷ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334–37 (1974) (instituting a stringent “actual malice” standard in defamation cases regarding public figures on issues of public concern due to the dangers of chilling effects and government abuse).

⁷⁸ In certain defamation cases, the Court has instituted the actual malice standard, which it defined as “knowledge that [the statement] was false or . . . reckless disregard of whether it was false or not.” *Sullivan*, 376 U.S. at 279–80. For present purposes, however, I put aside the issue of recklessness, as that concept does not really fit within situations where the speaker genuinely believes in *patently false* statements of fact. See Tushnet, *supra* note 21, at 20 n.91 (“Reckless disregard suggests inattention to the issue of truth, yet those who make ideologically inflected

reducing chilling effects on speakers and limiting the potential for government abuse.⁷⁹ Thus, the absence of a requirement that the falsehood be a knowing one would cut heavily in favor of unconstitutionality.⁸⁰

Furthermore, as Tushnet observed, when speakers genuinely believe their patently false assertions, presenting them with counter-evidence might lead them to abandon their views.⁸¹ And to the extent that—as discussed above—these sorts of patent falsehoods can be conceptualized as manifestations of a particular ideological mindset, confronting speakers with such counter-evidence might ultimately lead them to rethink their fundamental ideological commitments, in a direct application of the traditional marketplace-of-ideas theory.⁸²

What about intentional patent falsehoods on matters of public concern—that is, falsehoods made by one who knows of their falsity? Let's say, for example, that I intentionally fabricate fake news—like the Pizzagate scandal—in an attempt to sell more newspapers or drive traffic to my website. Or I tell someone that antiretrovirals are worthless in fighting AIDS and that it is better for him to forego all treatment, knowing this to be false. Or I knowingly make false assertions that the United States was actually founded in 1850, and that the “official history” we have learned in school was the product of a vast government cover-up, simply because I know that these statements will draw interest (and donations) from conspiracy enthusiasts. To what extent should these sorts of intentional, patent falsehoods be regulable?

On the one hand, an intent requirement, as discussed above, drastically reduces the potential for chilling effects and government abuse, given the reduced scope of liability associated with a more stringent fault standard. And on an instrumental level, there are few arguments that can be made for the inherent value of such speech. There is no issue of counter-evidence working to persuade the speaker if the speaker is already well aware of the falsity of the speech. And it is difficult to identify any meaningful value if the speaker's ultimate goal is to

statements are ordinarily quite conscious of the evidence against the assertions they make but disagree with its import.”).

⁷⁹ Han, *supra* note 60.

⁸⁰ See *United States v. Alvarez*, 567 U.S. 709, 719 (plurality opinion) (“Even when considering some instances of defamation and fraud, . . . the Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”); *id.* at 732 (Breyer, J., concurring) (“I would read the [Stolen Valor Act] favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true.”).

⁸¹ Tushnet, *supra* note 21, at 18.

⁸² *Id.* at 19–20.

accomplish social harm through the mechanism of deception. There are thus strong reasons to characterize intentional patent falsehoods on matters of public concern as truly worthless, such that society would always be better off if they were never made.

On the other hand, if our primary concern with regulating such speech is distrust of the government, then it perhaps should not matter what the *source* of the falsehood is. Perhaps all that matters is that the false assertion has been introduced into public discourse, and that it is strongly associated with a particular ideological point of view. Whether Pizzagate or reptilian conspiracy theories were introduced intentionally by speakers seeking to profit from knowing lies or in good faith by true believers, once they enter the public discourse, they take on a life of their own: they acquire adherents, whose belief in what seems to the general public to be patent absurdity represents a particular ideological position regarding the role and motives of various “trusted authorities” within public life. Thus, although an intent requirement might broadly limit the *scope* of potential government intervention, it does not eliminate the fundamental problem of the government affirmatively managing ideologically inflected facts within public discourse.

There is, I think, much to be said about this issue—far more than can be addressed in this brief Essay. But I will close with a few thoughts as to what sorts of theoretical and practical considerations might come into play in determining the constitutional scope of the government’s regulatory power here.

As a starting point, it is clearly an overstatement to say that there is *no* constitutional distinction between intentional factual falsehoods on issues of public concern and pure ideological advocacy. There are undoubtedly situations in which such falsehoods can be sanctioned while abstract advocacy cannot. For example, the Court has made clear that fraud, perjury, defamation, false advertising, and lies to government officials can be constitutionally regulated.⁸³ So an intentional, patently false statement on an issue of public concern could still be punished as perjury if made under oath, and the Court’s defamation jurisprudence makes clear that knowingly false defamatory statements on a matter of public concern can be constitutionally subject to liability.⁸⁴

So how might we distinguish the sorts of intentional patent falsehoods that the government can constitutionally

⁸³ See, e.g., *Alvarez*, 567 U.S. at 717, 720 (plurality opinion).

⁸⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347–48 (1974).

regulate from those that it cannot?⁸⁵ Again, this broad issue can be conceptualized as choosing the lesser evil between the substantial social harms produced by intentional patent falsehoods and the dangers associated with a public discourse policed by a likely self-interested government actor. It therefore follows that government regulation is more likely to be permissible where the evils produced by intentional patent falsehoods are particularly acute and where the risk of government abuse is significantly limited in some manner.

Thus, as both the plurality and the concurrence in *Alvarez* strongly suggested, the type and degree of social harm associated with the falsehoods in question would play a significant role in the inquiry.⁸⁶ As Helen Norton has observed, “The more generalized and less tangible the harms threatened by the targeted lies, . . . the greater the concerns about selective or partisan enforcement.”⁸⁷ If the government seeks to regulate lies—even intentional, obvious lies—untethered to any sort of material harm requirement, its freedom to control public discourse on this basis would be effectively unchecked, thus raising significant suspicion of improper government motives.⁸⁸ On the other hand, if the regulation is explicitly limited to contexts where, say, concrete monetary or physical harm has been suffered (as opposed to abstract or de minimis harms), there would be less reason to fear government abuse, as the regulation would be tied to particularly compelling circumstances where

⁸⁵ As I noted above, as a purely doctrinal matter, the Court has purported to apply the purely historical *Stevens* test in identifying low-value categories of speech. See *supra* note 53 and accompanying text. As I have argued at length elsewhere, however, the idea of a meaningfully objective, purely historical test in this context is illusory. Because courts have substantial latitude to analogize the speech in question to historically excluded categories of speech at varying levels of generality, any “purely historical” determination is inevitably driven by the sorts of underlying value judgments that the *Stevens* Court purported to reject. See David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 383–91 (2015). Thus, the *Stevens* test would not likely serve as a meaningful obstacle if courts were inclined to recognize additional subsets of low-value speech. See *id.* at 392 (observing that “savvy courts can easily translate strongly held value judgments regarding the speech in question into facially neutral historical analysis by framing the speech in a particular manner, selecting one particular historical narrative over others, and/or drawing analogies broadly or narrowly”).

⁸⁶ See *Alvarez*, 567 U.S. at 718–19 (plurality opinion) (distinguishing the lies covered by the Stolen Valor Act from historically unprotected lies like fraud and perjury based largely on the absence of a “legally cognizable harm” associated with the lies prohibited by the Act); *id.* at 734, 738 (Breyer, J., concurring) (focusing on the Act’s lack of a “material” or “tangible” harm requirement).

⁸⁷ Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 187 (2013).

⁸⁸ Cf. *Alvarez*, 567 U.S. at 723 (“Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.”).

tangible social harm is actually produced.⁸⁹ This explains the relative flexibility afforded to the government in regulating falsehoods that constitute fraud, defamation, or perjury: each is associated with direct, concrete, and material harms, whether to individuals or to the day-to-day functioning of government institutions.⁹⁰

Also relevant to the inquiry might be the manner by which the speech is disseminated. Let's take, for example, a patently and intentionally false assertion that antiretrovirals do nothing to alleviate the symptoms of AIDS and that any statements to the contrary are the product of a conspiracy between the government and pharmaceutical companies. If this assertion were made via a public pronouncement at a rally or in a widely distributed book or article, it would tend to take on the quality of an ideological assertion, even if the speaker is well aware of its falsity. In effect, the speaker is injecting the patently false assertion directly into public discourse, where, as discussed above, the assertion might take on a life of its own, standing in for a set of particular ideological beliefs.

By contrast, let's say that I privately make the exact same patently false assertion to only one other person—someone who I know is particularly impressionable—for the express purpose of causing him harm (that is, I know it will cause him to reject his antiretroviral treatment). Although the assertion regards an issue of public concern, any concerns regarding government abuse would be more limited in this one-on-one context, as the assertion is not directly injected into public discourse.⁹¹ Furthermore, when the assertion is made within this context—particularly given the specifically targeted intent of the speaker—it more closely resembles a purely mechanical means of bringing about the specified harm, like hiding the person's medication, rather than an abstract ideological assertion.⁹² And, of course, where there is an indication of this sort of highly particularized intent to do direct harm on a particular target, there is less concern with government abuse in general, given the compelling regulatory interests associated with punishing or deterring such

⁸⁹ See Han, *supra* note 60; Alvarez, 567 U.S. at 719–23.

⁹⁰ See Han, *supra* note 60.

⁹¹ Cf. RESTATEMENT (SECOND) OF TORTS § 652D, cmt. a (stating that the violation of a particular privacy right occurs only when one “gives publicity” to certain matters and defining “publicity” to mean “that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge”).

⁹² It might perhaps make sense to put this in the language of proximate cause: here, the patent falsehood—although it regards an issue of public concern—seems to connect very closely, directly, and foreseeably to a highly particularized material harm. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 104–05 (N.Y. 1928) (Andrews, J., dissenting).

conduct. Thus, where private rather than public dissemination is involved, and where the falsehood is specifically intended to directly harm particular individuals, the risks of government abuse may be reduced, thus allowing for more regulatory flexibility.

Finally, one might consider the extent to which the type of false assertion and the conditions under which the assertion is made short-circuit listeners' ability to rationally evaluate its veracity. Certain false factual statements on issues of public concern might be clearly and objectively provable as false, but may not be easily or practically identifiable as such by listeners under the particular circumstances. Take, for example, an intentional and patently false statement that a child sex ring is operating within a certain house in the neighborhood. If the assertion is made in a situation where, say, time appears to be of the essence (for example, the perpetrators might flee at any moment and never be found), then a listener may not have any opportunity to evaluate the veracity of the statement before intervening. Thus, a rational listener might simply assume the truth of the statement—even if he actually harbors doubts as to the statement's accuracy⁹³—and social harm may therefore result from the listener's actions.

This is, in essence, an incitement-like scenario,⁹⁴ although this context is somewhat different from the paradigmatic incitement case.⁹⁵ And similar to the incitement context, the government may be entitled to greater regulatory flexibility here simply because any harm produced by the falsehoods in question would not be brought about by persuasion or the listener's unadulterated rational processes.⁹⁶ Rather, the harm is produced by pure misinformation that the listener cannot independently evaluate,⁹⁷ akin to telling a blind pedestrian that the light is red

⁹³ For example, if the listener thinks the statement has only a 20% chance of being true, he may nevertheless rationally intervene under a judgment that the high risk of error is outweighed by the massive social benefit that would result should the assertion prove to be truthful.

⁹⁴ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (observing that the First Amendment "do[es] 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").

⁹⁵ That is, the harm here may not be produced by directly inflaming the passions of listeners to take lawless action. See, e.g., *Hess v. Indiana*, 414 U.S. 105, 105–09 (1973) (per curiam). Rather, the harm may be produced by influencing sober-minded listeners to act rationally under the circumstances based on false information.

⁹⁶ See Strauss, *supra* note 25, at 339 ("[T]he risk of law violation can justify suppression of speech only if the speech brings about the violation by bypassing the rational processes of deliberation.").

⁹⁷ Cf. *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

when it is actually green.⁹⁸ In this context, factual falsehoods—even those that may relate to matters of public concern—are not operating as ideologically inflected assertions, and any regulation would therefore present a relatively lower risk of government abuse.

This is only a brief survey of factors that might influence this theoretical inquiry; it is certainly not meant to be exhaustive. Furthermore, to say that these factors may be theoretically relevant to the analysis is not necessarily to say that any of them is dispositive, or even that they must be integrated into the doctrine. Structural and practical considerations must always be taken into account in crafting doctrine, and there are many standard reasons—such as concerns with chilling effects and excessive judicial discretion—to prefer blunt and administrable rule-like approaches as opposed to more tailored and comprehensive standard-like approaches.⁹⁹ These sorts of considerations would ultimately influence any determination as to which doctrinal factors should be used to distinguish between different types of falsehoods.

In the end, however, it is worth reemphasizing that anytime the government seeks to regulate factual falsehoods regarding issues of public concern—whether characterized as conspiracy theories, fake news, or anything else—the strong presumption, which would hold true in most cases, is that the speech is fully protected, such that any content-based regulation would almost certainly be unconstitutional. Although, as I have discussed above, the government may retain some flexibility to directly regulate intentional patent falsehoods under certain circumstances, any such regulatory freedom would be narrow in nature, limited to particular contexts where the potential for government abuse has been significantly limited and the social harm produced by such falsehoods is particularly acute.

IV. CONCLUSION

As a purely intuitive matter, it seems somewhat strange to say that the Constitution offers any protection to patently false factual statements on issues of public concern, including those that may cause grievous social harm. But when such falsehoods take the form of a conspiracy theory, they are inextricably linked to a singular ideological position: a radical skepticism of authority that assumes we are all being clandestinely

⁹⁸ Cf. Strauss, *supra* note 25, at 335 (“The clearest example of speech that might induce action by nonrational means is a false statement of fact. A rational person never wants to act on the basis of false information.”).

⁹⁹ Han, *supra* note 85, at 367–70.

manipulated for nefarious ends by the various powers-that-be. Thus, to allow the government unchecked freedom to regulate such speech is to give it a powerful tool to control public discourse—a result that is highly dissonant with the fiercely anti-paternalistic posture of American free speech jurisprudence.

It is an oversimplification, however, to say that such patent falsehoods are therefore always entitled to the same broad constitutional protection afforded to abstract ideological advocacy. Although I have made some broad observations as to how courts might navigate and shape the constitutional contours of such speech, we may ultimately never get very much doctrinal clarity as to this issue. Few cases addressing this issue have reached the courts,¹⁰⁰ and even amidst all of the current hand-wringing regarding the dangers of fake news, little legislative action has been taken to address the issue. Thus, in the end, the issue may simply be settled by broad cultural consensus rather than constitutional adjudication—a consensus that within the American free speech tradition, considerable skepticism regarding the intentions of the powers-that-be is, in fact, a good thing, despite its costs.

¹⁰⁰ See Schauer, *supra* note 5, at 916 (“As is well known and frequently analyzed, the willingness to sanction Holocaust denial in numerous liberal and open democratic societies is in stark contrast to American practice, but what is perhaps most interesting is the absence of anything even close to a Supreme Court case directly on point.”) (footnote omitted).

CHEAP SPEECH AND WHAT IT HAS DONE (TO AMERICAN DEMOCRACY)

Richard L. Hasen*

INTRODUCTION

In a remarkably prescient article in a 1995 *Yale Law Journal* symposium on “Emerging Media Technology and the First Amendment,”¹ Professor Eugene Volokh looked ahead to the coming Internet era and correctly predicted many changes. In *Cheap Speech and What It Will Do*, Volokh could foresee the rise of streaming music and video services such as Spotify and Netflix,² the emergence of handheld tablets for reading books,³ the demise of classified advertising in the newspaper business,⁴ and more generally how cheap speech would usher in radical new opportunities for readers, viewers, and listeners to custom design what they read, see, and hear, while concomitantly undermining the power of intermediaries including publishers and bookstore owners.⁵

To Volokh, these changes were exciting and democratizing. Volokh’s predictions were not perfect—for example, he expected we would be using high-speed printers to print out columns from our favorite newspaper columnists,⁶ and he grossly underestimated how cheap speech would wreck the economics of the newspaper business.⁷ He also could see some dark sides to cheap speech, such as the Internet lowering the organizing costs for hate groups such as the Ku Klux Klan.⁸ But

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¹ Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

² *Id.* at 1808–18; see also *id.* 1831 (“What people would like, I believe, is to choose from home—at any time convenient to them—any TV show or movie they want, just as they choose a book in a bookstore, only more conveniently and less expensively (or even free, since the medium might still be advertiser-supported).”).

³ *Id.* at 1823.

⁴ *Id.* at 1841–42.

⁵ *Id.* at 1848–49.

⁶ *Id.* at 1820–21.

⁷ *Id.* at 1842 (“The loss of classified revenues, coupled with the cost savings and opportunities for extra profits from electronic distribution, should help push newspaper publishers into going electronic [E]ach electronically delivered newspaper will have ads calculated to fit the particular subscriber’s profile—age, sex, and whatever other information the newspaper gets at subscription time, or can deduce from the mix of stories he’s ordered.”).

⁸ *Id.* at 1848.

the overall picture he painted of the cheap speech was a positive one,⁹ especially as First Amendment doctrine no longer had to deal with the scarcity of broadcast media to craft special First Amendment rules curtailing some aspects of free speech. Volokh asked: “Will listeners do a better job of informing themselves than the intermediaries have been doing? When the media aren’t there to help set a national agenda, or to give people a common base of information to argue from, will people be able to deliberate together? I think the answer to both questions is yes, but others . . . disagree.”¹⁰

Twenty-two years later, the picture of what cheap speech has already done and is likely to still do—in particular to American democracy—is considerably darker. No doubt cheap speech has increased convenience, dramatically lowered the costs of obtaining information, and spurred the creation and consumption of content from radically diverse sources. But the economics of cheap speech also have undermined mediating and stabilizing institutions of American democracy including newspapers and political parties, with negative social and political consequences. In place of media scarcity, we now have a media fire hose which has diluted trusted sources of information and led to the rise of “fake news”—falsehoods and propaganda spread by domestic and foreign sources for their own political and pecuniary purposes. The demise of local newspapers sets the stage for an increase in corruption among state and local officials. Rather than democratizing our politics, cheap speech appears to be hastening the irrelevancy of political parties by facilitating the ability of demagogues to secure support from voters by appealing directly to them, sometimes with incendiary appeals. Social media also can both increase intolerance and overcome collective action problems, both allowing for peaceful protest but also supercharging polarization and raising the dangers of violence in the United States.

The Supreme Court’s libertarian First Amendment doctrine did not cause the democracy problems associated with the rise of cheap speech, but it may stand in the way of needed reforms. For example, in the campaign finance arena, the Court’s doctrine and accompanying libertarian ethos may stymie efforts to limit foreign money flowing into elections, including money being spent to propagate “fake news.” The Court’s reluctance to allow the government to regulate false speech in the political arena could limit laws aimed at requiring social media

⁹ *Id.* at 1849.

¹⁰ *Id.* For some early expressions of concern about the role of technology and the First Amendment in undermining democratic discourse, see RONALD K.L. COLLINS & DAVID M. SKOVER, *THE DEATH OF DISCOURSE* (1996).

sites to curb false political advertising. Loose, optimistic dicta in Justice Kennedy's majority opinion for the Court in 2017's *Packingham v. North Carolina*¹¹ case also may have unintended consequences with its infinitely capacious language about First Amendment protection for social media. In the era of cheap speech, some shifts in First Amendment doctrine seem desirable to assist citizens in ascertaining truth and bolstering stabilizing institutions. Nonetheless, it is important not to fundamentally rework First Amendment doctrine, which also serves as a bulwark against government censorship and oppression potentially undertaken in an ostensible effort to battle "fake news." We do not want the cure to be worse than the disease.

Non-governmental actors, rather than the courts and government, are in the best position to ameliorate some of the darker effects of cheap speech. Social media hosts and search sites such as Facebook, Google, and Twitter can assist readers, viewers, and listeners in ferreting out the truth if the companies have a commercial reason to do so. Consumer pressure may be necessary to get there, but it is not clear if consumers or shareholders will have the power to move dominant market players who do not want to be moved. Fact checks can also help. Subsidies for (especially local) investigative reporting can also help the problems of corruption and bolster the credibility of newspapers and other supports for civil society. But nothing is certain to work in these precarious times, and the great freedom of information that Volokh rightly foresaw in the era of cheap speech is coming with a steep price for our democracy.

I. THE PROBLEM: WHAT CHEAP SPEECH HAS DONE AND WILL DO TO AMERICAN DEMOCRACY

A. The Decline of Traditional Journalism and the Rise of Fake News

There is no doubt that the rise of the Internet and social media has had many free speech benefits. Society worries much less about traditional media consolidation and scarcity. Readers and viewers may receive information from a vastly increased number of diverse sources. It is possible to make one's ideas potentially available to a huge audience, even without being wealthy. Information that used to be available only at a world-class library can now be at one's fingertips with a smart phone, computer, or other device. New sources of ideas and information can benefit democracy.

But this communications revolution has also come with a downside, and the top concern is the demise of the economic

¹¹ 137 S. Ct. 1730 (2017).

model that supported newspapers and news reporting. The economic collapse of the (especially local) newspaper industry thanks to the rise of cheap speech is already having negative consequences for American democracy, with the worst likely yet to come. In 2001, approximately 411,800 people were employed in the journalism industry.¹² By 2016, the number fell below 174,000.¹³ Between 2000 and 2015, newspaper print advertising revenue declined from \$60 billion to \$20 billion per year.¹⁴ “In constant 2014 dollars, advertising revenues [in 2014] were \$3.6 billion (and 18%) below the \$20 billion spent in 1950, 62 years ago.”¹⁵ “What is under threat is independent reporting that provides information, investigation, analysis, and community knowledge, particularly in the coverage of local affairs.”¹⁶

The decline in newspaper revenue is accelerating, as advertising shifts dramatically to social media. As *The Atlantic* reported in November 2016:

[T]he *New York Times* announced that print ad revenue fell 19 percent for the quarter. Nine hours later . . . Facebook announced that its digital advertising revenue rose 59 percent. There is no direct comparison between the *Times*, a newspaper that pays luxuriously for reporters and editors, and Facebook, an attention arbitrage network that induces content from unpaid makers-viewers. But it illustrates the larger story . . . Audiences are migrating from print bundles to mobile networks and aggregators.¹⁷

¹² Ross Barkan, *The Biggest Threat to Journalism Isn't Donald Trump. It's Declining Revenues*, THE GUARDIAN (July 17, 2017, 11:47 AM), <https://www.theguardian.com/commentisfree/2017/jul/17/news-industry-revenue-declines-biggest-threat-to-journalism>.

¹³ *Id.* Newspapers were declining even before the rise of the Internet, but the decline has been precipitous since 2000, especially with the loss of classified advertising. C.P. Chandrasekhar, *The Business of News in the Age of the Internet*, 41 SOC. SCIENTIST 25 (2013); Matthew Gentzkow, *Tracing Dollars for Dollars: The Price of Attention Online and Offline*, 104 AM. ECON. REV. 481, 481 (2014); Robert H. Giles, *An Emergent Neo-Journalism: The Decline and Renewal of News Media*, 32 HARV. INT'L REV. 36, 38 (2010).

¹⁴ Mark J. Perry, *Creative Destruction: Newspaper Ad Revenue Continued Its Precipitous Free Fall in 2014, and It's Likely to Continue*, AM. ENTER. INST. (Apr. 30, 2015), <https://www.aei.org/publication/creative-destruction-newspaper-ad-revenue-continued-its-precipitous-free-fall-in-2014-and-its-likely-to-continue/>.

¹⁵ *Id.*

¹⁶ Leonard Downie, Jr. & Michael Schudson, *The Reconstruction of American Journalism*, COLUM. J. REV. (Nov./Dec. 2009), http://archives.cjr.org/reconstruction/the_reconstruction_of_american.php.

¹⁷ Derek Thompson, *The Print Apocalypse and How to Survive It*, THE ATLANTIC (Nov. 3, 2016), <https://www.theatlantic.com/business/archive/2016/11/the-print-apocalypse-and-how-to-survive-it/506429/>.

Whether a subscription-driven *New York Times*¹⁸ or online only news organizations such as BuzzFeed, Vice, and the Huffington Post can fill the shoes especially of local-based journalism is uncertain at best.¹⁹ Network television news is also facing precipitous declines.²⁰ There is no Walter Cronkite for all Americans to trust anymore. Meanwhile, the new concern is search and social media consolidation, particularly the role of Facebook and Google.

The 2016 election saw not only the shift from traditional media to social media, but also a rise in false news stories (“fake news”) spread via social media.²¹ False news stories and

¹⁸ Syndey Ember, *New York Times Co.’s Decline in Print Advertising Tempered by Digital Gains*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/business/media/new-york-times-q4-earnings.html> (discussing how in 2016, the company’s print advertising revenue fell 16%, and despite a rise in digital advertising revenue, overall advertising revenue dropped 9%). “Revenue from the company’s digital-only subscriptions jumped 17% in 2016, to \$233 million.” *Id.*

¹⁹ Karin Wahl-Jorgensen et al., *The Future of Journalism: Risks, Threats, and Opportunities*, 17 JOURNALISM STUD. 801, 804 (2016). BuzzFeed has made some of its money through “native” advertising that looks like BuzzFeed content, but it looks like Facebook has found a strategy to gobble up even more advertising revenue by letting companies pay to promote positive reviews of their content from news outlets. Alex Kantrowitz, *Paying to Promote News Stories on Facebook is the Ad World’s Favorite New Tactic*, BUZZFEED (Jul. 24, 2017, 6:40 PM), https://www.buzzfeed.com/alexkantrowitz/media-companies-lose-out-again-as-advertisers-promote-their?utm_term=.bo2mGq8Yb#.nkM6Gdyew (“The practice could be particularly painful to publishers with native ad shops (BuzzFeed included), which create content for advertisers, since advertisers may decide they can get by on free editorial coverage, using Facebook as a delivery mechanism.”).

²⁰ Rasmus Kleis Nielson & Richard Sambrook, *What is Happening to Television News?*, REUTERS INST. FOR THE STUDY OF JOURNALISM 3 (2016), <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-06/What%20is%20Happening%20to%20Television%20News.pdf>. The study found that

[t]elevision viewing in countries like the UK and the US have declined by 3 to 4% per year on average since 2012. These declines are directly comparable to the declines in print newspaper circulation in the 2000s and if compounded over ten years will result in an overall decline in viewing of 25 to 30%. The average audience of many television news programmes is by now older than the average audience of many print newspapers. The decline in viewing among younger people is far more pronounced both for television viewing in general and for television news specifically, meaning that the loyalty and habits of older viewers prop up overall viewing figures and risk obscuring the fact that television news is rapidly losing touch with much of the population.

Id.

²¹ “We define ‘fake news’ to be news articles that are intentionally and verifiably false, and could mislead readers.” See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 213 (2017). The next few paragraphs draw from Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, WM. & MARY BILL OF RTS. J. (forthcoming 2018).

propaganda are nothing new,²² but the collapse of traditional media has amplified concern about propaganda and misinformation. As barriers to entry into media space have dropped thanks to cheap speech, the public's trust in traditional media has fallen, and social media has arisen as an ideal vehicle to deliver falsehoods and propaganda disguised as news.²³ The key problem for American democracy, as Professor Nate Persily put it, "is the deliberate use of misinformation to influence attitudes on an issue or toward a candidate."²⁴

Fake news is a problem for American democracy because of its social costs. Professors Allcott and Gentzkow explained the four primary social costs of fake news:

First, consumers who mistake a fake outlet for a legitimate one have less accurate beliefs and are worse off for that reason. Second, these less-accurate beliefs may reduce positive social externalities, undermining the ability of the democratic process to select high-quality candidates. Third, consumers may also become more skeptical of legitimate news producers, to the extent that they become hard to distinguish from fake news producers. Fourth, these effects may be reinforced in equilibrium by supply-side responses: a reduced demand for high-precision, low-bias reporting will reduce the incentives to invest in accurate reporting and truthfully report signals.²⁵

Fake news was a major problem in the 2016 election, and the volume of fake news is likely to increase dramatically in coming years, for both political and pecuniary reasons.²⁶

²² On the prevalence and causes of political misperceptions, see D.J. Flynn et. al, *The Nature and Origins of Misperceptions: Understanding False and Unsupported Beliefs About Politics*, 38 ADVANCES POL. PSYCHOL. 127 (2017).

²³ Allcott & Gentzkow, *supra* note 21, at 215; *see also id.* at 223–24 (finding that respondents in a post-election survey reported spending 38% of their time on social media following election news and that 14% of respondents listed social media as their "most important" news source); *id.* at 232 ("We estimate that the average US adult read and remembered on the order of one or perhaps several fake news articles during the election period, with higher exposure to pro-Trump articles than pro-Clinton articles. How much this affected the election results depends on the effectiveness of fake news exposure in changing the way people vote.").

²⁴ Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 68 (2017).

²⁵ Allcott & Gentzkow, *supra* note 21, at 219. The authors add: "These negative effects trade off against any welfare gain that arises from consumers who enjoy reading fake news reports that are consistent with their priors." *Id.*

²⁶ *Id.* at 217 (noting "pecuniary" and "ideological" reasons for spreading fake news). For more on the fake news aspects of the 2016 U.S. elections, see Anthony J.

As part of a larger effort to influence the 2016 presidential election and U.S. politics, Russia undertook an extensive propaganda effort, which included publishing negative stories about Clinton and U.S. interests²⁷ as well as inflaming passions and spreading false stories aimed at influencing the outcome of the election in Trump's favor. "For example, [Russian news website] Sputnik published an article that said the [John] Podesta email dump included certain incriminating comments about the Benghazi scandal, an allegation that turned out to be incorrect. Trump himself repeated this false story" at a campaign rally.²⁸

Sources allied with the Russian government paid at least \$100,000²⁹ to Facebook to spread election-related messages and false reports to specific populations (a process called "microtargeting"³⁰), including aiming certain false reports at journalists who might be expected to further spread the propaganda and misinformation.³¹ Russia and others also used

Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL'Y 57, 64–74 (2017).

²⁷ See *Assessing Russian Activities and Intentions in Recent US Elections*, INTELLIGENCE CMTY. ASSESSMENT 3 (Jan. 6, 2017),

https://www.dni.gov/files/documents/ICA_2017_01.pdf; see also *id.* at Annex A.

²⁸ Lauren Carroll, *Russia and Its Influence on the Presidential Election*, POLITIFACT (Dec. 1, 2016, 5:25 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/01/russia-and-its-influence-presidential-election/>; see also Louis Jacobson, *Donald Trump Incorrectly Pins Benghazi Criticism on Sidney Blumenthal*, POLITIFACT (Oct. 11, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/oct/11/donald-trump/donald-trump-incorrectly-pins-benghazi-criticism-s/>.

²⁹ Scott Shane & Vindu Goel, *Fake Russian Facebook Accounts Bought \$100,000 in Political Ads*, N.Y. TIMES (Sept. 6, 2017, 2:34 PM), <https://www.nytimes.com/2017/09/06/technology/facebook-russian-political-ads.html>; see also Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017) <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html> (describing fake profiles of Americans backed by Russians tweeting campaign messages).

³⁰ See Interview by Gwen Ifill with Ken Goldstein, Professor of Politics, University of San Francisco, and Eitan Hersh, Professor of Political Science, Yale University, *How Microtargeting Works in Political Advertising*, PBS (Feb. 18, 2014, 8:32 PM), <http://www.pbs.org/newshour/bb/how-microtargeting-works-political-advertising/> (explaining that microtargeting is not limited to the spread of false reports; it aims information at particular voters based upon data collected about them.).

³¹ Massimo Calabresi, *Inside Russia's Social Media War on America*, TIME (May 18, 2017, 3:48 PM), <http://time.com/4783932/inside-russia-social-media-war-america/>.

Congressional investigators are looking at how Russia helped stories like these spread to specific audiences. Counterintelligence officials, meanwhile, have picked up evidence that Russia tried to target particular influencers during the election season who they reasoned would help spread the damaging stories. These officials have seen evidence of Russia using its algorithmic techniques to target the social media accounts of particular reporters, senior intelligence officials tell TIME. "It's not necessarily the journal or the newspaper or the TV show," says the senior intelligence official. "It's the specific reporter that they find who might be a

automated “bots” to spread and amplify false news across social media platforms such as Facebook and Twitter.³²

Russia was not alone in using bots to amplify microtargeting efforts. Persily notes that “the advent of campaign bots represents the final breakdown in established modes and categories of campaigning All the worry about shady outsiders in the campaign finance system running television ads seems quaint when compared to networks of thousands of bots of uncertain geographic origin creating automated messages designed to malign candidates and misinform voters.”³³

The fake news problem extended beyond Russia and beyond anti-Clinton propaganda. A group of young Macedonians spread a huge amount of pro-Trump fake news as a way of making money on social media advertising.³⁴ A false story from one of the Macedonians saying Hillary Clinton would be indicted in 2017 got 140,000 shares and comments on Facebook, generating good revenue. An American from

little bit slanted toward believing things, and they'll hit him” with a flood of fake news stories. Russia plays in every social media space. The intelligence officials have found that Moscow’s agents bought ads on Facebook to target specific populations with propaganda. “They buy the ads, where it says sponsored by—they do that just as much as anybody else does,” says the senior intelligence official. (A Facebook official says the company has no evidence of that occurring.) The ranking Democrat on the Senate Intelligence Committee, Mark Warner of Virginia, has said he is looking into why, for example, four of the top five Google search results the day the U.S. released a report on the 2016 operation were links to Russia’s TV propaganda arm, RT. (Google says it saw no meddling in this case.) Researchers at the University of Southern California, meanwhile, found that nearly 20% of political tweets in 2016 between Sept. 16 and Oct. 21 were generated by bots of unknown origin; investigators are trying to figure out how many were Russian.

Id.

³² Gabe O’Connor, *How Russian Twitter Bots Pumped Out Fake News During the 2016 Election*, NPR (Apr. 3, 2017, 4:53 PM), <http://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election>.

³³ Persily, *supra* note 24, at 70 (“During the 2016 campaign, the prevalence of bots in spreading propaganda and fake news appears to have reached new heights. One study found that between 16 September and 21 October 2016, bots produced about a fifth of all tweets related to the upcoming election. Across all three presidential debates, pro-Trump Twitter bots generated about four times as many tweets as pro-Clinton bots. During the final debate in particular, that figure rose to seven times as many.”).

³⁴ Craig Silverman & Lawrence Alexander, *How Teens in the Balkans are Duping Trump Supporters with Fake News*, BUZZFEED (Nov. 3, 2016, 8:02 PM), <https://www.buzzfeed.com/craigsilverman/how-macedonia-became-a-global-hub-for-pro-trump-misinfo>.

Clearwater, Florida started a fake news site as a joke and gained one million views in two weeks.³⁵

During the 2016 elections, more fake news spread on the right than on the left, such as the false story that the Pope had endorsed Donald Trump for president (which had 960,000 Facebook engagements).³⁶ Allcott and Gentzkow's study of fake news articles on social media during the 2016 election found about three times as many pro-Trump fake news articles as fake pro-Clinton articles, with the pro-Trump articles shared 30.3 million times on Facebook (compared to 7.6 million shares of pro-Clinton fake news).³⁷ The authors are skeptical that fake news swung the election to Trump,³⁸ but the potential for fake news to influence future election outcomes is manifest as social media continues to grow and as traditional media struggle with viable economic models.

Trump has made things even worse by labeling negative but truthful stories about him as "fake news." Trump used the term at least 70 times on Twitter,³⁹ such as in a June 2017 tweet, "The Fake News Media has never been so wrong or so dirty. Purposely incorrect stories and phony sources to meet their agenda of hate. Sad!"⁴⁰ This strategy makes it even harder for journalists and others to communicate to voters that there is truth and falsity in the world, and that there is a fair and accurate way to identify stories which have no basis in reality.

Meanwhile, with Trump in power, Democrats and others on the left are increasingly falling for fake news. Senator Ed Markey of Massachusetts made false claims on CNN about

³⁵ Joshua Gillin, *Fake News Website Starts as Joke, Gains 1 Million Views Within Two Weeks*, POLITIFACT: PUNDITFACT (Mar. 9, 2017, 12:17 PM), <http://www.politifact.com/punditfact/article/2017/mar/09/fake-news-website-starts-joke-gains-1-million-view/>.

³⁶ Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016), <https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>.

³⁷ Allcott & Gentzkow, *supra* note 21, at 223–24. The authors added a caveat: "To be clear, these statistics show that more of the fake news articles *on these three fact-checking sites* are right-leaning. This could be because more of the actual fake news is right-leaning, or because more right-leaning assertions are forwarded to and/or reported by fact-checking sites, or because the conclusions that fact-checking sites draw have a left-leaning bias, or some combination. Some anecdotal reports support the idea that the majority of election-related fake news was pro-Trump: some fake news providers reportedly found higher demand for pro-Trump (or anti-Clinton) fake news, and responded by providing more of it." *Id.* at 223–24.

³⁸ *Id.* at 232.

³⁹ Search Results of Tweets by Donald Trump That Include the Term "Fake News", TWITTER, <https://twitter.com/search?1=&q=%22fake%20news%22%20from%3Arealdonaldtrump&src=typd> (last visited Mar. 10, 2018).

⁴⁰ Donald Trump (@realDonaldTrump), TWITTER, (June 13, 2017, 3:35 AM), <https://twitter.com/realDonaldTrump/status/874576057579565056>.

grand juries being empaneled to look into the Trump campaign's ties to Russia.⁴¹ Harvard Law professor Laurence Tribe also spread false claims on Twitter, including a false claim that White House advisor Steve Bannon was physically assaulting White House staffers.⁴² Both Markey and Tribe fell for false reports coming from a group of sources allied with former British legislator and purveyor of false stories Louise Mensch.⁴³

B. Increase in State and Local Corruption

Fake news may be the largest concern for American democracy stemming from the rise of cheap speech, but it is far from the only one. It also may have other negative effects. To begin with, it seems likely that the decline in local newspaper coverage thanks to the rise of cheap speech will increase the amount of state and local corruption.

In an earlier study considering why Members of Congress are much less likely than state and local officials to be found to have engaged in bribery and other forms of corruption, I noted that the press pays much closer attention to the actions of Congress than to what happens in the states, and the lack of an active press watchdog seems correlated with higher levels of corruption.⁴⁴ If that is correct, then the demise of local newspapers should lead to an increase in the amount of state and local corruption, which currently gets the most coverage by local professional journalists.

Indeed, we can see what the collapse of the economic model for local journalism will mean for an increase in corruption by looking at a related phenomenon: lack of news reporters near state capitals is correlated with an increase in corruption. In an insightful *American Economic Review* article,⁴⁵ Felipe Campante and Quoc-Anh Do examined the hypothesis that public corruption in a state is greater when the state capital

⁴¹ Jeet Heer, *No, Liberals are Not Falling for Conspiracy Theories Just Like Conservatives Do*, NEW REPUBLIC (May 23, 2017), <https://newrepublic.com/article/142828/no-liberals-not-falling-conspiracy-theories-just-like-conservatives>.

⁴² See McKay Coppins, *How the Left Lost Its Mind*, THE ATLANTIC (July 2, 2017), <https://www.theatlantic.com/politics/archive/2017/07/liberal-fever-swamps/530736/>.

⁴³ Zack Beauchamp, *Democrats are Falling for Fake News About Russia*, VOX (May, 19, 2017, 8:30 AM), <https://www.vox.com/world/2017/5/19/15561842/trump-russia-louise-mensch>; see also Brendan Nyhan, *Why More Democrats are Now Embracing Conspiracy Theories*, N.Y. TIMES: THE UPSHOT (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/upshot/why-more-democrats-are-now-embracing-conspiracy-theories.html>.

⁴⁴ Richard L. Hasen, *Why Isn't Congress More Corrupt? A Preliminary Inquiry*, 84 FORDHAM L. REV. 429, 436–37 (2015).

⁴⁵ Felipe R. Campante & Quoc-Anh Do, *Isolated Capital Cities, Accountability, and Corruption: Evidence from U.S. States*, 104 AM. ECON. REV. 2456 (2014).

is relatively far from the state's population centers. They found that:

[I]solated capital cities are robustly associated with greater levels of corruption across [U.S.] states, in line with the view that this isolation reduces accountability. [They] provide direct evidence that the spatial distribution of population relative to the capital affects different accountability mechanisms: newspapers cover state politics more when readers are closer to the capital, voters who live far from the capital are less knowledgeable and interested in state politics, and they turn out less in state elections. [They] also find that isolated capitals are associated with more money in state-level campaigns, and worse public good provision.⁴⁶

Campante and Do's model shows that government honesty and accountability are driven in part by close media coverage. The media cover state politics less frequently when state capitals are isolated, and readers in such states consequently read state politics news less. Voter turnout in state elections is lower in states with isolated capitals as well, perhaps because voters believe they do not have enough information to cast intelligent votes or because there is no scandal news to give voters a signal or reason to vote. The lack of accountability creates an opening for corruption.

The authors' findings on campaign finance are especially interesting. Campaign contributions are higher in states with isolated capitals, and donations in those states are dominated by people who live closer to those isolated capitals.⁴⁷ The authors speculate that "with lower media scrutiny and reduced involvement by voters, an isolated capital opens the way for a stronger role of money in shaping political outcomes."⁴⁸

What Campante and Do find occurring with isolated capitals increasingly will apply across the board to state and local news coverage; as news coverage diminishes, expect corruption to increase, voter turnout to decrease, and the influence of money on politicians to increase.

When one thinks of state and local corruption scandals, such as the Bell, California self-dealing, it is important to remember that these stories often have been broken by local

⁴⁶ *Id.*

⁴⁷ *Id.* at 2475–76.

⁴⁸ *Id.* at 2478.

newspapers. In the case of Bell, it was the *Los Angeles Times*'s reporting, for which it won a Pulitzer Prize gold medal for public service.⁴⁹ As newspapers like the *Times* lose revenue and then reporters, these kinds of scandals will proliferate, especially in locations that newspapers will no longer be able to afford to cover, such as small cities like Bell or the far-away state capital of Sacramento.⁵⁰

C. The Decline of Political Parties and the Rise of Candidate Demagoguery

The technology of campaigning has long influenced the nature and strength of political parties. With the advent of radio and television advertising, campaigns shifted from labor-intensive party-driven campaigns (often fueled by patronage jobs, especially in large cities) to capital-intensive advertising-driven campaigns raising large amounts of money to reach mass audiences.⁵¹ Parties have become key fundraisers for national candidates, providing expertise and scale, thereby allowing candidates to spend sums necessary for effective advertising.

This short Symposium Article cannot canvass all the ways that the Internet and social media have and will further change campaigning and campaign funding. Here I focus on a few key ways that the cheap speech phenomenon has changed campaigns.

To begin with, cheap speech has not yet lessened the cost of campaigns, but it has shifted a significant portion of campaign expenditures to a handful of digital companies. Digital advertising revenue from 2016 political campaigns reached \$1.4 billion,⁵² a 789% increase over the 2012 campaign.⁵³ Facebook and Google received up to 85% of that revenue, with Twitter a

⁴⁹ Robin Abcarian & Geraldine Baum, *Los Angeles Times Wins Two Pulitzer Prizes*, L.A. TIMES (Apr. 19, 2011), <http://articles.latimes.com/2011/apr/19/nation/la-na-pulitzers-20110419>.

⁵⁰ See Hasen, *supra* note 44, at 442 ("There is not even enough money to cover normal state politics. In Los Angeles, for example, all the local television stations have closed their Sacramento bureaus covering California state politics.").

⁵¹ Richard L. Hasen, *An Enriched Economic Model of Political Patronage and Campaign Contributions: Revising Supreme Court Jurisprudence*, 14 CARDOZO L. REV. 1321–22 (1993).

⁵² Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, ADVERT. AGE (Jan. 3, 2017), <http://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346/>.

⁵³ Sean J. Miller, *Digital Ad Spending Tops Estimates*, CAMPAIGNS & ELECTIONS (Jan. 4, 2017), <https://www.campaignsandelections.com/campaign-insider/digital-ad-spending-tops-estimates>.

“distant third.”⁵⁴ Overall campaign costs have continued to rise, with some early signs they may be flattening.⁵⁵

Further, campaigns have become adept at using the Internet for small donor fundraising, a phenomenon used to great advantage by President Barack Obama and others, most recently by President Donald Trump.⁵⁶ This phenomenon does have a democratizing and equalizing effect that many people across the political spectrum can cheer, especially with the rise of mega-donors giving to Super PACs.

Most importantly for our purposes, the Trump campaign illustrated how cheap speech may facilitate a candidate’s extreme appeals directly to voters. Trump is the first “Twitter president,” not only in the volume of tweets that he sent out to his millions of followers but also in their incendiary nature. Trump was able to attract free (traditional) media attention through his social media program, and communicate in ways that did not depend upon political parties, journalists, or other intermediaries to filter his message. And he was able to do so in short, angry bursts which would not be possible if directly addressing voters in a weekly radio address or a speech from the Oval Office.⁵⁷

⁵⁴ Dawn Chmielewski & Kurt Wagner, *Facebook and Google are Winning the Political Ad Race. Here’s Twitter’s Plans to Catch Up*, RECODE (Apr. 26, 2016, 9:10 AM), <https://www.recode.net/2016/4/26/11586416/twitter-political-ads-google-facebook>. Precise numbers are hard to come by. Facebook deliberately keeps political advertising information confidential. Reuters, *Facebook Won’t Reveal Data About Political Campaign Ads*, FORTUNE (June 22, 2017), <http://fortune.com/2017/06/22/facebook-political-campaign-ads/>. And a categorical breakdown of Google’s 2016 \$79.28 billion advertising revenue is not readily accessible. *Google’s Ad Revenue from 2001 to 2016 (in Billion U.S. Dollars)*, STATISTA, <https://www.statista.com/statistics/266249/advertising-revenue-of-google/> (last visited Mar. 10, 2018).

⁵⁵ See DANIEL H. LOWENSTEIN ET AL., ELECTION LAW—CASES AND MATERIALS 808 (6th ed. 2017) (“Total spending on federal election activity related to the 2012 elections hit \$7.1 billion (with preliminary figures for 2016 in the same range), compared to just under \$6 billion in the 2008 elections (\$6.73 billion in 2016 dollars), \$4.5 billion in 2004 (\$5.76 billion in 2016 dollars), and \$3.8 billion in 2000 (\$5.33 billion in 2016 dollars).”).

⁵⁶ Press Release, Campaign Fin. Inst., President Trump, with RNC Help, Raised More Small Donor Money than President Obama; As Much as Clinton and Sanders Combined (Feb. 21, 2017), http://cfinst.org/Press/PReleases/17-02-21/President_Trump_with_RNC_Help_Raised_More_Small_Donor_Money_than_President_Obama_As_Much_As_Clinton_and_Sanders_Combined.aspx.

⁵⁷ Brian Feldman, *Is Trump’s Twitter Changing the Presidency?*, N.Y. MAG.: SELECT ALL (Jan. 11, 2017, 8:47 AM), <http://nymag.com/selectall/2017/01/is-trumps-twitter-changing-the-presidency.html> (interviewing historian David Greenberg). Of course, Trump’s incendiary campaign also earned him a great deal of free media attention on television. One study of his free television time during the 2016 primaries pegged its value at \$2 billion. Nicholas Confessore & Karen Yourish, *\$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES: THE UPSHOT, (Mar. 15, 2016), https://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html?mcubz=1&_r=0.

One study of Trump's tweets between the time he secured the Republican Party nomination and the Inauguration Day found:

The majority of Trump's tweets were exclamations. One in five used all caps, a virtual form of yelling. Nearly half of Trump's tweets were negative criticisms, twice as much as anything else, including more standard political uses, such as sharing information or giving thanks.

Trump's successful use of Twitter was predicated on his unprecedented willingness to "go negative" and be emphatic. Of Trump's Tweets that received 30,000 or more likes, 51 percent went negative and 65 percent were an exclamation or in all caps. Similarly, of Trump's tweets that were re-tweeted 9,000 or more times 54 percent went negative and 64 percent were an exclamation or in all caps.⁵⁸

While the ability of candidates to speak directly to voters sounds democratizing, in Trump's hands the tool promoted demagoguery. Many of the tweets were used to demean other candidates and political figures (Trump referred to Senator Ted Cruz as "Lyin' Ted," Senator Marco Rubio as "Little Marco," his opponent Hillary Clinton as "Crooked Hillary," and Senator Elizabeth Warren as "Pocahontas"⁵⁹). Trump hurled insults and also used his Twitter account to spread false claims, for instance, that there was massive voter fraud in the 2016 election.⁶⁰ He offered a variety of false, exaggerated, and incendiary claims many of which would not have been spread as widely and in an unmediated way before the era of cheap speech.

A *Harvard Business Review* study of Trump's twitter strategy during the 2016 campaign dryly noted that "Extreme provocation may be advisable only when the CEO has nothing to lose, which was true for . . . Trump as a long-shot candidate."⁶¹

⁵⁸ Luke Perry & Paul Joyce, *Trump's Use of Twitter in the 2016 Campaign*, UTICA COLL. CTR. OF PUB. AFFAIRS & ELECTION RESEARCH (Mar. 19, 2017), <https://www.ucpublicaffairs.com/home/2017/3/19/trumps-use-of-twitter-in-the-2016-campaign-by-luke-perry-and-paul-joyce>.

⁵⁹ Chris Cillizza, *Donald Trump is the Best Troll in All of Politics*, CNN (Apr. 29, 2017, 8:01 AM), <http://www.cnn.com/2017/04/28/politics/donald-trump-nra/index.html>.

⁶⁰ Tal Kopan & Ariane de Vogue, *New Lawsuits Cite Trump Comments, Tweets to Challenge Voting Panel*, CNN (Jul. 11, 2017, 7:49 AM), <http://www.cnn.com/2017/07/10/politics/voting-panel-trump-tweets/index.html>.

⁶¹ Barbara Bickart, Susan Fournier, & Martin Nisenholtz, *What Trump Understands About Using Social Media to Drive Attention*, HARVARD BUS. REVIEW (Mar. 1, 2017),

The big question is whether the strategy is replicable by other candidates; that is, whether Trump is a harbinger or an aberration. Certainly, social media provides a platform for extreme provocation by future candidates who wish to pursue this kind of candidacy.

D. Social Media, Social Protest, Extremism, Radicalization, and Potential Violence

When Professor Volokh worried in 1995 about how cheap speech could help extreme groups such as the Ku Klux Klan identify like-minded people and organize for political action,⁶² he saw a key dark side to the information revolution and the double-edged sword that cheap speech would bring to political organizing and action. The same social media technology that helped to bring about democratization movements around the world, such as the “Arab Spring,” also helped supporters of ISIS and Al Qaeda organize for political action, and even allowed “lone wolf” terrorists to receive radicalizing messages in an unfiltered way.⁶³

The full interrelationship between the rise of social media and constructive and destructive political activity is a topic for another article. Suffice it to say that the new technology could well be as transformative to society as the invention of moveable type in the fifteenth century, and it raises danger signs for political stability and democracy around the world. As Professor Zeynep Tufekci argues:

Like the printing press and the industrial revolution, this historical transformation in digital connectivity and computing is a complex, dialectical process[] with no clear teleology, no predetermined outcome or preset group of winners and losers. The same undermining of gatekeepers that has permitted social movements to bring the facts to the public despite active repression by authoritarian regimes or casual

<https://hbr.org/2017/03/what-trump-understands-about-using-social-media-to-drive-attention>.

⁶² Volokh, *supra* note 1, at 1848.

⁶³ Alexander Smith, *How ISIS Capitalizes on Lone Wolves to Spread Terror ‘At No Cost’*, NBC NEWS (May 5, 2015, 2:26 PM), <http://www.nbcnews.com/news/us-news/how-isis-uses-twitter-lone-wolves-carry-out-attacks-free-n353996>. They are not always lone wolves, however, but are sometimes led by terrorists communicating remotely through anonymizing apps. See Rukmini Callimachi, *Not ‘Lone Wolves’ After All: How ISIS Guides World’s Terror Plots from Afar*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/world/asia/isis-messaging-app-terror-plot.html> (explaining that direct communication via encrypted apps remains a key problem in stopping terrorist recruitment).

indifference also enable the effective suppression of the facts through the proliferation of fake news.⁶⁴

We are just beginning the transformation of American politics through social media, and the early signs are not encouraging. Already social media seems to have helped fuel polarization,⁶⁵ and so far, this polarization has been asymmetrically tilted toward the right. A *Columbia Journalism Review* “study of over 1.25 million stories published online between April 1, 2015 and Election Day [in November 2016] shows that a right-wing media network anchored around Breitbart developed as a distinct and insulated media system, using social media as a backbone to transmit a hyper-partisan perspective to the world.”⁶⁶ The authors found that “[t]his pro-Trump media sphere appears to have not only successfully set the agenda for the conservative media sphere, but also strongly influenced the broader media agenda, in particular coverage of Hillary Clinton.”⁶⁷ The phenomenon went well beyond the spread of fake news: “the insulation of the partisan right-wing media from traditional journalistic media sources, and the vehemence of its attacks on journalism in common cause with a similarly outspoken president, is new and distinctive.”⁶⁸

More ominously, social media helped so-called “alt-right” Nazi sympathizers identify each other and organize on Twitter. Beyond the cyberbullying that many Jewish journalists⁶⁹

⁶⁴ ZEYNEP TUFEKCI, *TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST* 267 (2017).

⁶⁵ See CASS R. SUNSTEIN, *Polarization, in #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* (2017).

⁶⁶ Yochai Benkler et al., *Study: Breitbart-Led Right Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. J. REV. (Mar. 3, 2017), <https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php>. See also Robert Faris et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y 1, 5 (Aug. 2017), https://dash.harvard.edu/bitstream/handle/1/33759251/2017-08_electionReport_0.pdf?sequence=9 (“On the conservative side, more attention was paid to pro-Trump, highly partisan media outlets. On the liberal side, by contrast, the center of gravity was made up largely of long-standing media organizations steeped in the traditions and practices of objective journalism.”).

⁶⁷ Benkler, *supra* note 66.

⁶⁸ *Id.*

⁶⁹ According to a report by the Anti-Defamation League, “[a]t least 800 journalists received anti-Semitic tweets with an estimated reach of 45 million impressions. The top 10 most targeted journalists (all of whom are Jewish) received 83% of these anti-Semitic tweets. . . . There is evidence that a considerable number of the anti-Semitic tweets targeting journalists originate with people identifying themselves as Trump supporters, ‘conservatives’ or extreme right-wing elements.” *ADL Report: Anti-Semitic Targeting of Journalists During the 2016 Presidential Campaign*, ANTI-DEFAMATION LEAGUE 1, 1 (Oct. 19, 2016), https://www.adl.org/sites/default/files/documents/assets/pdf/press-center/CR_4862_Journalism-Task-Force_v2.pdf.

and others faced from these groups during the 2016 campaign, social media helped catalyze the alt-right movement in the physical world. Perhaps one of the most chilling images to come out of the 2016 campaign was a video of a group of about 200 Nazi sympathizers led by Richard Spencer giving a Hitler salute and exclaiming, “Hail Trump, hail our people, hail victory” at a post-election conference.⁷⁰

Social media lowers the costs of collective action, for good and for ill. The reason for pessimism about this transformation is that the lowering of costs has come with a simultaneous loss of reliable intermediaries. Without intermediaries, people are more prone to believe fake news and more likely to have false and incendiary messages amplified by both like-minded people and strategically deployed bots. Cheap speech has dramatically lowered costs for those who want to draw on people’s fears and rile them up for violent purposes.

II. POSSIBLE SOLUTIONS FROM GOVERNMENT AND NON- GOVERNMENTAL ACTORS TO THE DEMOCRACY PROBLEM CAUSED BY CHEAP SPEECH

A. Government Action and Its Limits Thanks to the First Amendment

First Amendment doctrine did not cause the democracy-related problems brought about by cheap speech, but it may stand in the way of some potential ameliorating steps. Further, conservative-libertarian First Amendment rhetoric⁷¹ has deterred some legislative and regulatory steps to deal with problems such as stealth foreign interference in our elections. But caution is in order; in an era of demagoguery and disinformation emanating from the highest levels of government, First Amendment doctrine may serve as a bulwark against censorship and oppression that could be enacted by the government in the name of preventing “fake news.”

Campaign finance law provides a good example of how First Amendment doctrine and rhetoric may interfere with sensible reforms. Consider the current controversy over

⁷⁰ Daniel Lombroso & Yoni Applebaum, *‘Hail Trump!’: White Nationalists Salute the President-Elect*, THE ATLANTIC (Nov. 21, 2016), <https://www.theatlantic.com/politics/archive/2016/11/richard-spencer-speech-npi/508379/>.

⁷¹ On conservative libertarianism generally, see Steven J. Heyman, *The Third Annual C. Edwin Baker Lecture for Liberty, Equality, and Democracy: The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231 (2014). As Professor Heyman describes it, the conservative-libertarian approach to the First Amendment aims “to invalidate laws or policies that in their view threatened to subordinate individual liberty to liberal or progressive goals such as political reform, racial and sexual equality, gay rights, secularism, unionization, and anti-smoking efforts.” *Id.* at 298.

microtargeted and bot-amplified Facebook ads and other online activity which Russia and others engaged in aimed at promoting fake news and stirring social unrest in the 2016 election. After investigation, Facebook announced finding at least \$100,000 in spending from sources connected to the Russian government on roughly 3,000 ads intended to influence the election.⁷² The ads reached at least 10 million people (44% before the 2016 election), and some focused on social controversies over immigration rights, gun rights, and racial justice.⁷³

If Russia paid for these ads without coordinating with any campaign, then it almost certainly did not violate current federal campaign finance law as to most of the ads.⁷⁴ Further, laws that would bar Russia from placing these ads could well be found at least partially unconstitutional under the First Amendment as the Supreme Court currently construes it.

Federal law bars foreign nationals, including foreign governments, from making expenditures, independent expenditures, and electioneering communications in connection with a “Federal, State or local election.”⁷⁵ However, it is at best uncertain whether independent online ads that do not expressly advocate the election or defeat of candidates are covered by the foreign expenditure ban.⁷⁶ For example, a Russian ad promoting a Black Lives Matter rally, but not mentioning or showing a candidate for office, likely would not be considered an election ad under current law, which does not cover pure issue advocacy even if intended to influence election outcomes.⁷⁷

⁷² Shane & Goel, *supra* note 29.

⁷³ Mike Isaac & Scott Shane, *Facebook’s Russia-Linked Ads Came in Many Disguises*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/technology/facebook-russia-ads-.html>.

⁷⁴ See 52 U.S.C. § 30121(a)(1)(A) (2012). If the activity was done in consultation with a campaign, this would constitute an impermissible “contribution” of a “thing of value” in violation of the statute.

⁷⁵ *Id.* § 30121 (establishing foreign contribution and spending ban); *Id.* § 30101(8)(a) (defining contribution).

⁷⁶ Spending to influence an election which appears on the Internet but which lacks words of express advocacy cannot count as an “electioneering communication” (which must be a broadcast, cable or satellite communication under 52 U.S.C. § 30104(f)(3) (2012)) or an independent expenditure (which must contain words of express advocacy pursuant to the Supreme Court’s decision in *Buckley v. Valeo*, 424 U.S. 1 (1976)), 52 U.S.C. § 30101(17) (2012). The foreign spending ban, however, also prohibits a foreign national, including a foreign government, from making “an expenditure,” *id.* § 30121(a)(1)(C), which includes “any purchase . . . made by any person for the purpose of influencing any election for Federal office,” *id.* § 30101(9)(A)(1). Money to pay bots or otherwise to spread fake news on Facebook with an intent to influence the U.S. election would appear to be an expenditure under this definition, but such an argument may run into constitutional problems that I discuss in the text.

⁷⁷ *Buckley*, 424 U.S. at 44, n.52 (construing the limit on independent spending to apply only to advertisements containing express advocacy).

These advertisements also would not be covered under proposed federal legislation, the “Honest Ads Act,” which would extend rules barring foreign spending on television or radio “electioneering communications” to communications via digital outlets like Facebook.⁷⁸ Electioneering communications must feature the name or likeness of a candidate for office to be covered.⁷⁹

Even if Congress passed a statute purporting to make illegal all of the activity Russians engaged in during the 2016 election, such a statute would likely run into First Amendment resistance. After the Supreme Court decided *Citizens United v. Federal Election Commission*,⁸⁰ a 2010 case holding that corporations have a First Amendment right to spend unlimited sums independently to support or oppose candidates for public office, the Court summarily affirmed a lower court decision in *Bluman v. Federal Election Commission*.⁸¹ *Bluman* upheld a federal law barring foreign nationals—in the case of Benjamin Bluman, a foreign national working in New York on a temporary work visa—from spending even fifty cents to print and distribute flyers expressly advocating the reelection of President Obama.⁸²

Bluman seems to indicate that, despite tensions with the holding in *Citizens United* that the identity of the speaker does not matter for First Amendment purposes, the government has a compelling interest in banning foreign spending in our elections:

It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government. It follows, therefore, that the United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.⁸³

⁷⁸ H.R. 4077, 115th Cong., 1st Sess., § 6 (as introduced by Rep. Kilmer & Rep. Coffman, Oct. 19, 2017) (expanding the definition of electioneering communications to cover digital advertising).

⁷⁹ 52 U.S.C. § 30104(f)(3) (2012).

⁸⁰ 558 U.S. 310 (2010).

⁸¹ *Bluman v. FEC*, 800 F. Supp. 2d 281, 292, *aff'd*, 565 U.S. 1104 (2012).

⁸² *Id.* at 288–89.

⁸³ *Id.* at 288. The Supreme Court’s summary affirmance of *Bluman* means that laws barring at least express advocacy by foreign nationals do not run afoul of the First Amendment. *See* *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (“[S]ummary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.”). The most likely reason the Court

But the *Bluman* court, in an opinion by conservative-libertarian D.C. Circuit judge Brett Kavanaugh, narrowly construed the foreign spending ban to cover only express advocacy and not issue advocacy. “This statute, as we interpret it, does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate.”⁸⁴ Indeed, three FEC Republican commissioners relied upon this dicta from *Bluman* in voting to hold that the foreign spending ban does not apply to ballot measure elections.⁸⁵

While this interpretation is not free from doubt—the statute is written broadly to cover all expenditures and not just independent expenditures⁸⁶—it seems like the kind of interpretation likely to be favored by the current Supreme Court. Indeed, it is not clear that the courts would accept a more clearly written foreign spending ban going beyond express advocacy and electioneering communications to cover foreign-funded ads meant to stir social unrest without using candidates’ names or likenesses. These ads should be covered, not because they necessarily contain false speech, but because they constitute a foreign government’s interference with American self-government.

upheld the constitutionality of such laws is the same as the reason the lower court recognized: bans on foreign spending on ads are justified by society’s compelling interest in self-government and non-interference by foreign nations in U.S. elections. *Bluman* recognizes that the State can stop foreign governments and other foreign individuals and entities from interfering in our elections via bans on election-related advertising. This narrow ban is acceptable even though the state cannot impose a licensing system for the receipt of foreign propaganda outside the context of elections. *Lamont v. Postmaster General of U.S.*, 381 U.S. 301, 307 (1965) (“We rest [our opinion] on the narrow ground that the addressee in order to receive his mail [containing ‘Communist propaganda’] must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee’s First Amendment right”); see also *id.* at 307–09 (Brennan, J., concurring) (noting that the case does not raise the question of whether foreign governments have any First Amendment rights to assert and that the government in its briefs did not raise any compelling interests which could justify infringement on foreign speech, but asserting that the “right to receive publications” is a “fundamental right”). The question then becomes how far beyond express advocacy a foreign spending ban can go in preventing foreign interference in elections without running into *Lamont*. Given that *Lamont* did not consider the compelling interest in self-government (especially related to elections) and limited itself to considering the constitutionality of licensing schemes for receipt of foreign propaganda by mail, *Lamont* does not seem like a great barrier to upholding the constitutionality election-related laws going beyond the regulation of foreign spending on express advocacy.

⁸⁴ *Bluman*, 800 F. Supp. 2d at 292.

⁸⁵ Federal Election Commission, MUR 6678, *Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline Hunter and Lee E. Goodman* at 2 (Apr. 30, 2015), <https://www.fec.gov/files/legal/murs/current/110432.pdf>.

⁸⁶ See *supra* note 76 and accompanying text (explaining the distinction between expenditures and independent expenditures).

As some evidence of the conservative-libertarian position on banning foreign spending, consider the dispute over whether the President's son, Donald Trump Jr., constitutionally could be prosecuted for the alleged soliciting of Russian government sources for "dirt" on Hillary Clinton, such as emails stolen from the Democratic National Committee.⁸⁷ Professor Volokh argued against a broad reading of the statute aimed at preventing foreign interference in U.S. elections, and he advanced libertarian arguments in favor of allowing foreign nationals (including perhaps foreign governments) to share "information" such as "opposition research" with American campaigns, information which might help the public decide who to vote for in elections.⁸⁸

Using the doctrine of substantial overbreadth, libertarians like Volokh have made arguments that would chip away at limitations on foreign intervention in U.S. elections in the name of protecting free speech. These new arguments in favor of foreign campaign spending follow a decade-long conservative-libertarian all-out push to prevent the Federal Election Commission from drafting rules which would regulate more campaign activity conducted via the Internet beyond what's been called "paid ads and spam,"⁸⁹ with paid ads including only express advocacy. The fight over Internet regulation has been so fierce at the FEC that former FEC chair Ann Ravel faced death threats.⁹⁰ Others have raised slippery-slope type arguments

⁸⁷ Jacob Gershman & Nicole Hong, *Emails Pose Potential Problem for Trump Jr. After Meeting with Russian Lawyer*, WALL ST. J. (July 11, 2017, 5:37 PM), <https://www.wsj.com/articles/emails-pose-potential-problem-for-trump-jr-after-meeting-with-russian-lawyer-1499809060>.

⁸⁸ Eugene Volokh, *Can It Be a Crime to do Opposition Research by Asking Foreigners for Information?* WASH. POST: VOLOKH CONSPIRACY (Jul. 12, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/12/can-it-be-a-crime-to-do-opposition-research-by-asking-foreigners-for-information>. Volokh's primary argument is that the statute is substantially overbroad, in that it covers instances in which foreign nationals might have information relevant to campaigns which campaigns would have a First Amendment right to receive. *Id.* One key problem with Volokh's analysis here is that the statute is severable. Title 52 of the United States Code distinguishes between "foreign principals" and other "foreign nationals." 52 U.S.C. § 30121(b) (2012). "Foreign principals" includes a foreign "government." 22 U.S.C. § 611(b)(1) (2012). There seems little doubt that under cases like *Bluman* (recognizing the compelling interest in self-government), Congress has the power consistent with the First Amendment to bar foreign governments from contributing things of value to U.S. election campaigns. The part of the statute barring foreign government interference in U.S. elections is severable and not overbroad. See Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 CAL. L. REV. 915, 953–58 (2011) (describing severability and its relationship to facial challenges).

⁸⁹ The issue goes back to 2006. See Rick Hasen, *FEC Still Set to Consider Internet Issue Despite Delay in Considering Draft Rule*, ELECTION LAW BLOG (Mar. 23, 2006), <http://electionlawblog.org/archives/005239.html> (discussing "paid ads and spam").

⁹⁰ Dave Levinthal, *Death Threats Directed at Election Regulator*, CTR. FOR PUB. INTEGRITY (May 17, 2016, 5:00 AM),

claiming without evidence that Commissioner Ellen Weintraub's call to investigate Russian social media spending in the 2016 election would allow the Commission to conduct an "inquisition" of conservative media outlets such as InfoWars, *Breitbart*, and the *Drudge Report*.⁹¹

Even the constitutionality of the disclosure of the foreign sources of some ads could be called into constitutional question. Thus far, the Supreme Court has held that mandatory disclosure of most campaign finance activity in elections does not violate the First Amendment.⁹² But conservative-libertarian First Amendment advocates continue to push arguments that such disclosure violates the First Amendment, especially if targeting issue ads like some of the Russian-funded ads not naming candidates. It is an argument that may ultimately resonate on an increasingly conservative Supreme Court. Right now, there are three Justices (Alito, Gorsuch, and Thomas) likely sympathetic to these arguments, and more Justices with these views may join the Court in the next few years depending upon political developments.

Campaign finance law is not the only area in which government regulation might brush up against the First Amendment. Consider also the laws related to false speech.⁹³ In

<https://www.publicintegrity.org/2016/05/17/19684/death-threats-directed-elections-regulator>.

⁹¹ Paul Bedard, *New Fears Drudge, InfoWars, Breitbart Could Face FEC Dem 'Inquisition'*, WASH. EXAM'R (Jul. 11, 2017, 10:12 AM), <http://www.washingtonexaminer.com/new-fears-drudge-infowars-breitbart-could-face-dem-fec-inquisition/article/2628257>; Paul Bedard, *FEC Dem Eyes Widening Russia Probe to Facebook, Drudge, Foreign Companies*, WASH. EXAM'R (Jun. 21, 2017, 3:40 PM), <http://www.washingtonexaminer.com/fec-dem-eyes-widening-russia-probe-to-facebook-drudge-foreign-companies/article/2626674>.

⁹² E.g., *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) (upholding, in an 8-1 vote, campaign finance disclosure laws in the Bipartisan Campaign Reform Act of 2002); see also *Meese v. Keene*, 481 U.S. 465 (1987) (upholding Foreign Agents Registration Act requirement that foreign distributors of "political propaganda" disclose certain information to the U.S. government). For a look at the Supreme Court's doctrine in this area, see LOWENSTEIN ET AL., *supra* note, 55; see also Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J. L. & POL. 557 (2012). But holes in current disclosure laws thanks to congressional and regulatory failure (at the FEC and Internal Revenue Service) have made it easy for those who wish to mask their identity to use LLCs and other entities for stealth political spending. Liz Kennedy & Alex Tausanovitch, *Secret and Foreign Spending in U.S. Elections: Why America Needs the DISCLOSE Act*, CTR. FOR AM. PROGRESS (Jul. 17, 2017, 9:01 AM), <https://www.americanprogress.org/issues/democracy/reports/2017/07/17/435886/secret-foreign-spending-u-s-elections-america-needs-disclose-act/>.

⁹³ For an overview, see Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53 (2013). One key issue is whether the First Amendment's protection for freedom of the press applies to professional journalists or to all who engage in putting content on social media. See Sonja West, *Favoring the Government*, 108 CAL. L. REV. (forthcoming 2018) (responding to Professor Volokh's earlier argument that the press protection applies to the technology of the printing press and not to professional journalists).

recent years, the Supreme Court and lower courts have clarified that many laws attempting to punish false campaign speech may run afoul of the First Amendment.⁹⁴ In cases such as *United States v. Alvarez*,⁹⁵ the Supreme Court made clear that even false speech gets First Amendment protection, and that protection for false speech is especially appropriate when political speech is involved.⁹⁶ *Alvarez* indicates that the proper response to false speech is counterspeech.⁹⁷

These precedents properly would stop the government from banning false campaign speech and imposing penalties for publishing it. Putting the power to ban false speech in the hands of the government is dangerous, especially when there is reason to believe government executives might misuse that power. Just consider how President Trump has called negative, but true, stories about him “fake news.”⁹⁸

But there is a danger that counterspeech will not be enough to deal with the flood of bot-driven fake news making it harder for voters with civic competence to separate truth from fiction and make informed voting and policy choices. For this reason, the First Amendment should not be interpreted to bar the government from enacting carefully drawn laws which would require social media and search companies such as Facebook and Google to provide certain information to let consumers judge the veracity of posted materials.

Outside the political arena, the government presumably has the power consistent with the First Amendment to protect the public by regulating websites to ensure they do not contain false advertising.⁹⁹ When the matters are political, and the line

⁹⁴ See generally *United States v. Alvarez*, 567 U.S. 709 (2012); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), *Susan B. Anthony List v. Driehaus*, 814 F.3d 466 (6th Cir. 2016); 281 *Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014), *cert. denied*, 135 S. Ct. 1550 (2015).

⁹⁵ 567 U.S. 709 (2012) (striking down federal law making it a crime to lie about receiving a certain congressional honor).

⁹⁶ *Id.* at 722.

⁹⁷ *Id.* at 726.

⁹⁸ See, e.g., Angie Drobnic Holan, *The Media's Definition of Fake News vs. Donald Trump's*, POLITIFACT (Oct. 18, 2017, 2:11 PM) (“Since the beginning of 2017, President Trump has invoked the phrase ‘fake news’ on 153 separate occasions. Virtually every instance has been in response to critical news coverage.”), <http://www.politifact.com/truth-o-meter/article/2017/oct/18/deciding-whats-fake-medias-definition-fake-news-vs/>. For scholarship on government lies to and about the press, see Helen L. Norton, *Government Lies and the Press Clause*, 89 U. COLO. L. REV. (forthcoming 2018).

⁹⁹ *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976) (“Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today does not prohibit the

between falsehoods and opinions may blur, it is not clear that such regulation would pass First Amendment muster. Again, the conservative-libertarian reading of First Amendment doctrine might stand in the way of efforts to deal with some democracy problems caused by cheap speech.

The Supreme Court's recent decision in *Packingham v. North Carolina*¹⁰⁰ also raises concerns about how excessively broad readings of the First Amendment's application to social media might harm democracy-enhancing efforts. *Packingham* considered a First Amendment challenge to a North Carolina law which made it a crime for a convicted sex offender who had finished serving jail time "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages."¹⁰¹ The defendant, who had been convicted in 2002 for having sex with a 13-year-old when he was 21, was found guilty of violating the social media statute in 2010 when he posted a message on Facebook thanking God that he had a parking ticket dismissed."¹⁰²

As the concurring opinion by Justice Samuel Alito explained, the law was so broadly written that it would have made it a crime for a convicted sex offender in North Carolina who had finished serving his sentence to purchase a product on Amazon.com, read a news article on Washingtonpost.com or research medical conditions on WebMD.com.¹⁰³ All the Justices agreed that the excessively broad law violated the First Amendment.¹⁰⁴

Where the majority and concurrence parted company was in the broad language Justice Anthony Kennedy included in the majority opinion on the First Amendment's application to social media. Justice Kennedy offered a paean to the Internet and social media, calling it a "revolution of historic proportions." He called the Internet in general "and social media in particular" among "the most important places" for the exchange of views.¹⁰⁵

State from insuring that the stream of commercial information flow cleanly as well as freely.") (citations and footnote omitted).

¹⁰⁰ 137 S. Ct. 1730 (2017).

¹⁰¹ *Id.* at 1733.

¹⁰² *Id.* at 1734.

¹⁰³ *See id.* at 1741–42.

¹⁰⁴ *Id.* at 1730. Justice Gorsuch, new to the Court, did not participate in the case.

¹⁰⁵ *Id.* at 1735–36. Justice Kennedy wrote:

A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights. Even in the modern era, these places are still essential venues for public

This is consistent with views Justice Kennedy communicated in a recent speech, where he expressed the same optimism Professor Volokh had twenty-two years ago about the loss of intermediaries and the power of cheap speech.¹⁰⁶

Justice Alito's concurrence noted this loose language in the majority opinion, and wrote to object to the language's potential to make it more difficult to draft narrowly tailored laws

gatherings to celebrate some views, to protest others, or simply to learn and inquire. While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the Internet in general, and social media in particular. Seven in ten American adults use at least one Internet social networking service. One of the most popular of these sites is Facebook, the site used by petitioner leading to his conviction in this case. According to sources cited to the Court in this case, Facebook has 1.79 billion active users. This is about three times the population of North America. Social media offers relatively unlimited, low-cost capacity for communication of all kinds. On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose. In short, social media users employ these websites to engage in a wide array of protected First Amendment activity on topics as diverse as human thought. The nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it. And when awareness comes, they still may be unable to know or foresee where its changes lead. Cf. D. Hawke, Benjamin Rush: Revolutionary Gadfly 341 (1971) (quoting Rush as observing: “The American war is over; but this is far from being the case with the American revolution. On the contrary, nothing but the first act of the great drama is closed”). So too here. While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

Id. at 1735–36 (some internal quotation marks and citations omitted).

¹⁰⁶ *Justice Anthony Kennedy Speaks at Salzburg Academy on Media and Social Change*, SALZBURG GLOBAL SEMINAR (Jul. 25, 2017), <http://www.salzburgglobal.org/topics/article/justice-anthony-kennedy-speaks-at-salzburg-academy-on-media-and-global-change.html>. At the beginning of his talk, Justice Kennedy said, “Journalists have to begin to understand we are in a new world.” *Id.* He went on to discuss how conventional institutions and structures were being bypassed as a result of the internet and how individuals were now participating in the revolution of the cyber age. *Id.* During his lecture, Justice Kennedy also reserved praise for Wikipedia, which he described as one of the most fascinating and inspiring works of modern civilization. *Id.* He remarked on the vast body of human knowledge which had been collected, describing it as a marvelous tribute to the human spirit. *Id.* (“The cyber age has tremendous potential, as indicated with Wikipedia. But if it bypasses space and time where there’s just this obsession with the present—this neglect of our heritage and history—then our world will change.”).

aimed at keeping sexual offenders from making contact with minors:

While I thus agree with the Court that the particular law at issue in this case violates the First Amendment, I am troubled by the Court's loose rhetoric. After noting that "a street or a park is a quintessential forum for the exercise of First Amendment rights," the Court states that "cyberspace" and "social media in particular" are now "the most important places (in a spatial sense) for the exchange of views." The Court declines to explain what this means with respect to free speech law, and the Court holds no more than that the North Carolina law fails the test for content-neutral "time, place, and manner" restrictions. But if the entirety of the internet or even just "social media" sites are the 21st century equivalent of public streets and parks, then States may have little ability to restrict the sites that may be visited by even the most dangerous sex offenders. May a State preclude an adult previously convicted of molesting children from visiting a dating site for teenagers? Or a site where minors communicate with each other about personal problems? The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.¹⁰⁷

The truth about the benefits and dangers of the Internet and social media likely falls somewhere between Justice Kennedy and Justice Alito's positions. But Justice Alito is right to be concerned over *Packingham*'s loose dicta, which raises dangers for narrowly tailored future laws that might be aimed at fake news and other negative consequences to our democracy flowing from cheap speech and social media. For example, it is not hard to see conservative-libertarians like Volokh relying on *Packingham* to argue against the constitutionality of laws that would limit the ability of foreign governments to spread false election-related information to American voters via social media. Indeed, I would expect Justice Alito (who has been much more protective of political speech than speech which could

¹⁰⁷ *Packingham*, 137 S. Ct. at 1743 (Alito, J., concurring) (citations and footnote omitted).

harm minors¹⁰⁸) to agree with that libertarian position should the issue come before the Supreme Court. That would be a mistake.

Caution is no doubt in order here. As Professor and UN Special Rapporteur on freedom of expression and opinion issues David Kaye notes, repressive governments may use attempts to stop “fake news” as an excuse for censorship.¹⁰⁹ On the other hand, the democracy problems with free speech must be addressed in effective ways. How the government can address these problems consistent with the First Amendment is an issue sure to vex lawyers, courts, scholars, and others in years to come.

B. Non-governmental Actors

1. Commercial Tools for Separating Real from Fake News (and Consumer Demand for It)

Especially given the potential First Amendment concerns with government regulations tackling fake news, and with other democracy problems caused by the rise of cheap speech, it is essential to consider whether private (and potentially market-driven) actions can help solve some of the problems.

During the 2016 U.S. election, market pressures did not stop the spread of fake news, as social media sites and search engines did precious little to help readers separate real from fake news. As Professor Tufekci observed:

[The] hands-off approach of most of the platforms regarding the distribution of [false] content meant that there was nobody watching what was spread: traditional gatekeepers, now dependent on these platforms to spread their own stories, were critically weakened. The internet made it easy for anyone to quickly set up a webpage, and Facebook’s user interface made it hard to tell the legitimate news outlets such as the *New York Times* or Fox News apart from the fake ones.¹¹⁰

¹⁰⁸ Compare *United States v. Alvarez*, 567 U.S. 709, 752 (Alito, J., dissenting) (finding laws regulating false speech as to matters of public concern presenting “a grave and unacceptable danger of suppressing truthful speech”) with *Packingham*, 137 S. Ct. at 1743 (Alito, J., concurring) (expressing concern that Court’s “loose rhetoric” may stymie ability of states to target online activities of sex offenders) and *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 821 (2011) (Alito, J., concurring) (leaving open the question of whether more narrowly tailored law barring the sale of violent video games to minors could pass first amendment muster).

¹⁰⁹ Yola Verbruggen, *Fake News*, INT’L BAR ASS’N (Jun. 16, 2017), <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=0ADBDB24-C0C2-4CC8-BEF8-E9B172DCF12A> (quoting Professor Kaye).

¹¹⁰ TUFEKCI, *supra* note 64, at 266.

The post-election focus on fake news, in part driven by the election of Donald Trump and continued reports of Russian and other attempted interference in U.S. elections may change the dynamic, however, leading to more positive changes.

Professor Persily reports that within two weeks of the 2016 election, both Facebook and Google attempted “to target fake-news-for-profit. They tried to remove the economic incentives that they had created for those sites to drive traffic based on outrageous, clickbait headlines. In particular, Google now bars certain fake-news sites from its advertising network (AdSense), meaning that such sites will not be able to earn money from having Google place an ad on their site. The regulated sites are ones that Google says “misrepresent, misstate, or conceal information about the publisher, the publisher’s content, or the primary purpose of the web property.”¹¹¹ “Facebook took similar steps with changes to its Audience Network Policy, to try to drain support for the most egregious sites that simply make up stories for profit.”¹¹² Facebook is similarly flagging and warning users who seek to share articles that at least two fact-checking organizations have tagged as false.¹¹³

Still, it is not clear whether Facebook and Google will go far enough, especially given the market dominance each holds over the social media and search markets respectively. So far, shareholder activism has been unsuccessful in forcing Facebook or Alphabet (the parent company of Google) to deal more transparently or directly with the issue of fake news. In June 2017, Facebook rejected a shareholder proposal on the issue, with head of Facebook, Mark Zuckerberg, voting against the proposal, claiming the company was doing enough to deal with the problem.¹¹⁴ Zuckerberg not only has a controlling voting interest in the company; he also may be a presidential candidate in 2020. Alphabet shareholders, following a recommendation of the company’s management, similarly rejected a June 2017 proposal for the company to produce a report on how the

¹¹¹ Ivanka Kottasova, *Facebook and Google to Stop Ads From Appearing on Fake News Sites*, CNN: TECH, (Nov. 15, 2016, 7:30AM), <http://money.cnn.com/2016/11/15/technology/facebook-google-fake-news-presidential-election/index.html>.

¹¹² Persily, *supra* note 24, at 73.

¹¹³ *See id.*

¹¹⁴ Hannah Albarazi, *Zuckerberg Votes Against Shareholder Push for Fake News Transparency*, CBS: S.F. (Jun. 2, 2017, 2:42 PM), <http://sanfrancisco.cbslocal.com/2017/06/02/zuckerberg-shareholder-fake-news-transparency/>.

company has “failed to effectively manage” the fake news problem.¹¹⁵

The key then will be consumer demand and the preferences of Zuckerberg and people at the top of Google. Facebook’s reliance on fact checkers will likely trigger counter-reaction, with attacks on fact checkers, and a push against reliance upon mainstream media sources such as the *Washington Post* or Factcheck.org for fact checks. Trump supporters and some others on the right have already painted these organizations as liberal and unreliable, and Facebook may face pressure to abandon them as views about fact checking are increasingly polarized.

We also should be skeptical that Facebook and Google will be able to do the job well, and there is the danger that these private actors with great market power could have their own biases in choosing to limit speech. As Professor Kaye asks:

Who will decide what is bogus and garbage? Who decides what is true and what is propaganda? Do we want a company with the profit-motive of expanding users to make those kinds of decisions? Will they set up administrative tribunals for those who challenge take-downs of content? And even if we are comfortable handing over that kind of censorship—for that’s what it is—to a private company, how will this magic algorithm tell the difference between the awful garbage of Breitbart and the hilarious garbage of The Onion? Who creates the software that distinguishes purposeful lies from public interest satire?¹¹⁶

It is also unclear whether fact checking itself will work to cure misperceptions going forward. A study by Professors Nyhan and Reifler found that exposure to fact checking during the 2014 election “improved belief accuracy and that this effect was

¹¹⁵ Ethan Baron, *Google Parent Alphabet Gender-Pay Proposal Dead on Arrival*, MERCURY NEWS (June 7, 2017, 11:13 AM), <http://www.mercurynews.com/2017/06/07/google-parent-alphabet-shareholders-shoot-down-gender-pay-report-proposal/>. Because the proposals at these companies secured very low affirmative votes from controlling the great majority of voting stock, shareholders are barred from considering similar issues for the next three years. Sarah Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 338 (2016). On the limits of shareholder democracy to force companies to address issues like fake news, see *id.*

¹¹⁶ David Kaye, *The False Promise of Banning Fake News*, FREEDEX (Nov. 25, 2016), <https://freedex.org/2016/11/25/the-false-promise-of-banning-fake-news/>; see also *#FakeNews: Innocuous or Intolerable*, WILTON PARK (Feb. 2017), <https://www.wiltonpark.org.uk/wp-content/uploads/WP1542-Report.pdf> (discussing means of combatting fake news problem, beginning with fact checking).

strongest among politically knowledgeable people.”¹¹⁷ But Democrats had a more positive view of fact checking than Republicans, “particularly among individuals with high political knowledge.”¹¹⁸ Especially in times of elite polarization like now, misperceptions can be sticky when they reinforce one’s preexisting political views and can therefore be difficult to cure.¹¹⁹

There also has to be a continued economic incentive for news organizations to continue to conduct fact checks; having Facebook and Google share the costs might be a nice way for these companies, making so much money by piggybacking off the journalistic efforts of others, to give something back. But there is no reason to believe they would pay up voluntarily to combat fake news.

One hopeful sign of the continued resiliency of fact checking is that even President Trump, who has railed against the media and labeled stories he does not like as “fake news,” has tried to avoid being called out by the fact checkers. In the midst of a July 2017 speech, he tried to hedge a (false)¹²⁰ claim of his about signing more bills than any other president at that point in his presidency:

We’ve signed more bills—and I’m talking about through the legislature—than any President ever. For a while, Harry Truman had us, and now I think we have everybody, Mike. I better say ‘think,’ otherwise they’ll give me a Pinocchio—(laughter)—and I don’t like those—I don’t like Pinocchios. (Laughter.)¹²¹

If the experience with campaign finance regulation is any guide, attempts to deal with issues of fake news will be an iterative process, as those attempting to engage in the process for

¹¹⁷ Brendan Nyhan & Jason Reifler, *Do People Actually Learn from Fact-Checking? Evidence from a Longitudinal Study During the 2014 Campaign* 1, 32 (Nov. 30, 2016), <http://www.dartmouth.edu/~nyhan/fact-checking-effects.pdf>.

¹¹⁸ *Id.* at 32–33.

¹¹⁹ See D.J. Flynn, Brendan Nyhan, & Jason Reifler, *The Nature and Origin of Misperceptions: Understanding False and Unsupported Beliefs about Politics*, 38 *ADVANCES POL. PSYCHOL.* 127, 142 (2017) (suggesting that “misperceptions are widespread and that elites and the media play a key role in promoting these false and unsupported beliefs”).

¹²⁰ Glenn Kessler, *No President Trump, You Haven’t Signed More Bills Than Any Other President*, *WASH. POST* (Jul. 17, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/07/17/no-president-trump-youve-havent-signed-more-bills-than-any-president/?utm_term=.d266cc456259.

¹²¹ Donald J. Trump, Remarks at Made in America Product Showcase (July 17, 2017) (transcript available at <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-made-america-product-showcase/>).

profit or with a political motive will resort to new measures to disseminate the misinformation, and as social media sites and search engines take new countermeasures. Whether this cat-and-mouse game can lead to a kind of real-time fact-checking or other measures is uncertain, especially when it comes to fake news spread for political reasons rather than for profit.

2. Bolstering (Especially Local) Investigative Reporting

The steps outlined above may help with the fake news problem, and to some extent may help with the problem of candidate demagoguery (when a candidate's outrageous factual statements are fact checked). As to the increased risk of corruption from the decline in (especially) local newspapers, I have suggested subsidies for investigative journalism,¹²² particularly subsidizing "muckraking journalism on the state level, along the lines of the ProPublica model. In this model, nonprofit public interest journalism partners with traditional journalism to provide muckraking content to local news outlets. Scandals sell, and ferreting out scandals is positively associated with public-regarding legislation."¹²³ Even putting aside the market value of some of this investigative good-government oriented reporting, it deserves subsidization because it provides an overall social good.¹²⁴

I see no First Amendment problem with the government subsidizing investigative journalism, just as the government may subsidize PBS or NPR. Less likely constitutional would be a tax solely on social media and search companies to pay for local, investigative journalism.¹²⁵ A much more likely route than either general government subsidy or tax, however, is private subsidies from rich benefactors and partnerships with for-profit news organizations that can benefit from the coverage. There is no guarantee the funding will materialize.

III. CONCLUSION

The democracy-related problems caused by the rise in cheap speech are not easily solvable, and some issues, such as hyperpolarization and the risk of extremism fueled by social

¹²² See Hasen, *supra* note 44, at 441–42.

¹²³ *Id.* at 442.

¹²⁴ Christopher Ali refers to local journalism as a "merit good" which should be provided regardless of consumption habits. Christopher Ali, *The Merits of Merit Goods: Local Journalism and Public Policy in a Time of Austerity*, 6 J. INFO. POL'Y. 105, 105 (2016).

¹²⁵ *Cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down a special tax on newspapers as a violation of the First Amendment).

media, are likely to get worse in upcoming years. The problem is primarily a social one, not a legal one, but First Amendment doctrine needs to be considered and deployed carefully so that it does not block careful efforts to fix some of the problems. Doctrine must both protect against government overreach and censorship and allow society to take steps to ensure that our citizenry remains well-informed and that our democracy functions free of corruption and threats of violence.

The rise of cheap speech has been a mixed bag. There is much more speech, and this leveling of access to promote that speech has a democratizing aspect to it. This benefit must be balanced against who is hurt by the new media fire hose. The unbridled optimism of Professor Volokh and, more recently, Justice Kennedy seems unwarranted, or at best premature. The promise that the Internet and social media will deliver to us a better democracy seems uncertain at best. The best strategy is vigilance. We cannot take for granted that the freedom and democracy this country has enjoyed will continue uninterrupted.

REAL “FAKE NEWS” AND FAKE “FAKE NEWS”

Lili Levi*

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INTRODUCTION

“Fake news” has become the central inflammatory charge in media discourse in the United States since the 2016 presidential contest.¹ The phrase has numerous meanings, and the phenomenon presents a spectrum of dangers.² In the political realm, both intentionally fabricated information³ and

¹ A search of the *New York Times* database on September 26, 2017, showed almost 1500 articles mentioning “fake news.” See *N.Y. Times: Search*, <https://query.nytimes.com/search/sitesearch/?action=click&contentCollection®ion=TopBar&WT.nav=searchWidget&module=SearchSubmit&pgtype=Homepage#/fake%20news%22> (last visited Sept. 26, 2017).

In keeping with the centrality of “fake news,” the Oxford English Dictionaries dubbed “post-truth” the word of the year for 2016. See *Word of the Year of 2016 is . . .*, <https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016> (last visited Mar. 14, 2018) (defining post-truth as “an adjective defined as ‘relating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief’”).

² See *infra* Section I. The distinction between “real” fake news and “fake” fake news in the title of this piece is a crude attempt to capture the spectrum of what is meant by the various uses of the term. At one end of the spectrum is “real” fake news—meaning intentionally fabricated misinformation. This kind of “fake news” consists of the dissemination of falsity, in whole or in part—whether for economic or political reasons. (This Article distinguishes this kind of intentionally fabricated falsity from mainstream press errors, inaccuracies, incompleteness and even slanted presentation of news and information.) At the other end of the spectrum is the use of the “fake news” phrase as a strategic tool to cast doubt on the truthfulness and credibility of standard mainstream news reporting organizations. Of course, the deployment of each type of “fake news” can undermine public trust in the truth of what is reported.

³ The 2016 election season saw the viral distribution of numerous factually inaccurate claims regarding political figures or events. For example, false reports circulated that Pope Francis endorsed the candidacy of Donald Trump, see Sydney Schaedel, *Did the Pope Endorse Trump?*, FACTCHECK.ORG (Oct. 24, 2016), <http://www.factcheck.org/2016/10/did-the-pope-endorse-trump/>; that Hillary Clinton was involved in a child trafficking ring operating out of a popular DC pizza parlor, see, e.g., Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns*, N.Y. TIMES (Dec. 5, 5, 2016), <https://www.nytimes.com/2016/12/05/business/media/comet-ping-pong-pizza-shooting-fake-news-consequences.html>; that Russian operatives had hacked the US power grid, see Kalev Leetaru, *'Fake News' And How The Washington Post Rewrote Its Story On Russian Hacking Of The Power Grid*, FORBES (Jan. 1, 2017, 2:31 PM), <https://www.forbes.com/sites/kalevleetaru/2017/01/01/fake-news-and-how-the-washington-post-rewrote-its-story-on-russian-hacking-of-the-power-grid/#f1d38377ad51>; and that Democrats had killed a DNC staffer in order to prevent him from testifying against Hillary Clinton in an FBI investigation into her use of a private email server, see Kim LaCapria, *Seth Rich Homicide: A Conspiracy Site Latched Onto the Tragic Murder of Young DNC Staffer Seth Rich to Spread False Information About His Killing*, SNOPE, <http://www.snopes.com/seth-conrad-rich> (last updated Aug. 10, 2016). Some of the fabricated news was motivated by the economic desire to generate income from clickbait, see Samantha Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news/>, while some was generated to advance ideological and/or political aims, see, e.g., Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017),

the “fake news” defense by politicians confronted with negative press reports⁴ can potentially influence public beliefs and possibly even skew electoral results.⁵ Perhaps even more insidiously, the “fake news” accusation can serve as a power-shifting governance mechanism to delegitimize the institutional press as a whole.⁶ In that spirit, President Trump has deployed the “fake news” trope to demonize and dismiss the traditional press as the “enemy of the American people.”⁷ Both these strategic uses of “fake news”—to achieve specific political results⁸ and to destabilize the press as an institution—are self-

<https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html>).

⁴ For example, both during the electoral campaign and after his election, Donald Trump consistently responded to negative press coverage by characterizing unfavorable reports as “fake news.” See, e.g., Donald Trump (@realDonaldTrump), Twitter (Oct. 4, 2017, 7:47 AM),

<https://twitter.com/realdonaldtrump/status/915589297096536065?lang=en>; Donald Trump (@realDonaldTrump), TWITTER (Dec. 24, 2017, 5:48 AM), <https://twitter.com/realdonaldtrump/status/952301373479104512?lang=en>; Donald Trump (@realDonaldTrump), TWITTER (Jan. 13, 2018, 2:08 PM), <https://twitter.com/realdonaldtrump/status/952301373479104512?lang=en>.

This emboldened other public figures to do the same. See, e.g., Brian Resnick, *Exclusive: Roy Moore Campaign Distributes “Primer” On How To Discredit Accusers, “Fake News”*, VOX (Dec. 11, 2017, 11:00 AM), <https://www.vox.com/policy-and-politics/2017/12/8/16754470/roy-moore-campaign-talking-points-debunk-sexual-allegations> (discussing the campaign position of controversial Senate candidate Roy Moore with respect to news reports of sexual molestation of teenage girls).

⁵ See *infra* note 13 and accompanying text.

⁶ By traditional institutional press, I refer to national, regional, and local print news organizations such as *The New York Times*, *The Washington Post*, *The Wall Street Journal*, *The Chicago Tribune*, *The Miami Herald*, etc. The electronic institutional press would include entities such as the broadcast networks (ABC, CBS, NBC), CNN, MSNBC, and CSPAN.

The Trump approach now is not just to dispute the accuracy of particular stories or accounts of factual events, but to label “real news” as “fake” simply if it does not support the executive’s version of events. See *supra* note 4. This indicates “a comprehensive, categorical labeling rather than a narrower critique of particular coverage” Ronnell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 AZ. ST. L. J. 1301, 1314 (2018). Of course, in addition to the broadside “fake news” attack on the press as an institution, President Trump also continues to use the phrase to challenge the accuracy of specific news stories about him. See, e.g., Billy Bush, *Yes, Donald Trump, You Said That*, N.Y. TIMES (Dec. 3, 2017), https://www.nytimes.com/2017/12/03/opinion/billy-bush-trump-access-hollywood-tape.html?_r=0 (responding to President Trump’s recent suggestion that an unflattering recording in which he admits to sexual misconduct was faked).

⁷ Michael M. Grynbaum, *Trump Calls the News Media the ‘Enemy of the American People’*, N.Y. TIMES (Feb. 17, 2017), <https://www.nytimes.com/2017/02/17/business/trump-calls-the-news-media-the-enemy-of-the-people.html>; see also Andrew Higgins, *Trump Embraces ‘Enemy of the People,’ A Phrase With A Fraught History*, N.Y. TIMES (Feb. 26, 2017), <https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html> (describing use of phrase by Stalin and Mao, among other authoritarian leaders).

⁸ The strategic dissemination of fake information is also infecting the processes of regulatory rule-making today. See, e.g., Paul Hitlin, Kenneth Olmstead & Skye Toor, *Public Comments to the Federal Communications Commission About Net Neutrality Contain*

evidently very dangerous for democracy.⁹ If the press is to help ensure government accountability by serving as democracy's watchdog, it cannot simultaneously be perceived as democracy's enemy. If public discourse is flooded with false information, at a minimum, voters will not know what to believe. Incompetence, demagoguery, and corruption¹⁰ in the public realm are a likely result. Moreover, as if this were not a sufficient threat to the democratic order, "fake news" is also a threat, *inter alia*, to the stability of the financial markets as well, with the ability to disrupt markets "on an unprecedented scale."¹¹ Whether for competitive advantage, terror, or geopolitical gamesmanship, the deployment of market-affecting fabricated information is a looming danger ahead. Simply put, therefore, "fake news" presents profound—and likely increasing—challenges for both the public *and* private spheres today.

Of course, intentionally false news (variously referred to as propaganda, misinformation, and disinformation) is hardly a new phenomenon, either in politics or in commerce.¹² And government officials preceding Donald Trump have certainly indulged in press-bashing.¹³ But circumstances are importantly

Many Inaccuracies and Duplicates, PEW RESEARCH CTR. (Nov. 29, 2017), <http://www.pewinternet.org/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/> (reporting what appeared to be strategic use of bot-generated comments, many apparently using fake identifying information, in comments filed with the Federal Communications Commission's proceeding on the rollback of net neutrality rules).

⁹ For a view that enemy construction of the press should be seen through a Schmittian lens as an invitation to the destabilization of other institutions beyond the press as well, see Jones & Sun, *supra* note 6; see also Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 NYU L. REV. (forthcoming 2018) (identifying "new forces at work that should make us concerned that the same disease plaguing today's political dialogue will infect (or further infect) the judiciary").

¹⁰ See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 209–211 (2018) (suggesting that local and regional corruption is likely to result from a decline in robust local and regional media covering statehouses).

¹¹ Tom C. W. Lin, *The New Market Manipulation*, 66 EMORY L.J. 1253, 1292–94 (2017) (describing, *inter alia*, threats of mass misinformation); see also *infra* Section III.B.

¹² From Octavian's false claims about Mark Anthony's last will to George Orwell's War of the Worlds broadcast, history is rife with notable examples of fabricated news. See, e.g., Lionel Barber, *Fake News In The Post-Factual Age*, FIN. TIMES (Sept. 16, 2017), <https://www.ft.com/content/c8c749e0-996d-11e7-b83c-9588e51488a0>; see generally Michael C. Dorf & Sidney G. Tarrow, *Stings and Scams: 'Fake News,' the First Amendment, and the New Activist Journalism*, 20 J. CONST. L. 1 (2017) 1 (describing the growth in volume and intensity of "fake news" on the Internet for several years prior to the 2016 US presidential election).

¹³ How can one forget that Vice President Agnew, speaking William Safire's words, famously characterized the press as "nattering nabobs of negativism" during the

different today. We now find ourselves in an informational environment where technology enables psychometric targeting, information floods, and filter bubbles;¹⁴ a political environment typified by escalating polarization, extremism, and distrust; a commercial environment in which financial markets depend on high-speed trading by bots; and a journalistic environment marked by economic pressure, declining shared norms, a resurgent partisan media, harassment of journalists, and increasing uncertainty about the degree of remaining legal and non-legal protection for the press.

Thus, the various flavors of “fake news” today present a powerful threat because of enhanced technology, political polarization, and reduced public trust in increasingly precarious traditional accountability institutions. The dark side of “cheap speech”¹⁵ is that technology enables the increasingly effective weaponization of fabricated information and facilitates the global implementation of speech control strategies by governments and others in pretended response to public concern over “fake news.” The sitting President’s relentless critique of the mainstream press, when joined with technologically weaponized “fake news” being disseminated to a politically polarized public, undermines already-fragile public trust in the press.¹⁶ The issue is particularly complex because of the party asymmetry in views about “fake news”¹⁷ and the asymmetric polarization of media.¹⁸ And the traditional press’s

Nixon Administration? See David Remnick, *Nattering Nabobs*, NEW YORKER (July 10, 2006), <https://www.newyorker.com/magazine/2006/07/10/nattering-nabobs>.

¹⁴ See, e.g., Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (September 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete> (describing noxious characteristics of the current information environment). The term “filter bubble,” coined by Eli Pariser, refers to the tendency of personalization on the web to offer users only news consistent with their world views and preferences. See ELI PARISER, *THE FILTER BUBBLE: HOW THE NEW PERSONALIZED WEB IS CHANGING WHAT WE READ AND HOW WE THINK* (2011).

¹⁵ This refers to Professor Eugene Volokh’s early-in-the-history-of-the-Internet-Age article, *Cheap Speech and What It Can Do*. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995) (discussing the likely effects of virtually costless opportunities for speech on the Internet).

¹⁶ See *infra* note 23 and accompanying text.

¹⁷ See David Lazer et al., *Combating Fake News: An Agenda For Research and Action*, SHORENSTEIN CTR. (2017), <https://shorensteincenter.org/combating-fake-news-agenda-for-research/> (“[M]isinformation is currently predominantly a pathology of the right . . .”). The left also appears credulous, however. See, e.g., Ken Bensinger, Jason Leopold & Craig Silverman, *The 1.6 Billion Dollar Hoax*, BUZZFEED (Mar. 15, 2017, 6:24 AM), https://www.buzzfeed.com/kenbensinger/how-donald-trumps-enemies-fell-for-a-billion-dollar-hoax?utm_term=.nn8O6Zn4v#.taEBQYgVy (describing “[a]n elaborate hoax based on forged documents escalates the phenomenon of ‘fake news’ and reveals an audience on the left that seems willing to believe virtually any claim that could damage Trump”).

¹⁸ See Rob Faris et al., *Partisanship, Propaganda, and Disinformation: Online Media and the 2016 U.S. Presidential Election*, HARVARD UNIV. BERKMAN KLEIN CTR. (Aug. 16,

ability to counteract “fake news” and act as watchdog over government activity and private power is diluted by a variety of increasing constraints.¹⁹ Such threats come not only from the press’s financial woes, but from a judicial turn away from press protection and a decline in customary press privileges.²⁰

The nature of the hazards posed by the phenomenon of “fake news” can best be understood against the background of these developments. They reveal that no single—or simple—tactic can address the variety of challenges posed by the multi-headed phenomenon of “fake news.” Nor should it. Because the issue of the relationship between the press, the government, and the public is so profoundly important and difficult; because “fake news” is such a multi-faceted and evolving phenomenon; and because today’s information environment is so complicated, proposing remedies to address the problem requires great care and restraint.

In that spirit, this Article suggests beginning with a three-pronged approach—focusing on platform self-regulation, audience information literacy, and empowerment of the press itself.²¹ The recommendations relating to platforms and

2017), <https://cyber.harvard.edu/publications/2017/08/mediacloud>; see also Michael Barthel & Amy Mitchell, *Americans’ Attitudes About the News Media Deeply Divided Along Partisan Lines*, PEW RESEARCH CTR. (May 10, 2017), http://assets.pewresearch.org/wp-content/uploads/sites/13/2017/05/09144304/PJ_2017.05.10_Media-Attitudes_FINAL.pdf; see also Vidya Narayanan et al, *Polarization, Partisanship and Junk News Consumption over Social Media in the US*, UNIV. OXFORD: COMPUTATIONAL PROPAGANDA PROJECT (Feb. 6, 2018), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2018/02/2018-1.pdf>. (finding that the distribution of fake and other “junk” news is “unevenly spread across the ideological spectrum” and that a network of “extreme hard right pages—distinct from Republican pages—share the widest range” on Facebook).

¹⁹ For an argument that the construction of the press as an enemy by the Trump Administration has undermined not only the ability of the press to serve as watchdog of government, but also the press’s function as educator and public proxy, see Jones & Sun, *supra* note 6.

²⁰ For another article noting the decline in customary privileges for the press, see Ronnell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. ONLINE 47 (2017), http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1251&context=nulr_online.

²¹ There is little consensus, studies tell us, on whether the many suggested solutions for “fake news” are likely to be successful. See Janna Anderson & Lee Rainie, *Internet and Technology, The Future of Truth and Misinformation Online*, PEW RESEARCH CTR. (Oct. 19, 2017), <http://www.pewinternet.org/2017/10/19/the-future-of-truth-and-misinformation-online/>; see also Laura Hazard Owen, *There Is ‘Nothing Resembling Consensus’ About Whether the Online Misinformation Problem Can Actually be Solved*, NIEMANLAB (Oct. 19, 2017), <http://www.niemanlab.org/2017/10/there-is-nothing-resembling-consensus-about-whether-the-online-misinformation-problem-can-actually-be-solved/> (describing split among experts as revealed by recent Pew report). That there is no assurance, however, does not mean that a multi-valent approach to amelioration is not worth exploring.

audiences are designed principally to address the problem of fabricated stories. The recommendation with respect to the press is designed to redress the costs to institutional legitimacy of calling the mainstream media as a whole “fake news.” The goal is to try to achieve a virtuous circle, with each prong reinforcing the others in order to reduce harms attributable to both types of “fake news” charges. The Article does not recommend express governmental attempts to prohibit or limit “fake news” directly.²² It does, however, recommend legislative and judicial expansion of affirmative rights for the press. Demonized by the right, the mainstream press today seems poised to be swept into the left’s recent attempts to desacralize the First Amendment on the ground of its “ideological drift”²³ to the right. The Article suggests that progressive scholars’ critiques of recent libertarian doctrinal developments with respect to the freedom of *speech*²⁴ should in no way impede the enhancement, recommended here, of the First Amendment’s protections for a free and independent *press*.

The Article’s first recommendation focuses on self-regulation by major information intermediaries.²⁵ Data suggests

²² Instead of attempting to mandate prohibitions on “fake news,” the Article first seeks to explore the possibilities of self-regulatory approaches because of concerns about official censorship. See *Joint Declaration on Freedom of Expression and “Fake News,” Disinformation and Propaganda*, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS (Mar. 3, 2017), http://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Expression/JointDeclaration3March2017.doc&action=default&DefaultItemOpen=1 [hereinafter *Joint Declaration*] (joint declaration by UN Special Rapporteur for Freedom of Expression and others, recognizing threat of fake news but warning against censorship in regulation). The Article assumes that voluntarily-adopted counter-measures are preferable to mandated prohibitions, and asserts that framing the issue correctly could lead to fruitful self-regulatory efforts—particularly when information intermediaries and other commercial market participants come to see the self-regulation of “fake news” as in their long-term economic self-interest. This Article *does* see a place for government rules—not in prohibiting “fake news,” but in mandating enhanced press rights so that the press can effectively serve its watchdog function and begin to rebuild public trust. See *infra* Section IV.

²³ Professor Jack Balkin coined the phrase “ideological drift” to describe shifts in constitutional interpretation in which radical or liberal ideas become mainstream orthodoxy and are then appropriated by conservatives. See J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383 (1990) (noting that ideological drift can move from right to left or left to right, but is more commonly reflected in “comparatively liberal principles that later serve to buttress comparatively conservative interests.”); see also J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993).

²⁴ See *supra* note 14 and accompanying text.

²⁵ See *infra* Section III.A. As Jack Balkin has persuasively argued, these intermediaries are now the central factors in the private governance of free speech. See, e.g., Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 52 U.C. DAVIS L. REV. (forthcoming 2018). I use the term “self-regulation” here not to deny that reality, but to distinguish their regulatory decisions from those mandated by legislatures or courts.

that much fabricated news has been circulated virally through the predominant social media platforms. Thus, the first step in addressing the problem would be to focus on those platforms and look to ways to dis-incentivize the generation and dissemination of factually false stories.²⁶ Powerful news intermediaries like Facebook and Google have already begun their own self-regulatory exercises, variously relying on algorithmic identification of problematic content, fact-check disclosure approaches, and attempts to prioritize high quality news content.²⁷ The platforms' interests in reputation and customer satisfaction are likely to exert non-legal pressure on, and provide alternative incentives for, such self-regulatory efforts. The principal questions here will concern the effectiveness of the platforms' private solutions in light of their own economic incentives in the advertising marketplace, and the appropriateness of turning powerful intermediaries such as Google and Facebook into private censors.

In addition to technological solutions²⁸ with which the platforms are experimenting, the Article recommends that information intermediaries adopt expanded sponsorship disclosure obligations in connection with their ad sales. If targeted psychometric marketing of "fake news" in order to exploit people's weaknesses can be disrupted (at least to some degree) via disclosures, then the perfect storm of "fake news" and the "AI propaganda machine"²⁹ might be more easily deflected. Promises of this sort have already been made by Facebook founder Mark Zuckerberg³⁰ in the shadow of pending legislation;³¹ remaining issues include Facebook's follow-through and the position of other major platforms.

²⁶ This Article's recommendations with respect to platform regulation and audience self-help are geared principally to constraining the fabricated content type of "fake news." The recommendations with regard to the press itself are geared to the use of the "fake news" label as a press-delegitimizing governance and discipline tactic.

²⁷ See *infra* Section III.

²⁸ Technology-based "fake news solutions" beyond the platforms's current initiatives are developing as well. Perhaps the most innovative such suggestion is a proposal for blockchain-enabled decentralized journalism. Civil, the first journalism marketplace of this sort, is a proselytizer for how blockchain will reputedly eliminate all fake news. See CIVIL, <https://joincivil.com/>; see also *infra* Section III.

²⁹ Berit Anderson & Brett Horvath, *The Rise of the Weaponized AI Propaganda Machine*, SCOUT (Feb. 9, 2017), <https://scout.ai/story/the-rise-of-the-weaponized-ai-propaganda-machine>.

³⁰ See, e.g., Hamza Shaban & Matea Gold, *Facebook, Google and Twitter Face Proposed Bill Targeting Shadowy Political Ads*, WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/09/22/facebook-google-and-twitter-could-face-a-new-law-targeting-shadowy-political-ads/?utm_term=.a164babf66e4.

³¹ See *infra* Section III.A.2.c (discussing the pending Honest Ads Act).

Virtually all of the scholarly discussions of “fake news”—including this Article—focus principally on the need to solve the problem because of the political threat it poses to elections and democracy. Yet framing the issue as primarily a political matter misses the fact that *both* politics and commerce are threatened by the proliferation of “fake news.” Recognition of that reality would align the incentives of those concerned about market integrity with those concerned about elections and democracy. More widespread and sincere commitment to the exploration of effective “fake news” counter-responses could emerge as a result. Corporate entities today are all aware (many from experience) that they are potential victims of hacks and data breaches, and now increasingly interpret cybersecurity as a corporate responsibility (although admittedly with varying degrees of success). Framing the “fake news” problem in a way that analogizes it to cybersecurity is likely to trigger commercial entities’ “buy-in” to the project of reducing “fake news.” This is not to minimize the importance of “fake news” to democracy, nor is it to assume that the solutions to the “fake news” threats to financial markets are necessarily the same as the solutions to the threats in the political context. Rather, it is to recognize that self-regulation efforts are more likely to succeed if they enlist the practical and sincere commitment of participants in both the political and commercial domains.

Still, a focus on technological solutions and platform self-regulation alone is unlikely to be either sufficient or unambiguously desirable. Thus, a second recommendation for dealing with “fake news” would be to address how to empower audiences in their ability to distinguish “fake news.” Calls for critical media literacy have been around for many years.³² But if today’s barrage of Internet-spread “fake news” can really influence political and commercial outcomes, then it is important to examine at a granular level what kinds of interventions could actually succeed in helping the public distinguish true from false information better than they currently do. The challenge here is to create more successful tools by incorporating the insights of political science and modern cognitive psychology concerning the effectiveness of corrections in light of cognitive biases and in contexts in which people operate within political echo chambers.³³

³² See, e.g., Douglas Kellner & Jeff Share, *Critical Media Literacy Is Not An Option*, 1 LEARNING INQUIRY 59 (2007) (arguing that critical media literacy is an imperative for participatory democracy in the 21st Century).

³³ See, e.g., S.I. Strong, *Alternative Facts and the Post-Truth Society: Meeting the Challenge*, 165 U. PA. L. REV. ONLINE 137 145–46 (2017),

Research has begun to emerge addressing this issue, and various cognitive biases have been identified correlating with people's susceptibility to "fake news."³⁴ Empirical data to date do not appear to have reached full consensus on the impact of those biases or what corrective information designs might neutralize them effectively. Still, some research suggests that people are likely to change their beliefs when they are challenged by surprising validators, and that their beliefs can be influenced by the choice of style, format, and context-recognition in factual corrections. Further research will be needed so that "the new media literacy" approach can properly drive policy.

In addition to effectiveness, the principal issue with respect to this aspect of the Article's recommendations is likely to be whether the proposed new approach to information literacy might itself present a legitimacy trap. In other words, structuring media literacy with a view to avoiding cognitive biases which lead to the viral spread of falsity can itself end up replicating the very kind of manipulation that it is designed to combat. That is an important risk to avoid.

Abstracting out from the correction of false stories, the Article's third set of recommendations focuses on ways to push back against the delegitimizing effects of the "fake news" charge when it is used as an overall institutional attack on the press. The goal here is to generate a counter-narrative of press function to re-legitimize the press and promote audience trust. The current informationscape ironically represents the very moment when the press can come into its own. It can do so by engaging in excellent investigation and reporting and rebuilding public trust. But how?

First, the tools. Scholars have highlighted the disparity in First Amendment protections of publication and newsgathering and decried the extensive constitutional protection of false speech as opposed to the minimal protection of truth-seeking newsgathering.³⁵ Even before the Trump Administration, during the Obama years, both doctrine and practice had begun to scale back protections for journalistic activity.³⁶ In addition to continuing—and even enhancing—

http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1193&context=penn_law_review_online; see also *infra* Section III.B.

³⁴ See *infra* Section III.B.

³⁵ See Dorf & Tarrow, *supra* note 12.

³⁶ See, e.g., James Risen, *If Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), <https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html> (discussing Obama Administration's approach to the press); see also *infra* Section II.A.

those developments, the Trump Administration has notably diminished customary, informal press-privileging practices.³⁷ And modern court practice—even with respect to publication—appears to be taking a less press-protective turn. The principal doctrinal recommendation on this front—perhaps counter-intuitively—is to reverse those trends and *increase* press protection, especially for newsgathering, protection from leak prosecutions, and balancing newsworthiness with other values. The recommendation to reverse current doctrine and practice is grounded on the bet that the modern context of “fake news” provides an opportunity for the press to shine in its watchdog role. The law should give the press more access to the information it needs to cover the “real” (and not the distracting) news in greater depth and more accurately.

Then the ethics and practice. If granted these enhanced protections, the press, in turn, must live up to them. It must address its journalism standards, engage in serious journalism and investigative work enabled by the expanded press protections recommended here, focus on reporting rather than opinion (perhaps eliminating the op-ed page, for example), be more transparent with the public about its norms and processes, resist having its agenda respond to that of the partisan media ecosystem,³⁸ and work “to avoid being drawn into alignment with either of the parties.”³⁹

The results will surely be imperfect, but the alternative is worse: a neutered and supine press operating merely to entertain the fragmented and polarized audience in an increasingly authoritarian global political environment.

The Article proceeds as follows. Section I describes the phenomenon of “fake news,” addresses various taxonomies of “fake news,” and situates the two ways in which “fake news” is

³⁷ See generally Jones & West, *supra* note 20 (describing some such diminutions); Carol Pauli, *Enemy of the People: Negotiating News at the White House* (Texas A&M Univ. Sch. of Law Legal Studies Research Paper No. 17–49, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007970 (same); see also *infra* Section II.B.

³⁸ See Yochai Benkler et al., *Study: Breitbart-Led Right-Wing Media Ecosystem Altered Broader Media Agenda*, COLUM. J. REV. (Mar. 3, 2017), <https://www.cjr.org/analysis/breitbart-media-trump-harvard-study.php> (noting how “a right-wing media network anchored around Breitbart developed as a distinct and insulated media system” that set the agenda for both the conservative media and “strongly influenced the broader media agenda.”)

³⁹ Andrew Guess, Brendan Nyhan & Jason Reifler, “You’re Fake News!” *The 2017 Poynter Media Trust Survey*, POYNTER (Nov. 29, 2017), <https://poyntercdn.blob.core.windows.net/files/PoynterMediaTrustSurvey2017.pdf>. This is particularly important because of the distrust fomented by despite the increasingly politicized media landscape fostered by Democratic support for the press and unrelenting attacks on the media from the White House. See *id.*

deployed in the news media's relationship to government in the age of Trump. Section I.A describes various taxonomies of "fake news." Section I.B explains the ways in which fabricated news has been weaponized by artificial intelligence ("AI"), social media dissemination, and public skepticism about the press and other authoritative social institutions. Section I.C lays out the impact on public trust of relentless presidential critique of the press. Finally, Section I.D notes the threats posed by the various types of previously discussed "fake news" outside the context of politics—and specifically with respect to the financial markets. Then, Section II describes the instability in—and indeed extensive reduction of—press privilege that has been occurring in judicial and administrative decisions, legislative action, customary accommodations, and the treatment of journalists. It also describes the complexity of the current media landscape against which these changes are taking place. The Section maintains that these developments are encouraged and given cover by the ubiquitous "fake news" charge. It then argues that these developments are having a particularly pernicious chilling effect on modern journalism. Next, Section III begins the discussion of possible solutions to the "fake news" problem, specifically addressing the viability and desirability of self-regulatory solutions by platforms in Section III.A. The Section also sketches possible regulatory approaches, and raises the question of the extent to which the "fake news" phenomenon can be used as a cover for demagogic speech control at a moment when progressive arguments seek to desacralize the First Amendment. Section III.B focuses on arguments for enhanced information literacy and de-biasing strategies. It sketches the interdisciplinary work that, as it proceeds, might help ground literacy strategies in cognitive and political science in order to be more effective. Finally, Section IV turns its attention to the delegitimizing effect on public trust in journalism of the "fake news" attack on the mainstream press as an institution. It argues that the growing phenomenon of "fake news" is—perhaps counterintuitively—the very reason justifying press preferences with respect to both newsgathering and publication today. It begins the conversation both about what kinds of press privileges would best help journalism today, and what kinds of changed press practices might help reduce the potential abuse of the expanded press protections that the Article recommends.

I. “FAKE NEWS” AND THE PRESS IN THE AGE OF TRUMP

The numerous instances of fabricated political information that have gone viral since 2016 have led the public to believe in factually inaccurate information, possibly influenced the presidential election in the United States, and, at a minimum, “triggered a precipitous decline in public confidence in election integrity”⁴⁰ Recent revelations indicate widespread use on social media of targeted false information by Russian interests attempting to influence American politics during the 2016 election season.⁴¹ In addition, the Trump Administration’s demonization of mainstream news organizations cannot help but undermine the public’s view of the press. That has surely been the goal of the Trump Administration in seeking to use “fake news” as a tool of governance. These two uses of “fake news” amplify one another. To the extent that the “fake news” concerns politics, the combined effect of these developments is one that fundamentally challenges American democracy. The potential impact of “fake news” goes even further, however—extending to commerce and markets, education, and virtually every other social activity. The mass circulation of deliberate falsehoods, when joined with public distrust in infrastructural institutions, paints a terrifyingly dystopian potential future.

This Section describes how technology and the new media environment weaponize “fake news,” and how the President’s delegitimizing attacks on the mainstream media (amplified by the alt-right media itself) affect public trust in the truth of the news they receive. The Section then addresses the threats posed by fabricated information in contexts outside politics—principally in the commercial world.

⁴⁰ Anthony J. Gaughan, *Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration*, 12 DUKE J. CONST. L. & PUB. POL’Y 57, 59 (2017).

⁴¹ See, e.g., Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, NY TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html>; Mike Isaac & Scott Shane, *Facebook’s Russia-linked Ads Came in Many Disguises*, N.Y. TIMES (Oct. 2, 2017), <https://www.nytimes.com/2017/10/02/technology/facebook-russia-ads.html>; Tom McCarthy, *Facebook, Google and Twitter Grilled by Congress Over Russian Meddling—As It Happened*, THE GUARDIAN (Oct. 31, 2017, 5:40 PM), <https://www.theguardian.com/technology/live/2017/oct/31/facebook-google-twitter-congress-russian-election-meddling-live>.

A. Taxonomies of “Fake News”

The term “fake news” has no single definition because it refers to a wide variety of things.⁴² Still, the phrase is an umbrella term referring to “real threats to meaningful public debate on the Internet[]”⁴³ and is therefore worth mapping. A number of taxonomies have been proposed to define “fake news,” some focusing on the content of the material disseminated, some focusing on the intent behind the dissemination, and some on both.⁴⁴

Most agree that the phrase refers to the intentional dissemination of false information. We can imagine “fake news” as representing a spectrum—both with regard to truth and with regard to disseminators’ intent.⁴⁵ Some “fake news”

⁴² See, e.g., Mark Verstraete, Derek E. Bambauer, & Jane R. Bambauer, *Identifying and Countering Fake News*, UNIV. OF ARIZ. 1, 4, https://law.arizona.edu/sites/default/files/asset/document/fakenewsfinal_0.pdf (last visited Mar. 14, 2018) (“The term has been used to refer to so many things that it seems to have lost its power to denote at all; as a result, several media critics have recommended abandoning it entirely.”).

⁴³ *Id.*

⁴⁴ See, e.g., *id.*; see also *Faking News: Fraudulent News and the Fight for Truth*, PEN AM. 1, 23 (Oct. 12, 2017), <https://pen.org/wp-content/uploads/2017/11/2017-Faking-News-11.2.pdf> [hereinafter *Faking News*]; see also Fabio Giglietto et al., *Fake News and the Election: A New Taxonomy for the Study of Misleading Information within the Hybrid Media System* (Univ. of Urbino, Italy, Working Paper No. 15–17, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2878774 (describing process-centered rather than actor-centered approach to the dissemination of false information online).

⁴⁵ Verstraete, Bambauer, and Bambauer propose the following taxonomy: “[w]e define satire as a news story that has purposefully false content, is financially motivated, and is not intended by its author to deceive readers”; “[a] hoax is a news story that has purposefully false content, is financially motivated and is intended by its author to deceive readers”; “[p]ropaganda is news or information that has purposefully biased or false content, is motivated by an attempt to promote a political cause or point of view, and is intended by its author to deceive the reader”; “[t]rolling is presenting news or information that has biased or fake content, is motivated by an attempt to get personal humor value (the lulz), and is intended by its author to deceive the reader.” Verstraete, Bambauer, & Bambauer, *supra* note 42, at 5–7. The Verstraete report then offers “a new way of organizing different types of fake news according to their distinctive attributes. The two defining characteristics used to identify species of fake news are (1) whether the author intends to deceive readers and (2) whether the payoff from fake news is motivated by financial interests or not.” *Id.* at 8. The report recognizes mixed intent, mixed motives, and mixed information as problems in crafting its typology. See *id.* at 9–12.

Another approach describes seven types of problematic content: satire or parody, misleading content, imposter content, fabricated content, false connections, false context, and manipulated content. See Claire Wardle, *Fake News. It’s Complicated*, FIRST DRAFT (Feb. 16, 2017), <https://firstdraftnews.com/fake-news-complicated/> (defining satire or parody as information having no intention to cause harm but the potential to fool; misleading content as “misleading use of information to frame an issue or individual”; imposter content as “when genuine sources are impersonated”; fabricated content as “100% false [new content], designed to deceive and do harm”; false connections as “when headlines, visuals or captions don’t support the content”; false context as “when genuine content is shared with false

consists of wholly fabricated stories, often developed and disseminated as “clickbait”—to generate advertising revenue.⁴⁶ Other instances of wholly fabricated “fake news” are designed to achieve political ends of persuasion.⁴⁷ Another type of “fake news” is political satire (and even some entertainment “news”).⁴⁸ There are also conspiracy theorists and ideologues making up stories on social media. Some stories contain kernels of true information, but also falsity or incorrect inferences from true facts.

The “fake news” charge is also a generalized assertion that news organizations consistently lie or distort the truth in their reporting, and are thus illegitimate sources of information generally. This kind of “fake news” charge can be seen as a claim that such news organizations operate pursuant to what might be called ideological “fake newsworthiness” norms.⁴⁹ Those who make the blunderbuss “fake news” charge against mainstream news organizations—like President Trump and various organs of the alt-right and alt-lite media—rely on news organizations’ publication of unverified material⁵⁰ or

contextual information”; and manipulated content as “when genuine information or imagery is manipulated to deceive”).

⁴⁶ Hundreds of Macedonian teenagers gained notoriety for their successful generation and dissemination of pro-Trump, anti-Clinton stories whose content was completely false and fabricated. See Subramanian, *supra* note 3.

⁴⁷ Recently, Facebook has admitted that thousands of fake advertisements were placed on the social media site by shadowy entities with connections to the Russian government. See, e.g., Isaac & Shane, *supra* note 41.

⁴⁸ The Onion is the paradigmatic example. The online magazine does not say anywhere on its front page that it is a satirical outlet and that none of its reporting is true. See Verstraete, Bambauer, & Bambauer, *supra* note 42 (discussing *The Onion*).

⁴⁹ I am indebted to RonNell Andersen Jones for the phrase.

⁵⁰ For example, in early 2017, BuzzFeed published an unverified “dossier” alleging deep ties between Trump and the Russian government and Trump-compromising material in Russian hands. Ken Bensinger, Miriam Elder, & Mark Schoofs, *These Reports Allege Trump Has Deep Ties to Russia*, BUZZFEED (Jan. 10, 2017, 9:09PM), https://www.buzzfeed.com/kenbensinger/these-reports-allege-trump-has-deep-ties-to-russia?utm_term=.pf1Eer9aq#.bwQdZeEqK.

I refer to the alt-right and alt-lite media to distinguish them more traditional conservatively-inclined mainstream media outlets (such as the Wall Street Journal, for example). While the term “alt-right” is often used to refer to elements of the white supremacist movement in the US, “alt-lite” refers to “right-wing activists who refuse[] to publicly embrace white supremacist ideology.” *From Alt Right to Alt Lite: Naming the Hate*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/education/resources/backgrounders/from-alt-right-to-alt-lite-naming-the-hate>; see also Justin Wm. Moyer & Perry Stein, ‘Alt-right’ and ‘Alt-lite’? Conservatives Plan Dueling Conservative Rallies Sunday in D.C., WASH. POST (Jun. 23, 2017), https://www.washingtonpost.com/local/alt-right-and-alt-lite-conservatives-plan-dueling-conservative-rallies-sunday-in-dc/2017/06/22/242d8de2-56bd-11e7-9fb4-fa6b3df7bb8a_story.html?utm_term=.4a042f4c1d3a (describing the split). For a description of the alt-lite blogger ecosystem, see Tyler Bridges, “Alt-Lite” Bloggers and the Conservative Ecosystem, SHORENSTEIN CTR. (Feb. 20, 2018, 9:30 AM), <https://shorensteincenter.org/alt-lite-bloggers-conservative-ecosystem/> (examining “the important role that ‘alt-lite’ bloggers play in promoting, amplifying, and

journalistic errors as evidence of liberal media bias.⁵¹ This Article does not focus on unintentionally erroneous news reports, regardless of their partisan origin in conservative- or liberal-leaning media, in the range of “fake news” it addresses.

fortifying Donald Trump’s anti-establishment message to his conservative supporters.”)

⁵¹ With respect to BuzzFeed’s publication of the Russian dossier, *see, e.g.*, David French, *The Russia Dossier Story: A Perfect Storm of Clinton Deception, Media Irresponsibility, and Democratic Moral Blindness*, NAT’L REVIEW (Oct. 25, 2017, 3:00 PM), <http://www.nationalreview.com/article/453104/russian-dossier-hillary-clintons-lies-reveal-media-bias> (criticizing the story as a partisan liberal lie). BuzzFeed’s publication was controversial in mainstream media circles as well. *See, e.g.*, Rory Carroll, *BuzzFeed Publishes Unsubstantiated Trump Report, Raising Ethics Questions*, THE GUARDIAN (Jan. 11, 2017, 6:35 PM), <https://www.theguardian.com/media/2017/jan/10/buzzfeed-publishes-donald-trump-russia-documents-ethics-questions>). In addition, conservative and alt-right media have fastened on any journalistic error in mainstream media reports as proof of bias. *See, e.g.*, John Nolte, *Fake News Firehose: Science Proves Media Are Not Making ‘Honest Mistakes’ About Trump*, BREITBART (Dec. 12, 2017), <http://www.breitbart.com/big-journalism/2017/12/12/science-history-prove-media-not-making-honest-mistakes-trump/>.

Recently, both ABC and CNN aired noteworthy false reports. *See, e.g.*, Amy B. Wang, *ABC News Apologizes for ‘Serious Error’ in Trump Report and Suspends Brian Ross for Four Weeks*, WASH. POST (Dec. 3, 2017), https://www.washingtonpost.com/news/arts-and-entertainment/wp/2017/12/03/abc-news-apologizes-for-serious-error-in-trump-report-suspends-brian-ross-for-four-weeks/?utm_term=.d6d71a57f345 (“Ross had incorrectly reported Friday that during the 2016 presidential campaign, Trump had directed Michael Flynn to make contact with Russian officials before the election.”); Callum Borchers, *CNN Armed Trump With New Ammunition. Sure Enough, He Launched Another ‘Fake News’ Attack*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/12/08/cnn-just-armed-trump-with-new-ammunition-to-launch-another-fake-news-attack/?utm_term=.886e84f1e695 (erroneously reporting that Donald Trump, Jr. received an email granting access to Wikileaks documents concerning the Democratic National Committee hack on September 4 rather than September 14).

While both ABC and CNN admitted fault and corrected their stories, some damage had already been done; not only had the ABC story apparently caused a slip in the stock market, but the fact that the news organizations made the unintentional errors to begin with gave ammunition to those who wished to perpetuate the narrative of the mainstream media as engaged, willfully, in “fake news” dissemination. *See, e.g.*, Wang, *supra* note 51.

Still, there is a significant difference between intentional dissemination of known falsity and unintentional error which is corrected immediately after discovery. Error is inevitable. The inference that ABC and CNN were engaging in a pattern of “fake news” dissemination in order to undermine the President is unwarranted from the facts in these two instances. At best, both evidence a journalistic tendency to look for a scoop on a scandal and act too quickly. Even if a journalistic tendency to seek scandal could make a journalist more prone to accept the truth of asserted evidence of scandal, that is a far cry from intentionally blanketing the conversation with knowing and targeted falsehoods. And the discovery of two erroneous news stories—immediately retracted—cannot reasonably be said to prove that the entire output of the mainstream media should be considered illegitimate. The critical issue is whether journalistic standards are used both to reduce the occurrence of error and to mitigate the impact of errors that do get through, as they inevitably sometimes will. It is for these reasons that this Article does not focus on unintentionally erroneous reporting in its analysis of “fake news.”

The breadth and complexity of the reference to “fake news” is used by some as a reason to reject the phrase itself.⁵² Others argue that the umbrella term presents a range of dangers to public discourse and that different forms may be susceptible to different sorts of responses.⁵³ At one extreme, platform-based advertising initiatives could provide concrete ways to disincentivize the dissemination of fabrications designed to generate click revenue. At the other end of the spectrum, concrete attempts to deter fabricated information will not defang “fake news” broadsides like President Trump’s attempts to sow doubt over mainstream news organizations’ overall political coverage.

The next section addresses what is particularly worrisome about fabricated false information. The succeeding sections address the dangers of the “fake news” charge as a sword designed to cut down the credibility of the press.

B. The Weaponization of Fabricated “Fake News”

Technology can all too easily weaponize false speech for maximum believability and impact. This is not only because the architecture of social media enables viral spreading of information, but because AI can increase the efficiency and effectiveness of distributed content through targeting and automation. A flood of targeted emotional manipulation, Facebook dark posts, and ubiquitous bots automatically peddling⁵⁴ real “fake news”⁵⁵ can stealthily influence public

⁵² See, e.g., Hossein Derakhshan & Claire Wardle, *Ban the Term ‘Fake News’*, CNN (Nov. 27, 2017, 3:12 PM), <http://www.cnn.com/2017/11/26/opinions/fake-news-and-disinformation-opinion-wardle-derakhshan/index.html>; see also Margaret Sullivan, *It’s Time to Retire the Tainted Term ‘Fake News’*, WASH. POST. (Jan. 8, 2017), https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a%2076f69a399dd5_story.html?utm_term=.861076611a76.

⁵³ By their taxonomies, some scholars seek to find ways to control the harmful type of fake news while protecting democratically-desirable political satire. See, e.g., Verstraete, Bambauer, & Bambauer, *supra* note 42 (making this point explicitly). But see generally Jeremy Littau & Daxton R. Stewart, “Truthiness” and Second-Level Agenda Setting: Satire News and Its Influence on Perceptions of Television News Credibility, 9 ELECTRONIC NEWS 122 (2015) (observing that satire shows undermine cable and television news credibility).

⁵⁴ See, e.g., Chengcheng Shao et al., *The Spread of Fake News by Social Bots*, Cornell Univ. Library, <https://arxiv.org/pdf/1707.07592.pdf> (last visited Mar. 14, 2018) (finding evidence, in an analysis of Twitter, that social bots play a key role in the spread of fake news).

⁵⁵ In this Article, I use the phrase “real ‘fake news’” to refer to fabricated stories designed to achieve particular ends, whether of political strategy or financial gain or both. By contrast, the Article uses the phrase “fake ‘real news’” to refer principally to the political strategy of delegitimizing the mainstream media by characterizing real journalism as ‘fake’ when news organizations challenge government’s characterization of events. (The phrase could of course also be read to refer to

opinion and behavior.⁵⁶ Voice-mimicking and video-simulating technology invites the fabrication of news that is very difficult to debunk.⁵⁷ While the possible threats posed by such amplified “fake news” are clear in the context of politics, manipulated information flows can have much broader harmful effects as well—in markets far beyond politics.⁵⁸ The structure of the information ecosystem—built around powerful platforms that act as information intermediaries—augments the effectiveness and therefore magnifies the dangers of strategic deployment of “fake news,” for political, regulatory, and commercial purposes.⁵⁹

Fabricated political information has been virally disseminated to an astonishing degree since 2016, much of it on social media.⁶⁰ Recent reports suggest that American voters

inaccurate or ideologically biased reporting, which is how President Trump characterizes the mainstream media’s political output.).

⁵⁶ I am aware of the fraught character of any claim of “manipulation.” I mean here only to point to systemic attempts, enhanced by use of artificial intelligence, to influence people’s behaviors by appealing to their weaknesses as identified through data analytics.

⁵⁷ See, e.g., Denise Clifton, *Fake News on Twitter Flooded Swing States That Helped Trump Win*, MOTHER JONES (Sept. 28, 2017, 1:00 AM), <http://www.motherjones.com/politics/2017/09/fake-news-including-from-russian-sources-saturated-battleground-states-trump-barely-won/>; Adam Clark Estes, *Insanely Accurate Lip Syncing Tech Could Turn Fake News Videos Into a Real Problem*, GIZMODO (July 12, 2017, 12:55 PM), <https://gizmodo.com/insanely-accurate-lip-synching-tech-could-turn-fake-news-1796843610>; *Fake News: You Ain’t Seen Nothing Yet*, THE ECONOMIST (July 1, 2017), <https://www.economist.com/news/science-and-technology/21724370-generating-convincing-audio-and-video-fake-events-fake-news-you-aint-seen>; Olivia Solon, *The Future of Fake News: Don’t Believe Everything You Read, See or Hear*, THE GUARDIAN (July 26, 2017, 1:00 PM), <https://www.theguardian.com/technology/2017/jul/26/fake-news-obama-video-trump-face2face-doctored-content>. The recent rise of “deepfakes”—“AI-assisted face-swap porn, often featuring a celebrity’s face mapped onto a porn star’s body”—indicates the increasing technological sophistication of video manipulation techniques. See Louise Matsakis, *Artificial Intelligence is Now Fighting Fake Porn*, WIRED (Feb. 14, 2018, 4:46 PM), <https://www.wired.com/story/gfycat-artificial-intelligence-deepfakes/> (describing the phenomenon and AI-focused methods of fighting it).

⁵⁸ See, e.g., Chris Flood, *Fake News Infiltrates Financial Markets*, FIN. TIMES (May 5, 2017), <https://www.ft.com/content/a37e4874-2c2a-11e7-bc4b-5528796fe35c>; see also Larry Greenmeier, *Could AI Be the Future of Fake News and Product Reviews?*, SCI. AM. (Oct. 16, 2017), <https://www.scientificamerican.com/article/could-ai-be-the-future-of-fake-news-and-product-reviews/>; Renae Merle, *Why Fake News is a Problem for Wall Street*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/news/business/wp/2017/10/12/why-fake-news-is-a-problem-for-wall-street/?utm_term=.2321471f4a20.

⁵⁹ For a recent description of what is new in today’s information economy and how the change finds no adequate space in traditional First Amendment theory, see Nabihah Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J.F. 337, 338 (2017), (discussing how online platforms, as the prime producers of fake news, reveal gaps in existing First Amendment theories).

⁶⁰ See, e.g., Gaughan, *supra* note 40, at 66 (addressing the presence of fabricated stories during the 2016 election and identifying fake news as a product of media

were exposed to more “fake news” than accurate political information on Twitter during the 2016 election contest⁶¹ and that “some of the most widely shared stories on social media were fake.”⁶² One study suggests that the volume of shared news from dubious sources was comparable to the news from individual mainstream news sources (e.g., the New York Times).⁶³ Although the conclusion is of course contested,⁶⁴ many still question whether “fake news” played a role in the outcome of the 2016 presidential election.⁶⁵ Research reveals

fragmentation); Lazer et al., *supra* note 17, at 5; see also Andrew Guess, Brendan Nyhan & Jason Reifler, *Selective Exposure to Misinformation: Evidence From the Consumption of Fake News During the 2016 U.S. Presidential Campaign*, DARTMOUTH 1, 7 (January 9, 2018), <https://www.dartmouth.edu/~nyhan/fake-news-2016.pdf> (estimating that 25% of Americans visited a fake news website during the last presidential campaign).

⁶¹ See, e.g., Philip Howard & Bence Kolanyi, *Social Media Companies Must Respond to the Sinister Reality Behind Fake News*, THE GUARDIAN (Sept. 30, 2017, 7:03 PM), <https://www.theguardian.com/media/2017/sep/30/social-media-companies-fake-news-us-election> (discussing the unequal distribution of fake news across the country during the 2016 election). A study by BuzzFeed of the last three months of the 2016 campaign showed that the top 20 fake election news stories on Facebook reached over 8.7 million readers, compared to the 7.3 million readers who received real election news stories on Facebook. See Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016, 5:15 PM), https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook?utm_term=.ctvjNY0R2#.iq36M0VPq (displaying graphical depictions of the viral fake election news stories). Admittedly, the BuzzFeed study undercounted the amount of real news to which Facebook users were exposed because it apparently excluded Reuters, AP, and small newspaper stories. Gaughan, *supra* note 40, at 66. Even so, the comparative numbers are staggering. See generally Hasen, *supra* note 10 (describing the vast amount of “fake news” before and after the inclusion of all news sources).

⁶² See, e.g., Lazer et al., *supra* note 17 (and source cited therein).

⁶³ *Id.* at 4.

⁶⁴ See, e.g., Brian Flood, *Real News Did More Damage Than Fake News On Election Day*, FOX NEWS (Sept. 28, 2017), <http://www.foxnews.com/politics/2017/09/28/real-news-did-more-damage-than-fake-news-on-election-day.html> (asserting a lack of evidence proving that fake news influenced the 2016 election); Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 232 (2017); see also Guess, Nyhan, & Reifler, *supra* note 60, at 12 (concluding that while fake news “is unlikely to have changed the outcome of the 2016 election . . . , exposure to it or similarly dubious and inflammatory content can still undermine the quality of public debate, promote misperceptions, foster greater hostility toward political opponents, and corrode trust in government and journalism.”); Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63 (2017) (providing an overview of the role of social media in the 2016 presidential election).

⁶⁵ See, e.g., Clay Calvert & Austin Vining, *Filtering Fake News Through a Lens of Supreme Court Observations and Adages*, 16 FIRST AMEND. L. REV. 153 (2018); Caitlin Dewey, *Facebook Fake-news Writer: ‘I Think Donald Trump is in the White House Because of Me’*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/?utm_term=.592469fb964b (interviewing a news writer who thinks articles like theirs that included “fake news” contributed to Trump becoming elected); see also Michael Barthel, Amy Mitchell, & Jesse Holcombe, *Journalism & Media, Most Americans Believe Fake News Is Sowing Confusion*, PEW

that “false information didn’t flow evenly across social networks [with more spreading on the right than the left]” and that “[a]verage levels of misinformation were higher in swing states than in uncontested states,” prior to the 2016 U.S. presidential election.⁶⁶

RESEARCH CTR. (Dec. 15, 2016), <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/> (indicating public belief that fake news is having an impact); Hasen, *supra* note 10, at 208 (“[T]he potential for fake news to influence future election outcomes is manifest . . .”).

Many opponents of President Trump believe that he won the election because voters were misled by such “fake news” harmful to Hillary Clinton. Although the empirical evidence of the electoral effect is not conclusive, studies do show extensive propagation of fabricated anti-Clinton messages in swing states. For studies and discussions of the issue, see Allcott & Gentzkow, *supra* note 64 (presenting results from a survey that used web browsing data, fact-checking websites, and results from an online survey to show empirical data about the impact of fact news on the 2016 election) and Clifton, *supra* note 57 (discussing a current study about the effect of “fake news” in the 2016 election on voters). See also Philip N. Howard et al., *Social Media, News and Political Information during the US Election: Was Polarizing Content Concentrated in Swing States?*, UNIV. OXFORD: COMPUTATIONAL PROPAGANDA PROJECT (2017), <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/09/Polarizing-Content-and-Swing-States.pdf> (presenting results analyzing the effect of computational propaganda from the 2016 election on public life). Recent revelations of extensive Russian disinformation on Twitter and Facebook indicate sophisticated attempts to interfere in the American presidential election. See Issie Lapowsky, *What We Know—and Don’t Know—About Facebook, Trump, and Russia*, WIRED (Sept. 26, 2017, 7:00 AM), <https://www.wired.com/story/what-we-know-and-dont-know-about-facebook-trump-and-russia/> (describing the prevalence of Russian advertisements on Facebook that were “fake news” and reached users). The actual electoral impact of such misinformation is much harder to assess. See Apuzzo & LaFraniere, *supra* note 41 (“American intelligence officials have said they have no way of calculating the effect of the Russian influence.”). A recent New York Times op-ed by Brendan Nyhan, one of the preeminent researchers of the impact of fake news argues that “people should not assume . . . huge [electoral] effects” from electoral “fake news.” Brendan Nyhan, *Fake News and Bots May Be Worrisome, but Their Political Power is Overblown*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/upshot/fake-news-and-bots-may-be-worrisome-but-their-political-power-is-overblown.html>. By contrast, a post-election survey undertaken by the Comparative National Elections Project concludes that “fake news most likely did have a substantial impact on the voting decisions of a strategically important set of voters.” Richard Gunther, Erik C. Nisbet, & Paul Beck, *Trump May Owe his 2016 Victory to ‘Fake News,’ New Study Suggests*, THE CONVERSATION (Feb. 15, 2018 10:59 AM), <https://theconversation.com/trump-may-owe-his-2016-victory-to-fake-news-new-study-suggests-91538>; Richard Gunther, Paul A. Beck, & Erik C. Nisbet, *Fake News Did Have a Significant Impact on the Vote in the 2016 Election: Original Fill-Length Version with Methodological Appendix 1–5* (unpublished manuscript), available at <https://u.osu.edu/cnep/files/2015/03/Fake-News-Piece-for-The-Conversation-with-methodological-appendix-11d0ni9.pdf> (last visited Mar. 14, 2018). In any event, what is less contested is a negative effect of “fake news” on public discourse. See, e.g., Nyhan, *supra* (“None of these findings indicate that fake news and bots aren’t worrisome signs for American democracy. They can mislead and polarize citizens, undermine trust in the media, and distort the content of public debate.”).

⁶⁶ Howard & Kolanyi, *supra* note 61. A recent study found that fake news consumption was heavily concentrated during the election season among the 10% of people with the most conservative online information diets. Guess, Nyhan, & Reifler *supra* note 60, at 5. Still, the study also suggested that more direct study of

The composition of today’s information ecosystem enables, and even encourages, the viral distribution of “fake news” on social media. This is important because a large segment of the American population gets its news online and specifically on social media.⁶⁷ The ease of sharing online can ensure those who generate “fake news” that it will be widely disseminated. Social media platforms are said to provide a “megaphone” to small numbers of actors who, “armed with technical, social or political know-how[,]” distribute large volumes of “fake news.”⁶⁸ The multiplicity, density, and clustering of homogeneous echo chambers (enabled by social influence and the ease of unfriending) also means that each user is likely to be bombarded by the same message from numerous sources.⁶⁹ To the extent that such platforms, like Facebook, reach massive numbers of people, it may be that the fake or ideologically slanted news they disseminate may have the greatest effects on less politically astute or ideologically partisan consumers.⁷⁰ These realities create “ideal conditions for selective exposure and confirmation bias.”⁷¹ Information overload and attention scarcity limit the ability of social networks to distinguish among shared messages with respect to quality.⁷² The spread of “fake news” is also greatly enhanced by the use of bots.⁷³ “Fake news” is said to become viral not because it is shared over long information cascades among a large number of average social media users, but because it is spread by celebrities and media sources.⁷⁴ Studies indicate that the biggest indicator of whether a social media user will forward “fake news” is the amount of news shared by that

selective exposure to fake news was needed, as “small groups can . . . propel fabricated claims from their echo chambers to widespread visibility, potentially intensifying polarization and negative affect toward opposing candidates.” *Id.*

⁶⁷ See, e.g., Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms*, PEW RESEARCH CTR. (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/> (reporting that “as of August 2017, two-thirds (67%) of Americans report that they get at least some of their news on social media—with two-in-ten doing so often”).

⁶⁸ Lazer et al., *supra* note 17, at 5.

⁶⁹ *Id.* at 7 (and sources cited therein).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* On Twitter, fake news can be widely disseminated by active “cyborg” users who automatically share news from particular sets of sources. *Id.*; see also *First Evidence That Social Bots Play a Major Role in Spreading Fake News*, MIT TECH. REVIEW (Aug. 7, 2017), <https://www.technologyreview.com/s/608561/first-evidence-that-social-bots-play-a-major-role-in-spreading-fake-news/> (reporting on study that suggests bot-operated accounts are significantly more likely to spread fake news on social media than those run by humans).

⁷⁴ Lazer et al., *supra* note 17, at 8.

person: the more news s/he shares, the more likely s/he is to share some “fake news.”⁷⁵ Moreover, profiles of those likely to share “fake news” indicate older people and those who are more extreme on the political spectrum.⁷⁶ Studies have shown that people find it difficult to distinguish between real and “fake news” on the Internet.⁷⁷

The difficulty of distinguishing between true and false information on social media is likely to be further exacerbated by recent technological developments. Significant strides have been made in technology that would allow the generation and proliferation of increasingly seamless and practically undetectable fabricated events and statements.⁷⁸ Reports herald “a new breed of video and audio manipulation tools, made possible by advances in artificial intelligence and computer graphics, that will allow for the creation of realistic looking footage of public figures appearing to say, well, anything.”⁷⁹

Real “fake news”—fabricated stories designed to achieve a particular end—is particularly pernicious when disseminated as part of a complex political strategy that mines big data to hyper-target audiences susceptible to its messages. One important element in the dangerous mosaic implicated by “fake news” in the digital environment is the ability to target individual voters or desired groups of voters. This allows the speaker to tailor political disinformation to particular voters’ or groups’ emotional and/or cognitive biases and weaknesses—and therefore, presumably, manipulate their behavior.

The sophistication of the disinformation campaigns varies. Research indicates that sophisticated players use data analytics and artificial intelligence to enhance the efficiency of their propaganda.⁸⁰ For example, Cambridge Analytica, which

⁷⁵ *Id.*

⁷⁶ *Id.*; see also Guess, Nyhan, & Reifler, *supra* note 60, at 5.

⁷⁷ See, e.g., Gaughan, *supra* note 40, at 32 (and sources cited therein).

⁷⁸ See, e.g., Solon, *supra* note 57 (discussing the impact on fake news of evolving AI technology that will enable the production of close-to-undetectable fake video and audio clips of public figures); see also Noah Smith, *The Robots Will Make the Best Fake News*, BLOOMBERG (Jul. 17, 2017), <https://www.bloomberg.com/view/articles/2017-07-17/the-robots-will-make-the-best-fake-news> (same); Karen Hao, *Researchers Have Figured Out How to Fake News Video With AI*, QUARTZ (July 19, 2017), <https://qz.com/1031624/researchers-have-figured-out-how-to-fake-news-video-with-ai/> (same).

⁷⁹ Solon, *supra* note 57; see also Mona Kasra, Cuihua Shen, & James O’Brien, *Seeing Is Believing: Do People Fail to Identify Fake Images on the Web?*, Paper Presented at the 17th Annual Conference of the Association of Internet Researchers 4 (October 2016), <http://graphics.berkeley.edu/papers/Kasra-SIB-2016-10/> (explaining how people are not good at distinguishing real news from fake news even if they are looking for cues of uncredibility).

⁸⁰ Anderson & Horvath, *supra* note 29; see also Dipayan Ghosh & Ben Scott, *#Digitaldeceit: The Technologies Behind Precision Propaganda on the Internet*,

mines data in order to engage in strategic political communication, boasts that in the U.S. alone, it has “played a pivotal role in winning presidential races as well as congressional and state elections.”⁸¹ Reports assert that the company is owned by conservative parties, features Breitbart’s Steve Bannon on its board, and has reportedly declined to work on Democratic campaigns.⁸² It allegedly leverages data analytics to engage in microtargeting by using its algorithmically derived predictive personality profile to deliver “personalized, adaptive, and ultimately addictive propaganda.”⁸³ The point is not only to gauge a voter’s likely behavior correctly, but, when necessary, to seek to change it by exploiting his or her emotions.⁸⁴ Some analysts are concerned that, at least to some degree, psychometric approaches can sway people’s political opinions and votes.⁸⁵

SHORENSTEIN CTR. (Jan. 2018), <https://na-production.s3.amazonaws.com/documents/digital-deceit-final-v3.pdf> (describing variety of ways in which “fake news” is weaponized online).

⁸¹ CAMBRIDGE ANALYTICA, https://ca-political.com/?__hstc=163013475.732b9ad50fa76e9cea2d511cf3dd2727.1506885131112.1506885131112.1506885131112.1&__hssc=163013475.1.1506885131112&__hsfp=3969316057 (last visited Mar. 14, 2018) (proclaiming, in part, “We find your voters and move them to action. CA Political has redefined the relationship between data and campaigns. By knowing your electorate better, you can achieve greater influence while lowering overall costs.”); *see also* Anderson & Horvath, *supra* note 29 (“By leveraging automated emotional manipulation alongside swarms of bots, Facebook dark posts, A/B testing, and fake news networks, a company called Cambridge Analytica has activated an invisible machine that preys on the personalities of individual voters to create large shifts in public opinion.”).

⁸² *See* Anderson & Horvath, *supra* note 29; *see also* Nina Burleigh, *How Big Data Mines Personal Info to Craft Fake News and Manipulate Voters*, NEWSWEEK (June 8, 2017, 1:01 PM), <http://www.newsweek.com/2017/06/16/big-data-mines-personal-info-manipulate-voters-623131.html>.

⁸³ *See* Anderson & Horvath, *supra* note 29. Using a variety of data derived from people’s offline and online activities (including Facebook and Twitter posts), the company’s algorithm is said to have created personality profiles with 5000 data points for each adult American. *See id.*

⁸⁴ *See* Anderson & Horvath, *supra* note 29 (“Using those dossiers, or psychographic profiles as Analytica calls them, Cambridge Analytica not only identifies which voters are most likely to swing for their causes or candidates; they use that information to predict and then change their future behavior.”); *see generally* Vian Bakir & Andrew McStay, *Fake News and the Economy of Emotions*, 6 DIGITAL JOURNALISM 154 (July 20, 2017), <http://www.tandfonline.com/doi/abs/10.1080/21670811.2017.1345645> (explaining how “empathetic media” has evolved to help optimize the spread of fake news).

⁸⁵ *See, e.g.*, S.A. Mathieson, *Trump, Brexit, and Cambridge Analytica—Not Quite the Dystopia You’re Looking For*, THE REGISTER (Mar. 7, 2017, 11:22 AM), https://www.theregister.co.uk/2017/03/07/cambridge_analytica_dystopianism/ (discussing studies that provide support for the role psychometrics might have played in the 2016 election). There are of course those who question the effectiveness of such psychometric targeting, and whether the concerns about weaponized AI-reliant political manipulation are overstated.

Recent reports of attempted state interference in foreign elections, with revelations by Facebook and Twitter that Russian interests attempted to influence the 2016 American presidential election in Donald Trump's favor through the deployment of powerful disinformation techniques,⁸⁶ also suggest the use of very targeted, sophisticated manipulation techniques. Specifically, Russian entities with ties to the Kremlin purchased Facebook ads (including "fake news" ads and ads designed to trigger emotional partisan responses in targeted voters), effectively used automated bots to viralize their messages, and unleashed troll armies to harass and intimidate opposition speakers.⁸⁷

This reminds us that "fake news" can also be weaponized as an invitation to and justification for the deployment of a variety of public and private informational censorship tools in response. For example, as Professor Tim Wu has recently described, the "fake news" trope can be used to mobilize troll armies and unleash terrorizing chilling effects in order to suppress contrary speech.⁸⁸

Moreover, what happens on the Internet also influences mainstream media coverage, of course. This means that items

⁸⁶ See, e.g., Apuzzo & LaFraniere, *supra* note 41 (describing DOJ indictment of Russian disinformation operatives); Jackson Hudgins & Alyssa Newcomb, *Google, Facebook, Twitter and Russia: A Timeline on the '16 Election*, NBC NEWS (Nov. 1, 2017, 12:01 PM), <https://www.nbcnews.com/news/us-news/google-facebook-twitter-russia-timeline-16-election-n816036> (portraying via timeline the extent to which the Kremlin influenced the 2016 election through social media); Kurt Wagner, *These Are Some of the Tweets and Facebook Ads Russia Used to Try and Influence the 2016 Presidential Election*, RECODE (Oct. 31, 2017, 8:05 PM), <https://www.recode.net/2017/10/31/16587174/fake-ads-news-propaganda-congress-facebook-twitter-google-tech-hearing> (providing examples of Russian ad purchases designed to spread fake news in Trump's favor throughout the 2016 election).

⁸⁷ See, e.g., Samuel Earle, *Trolls, Bots and Fake News: The Mysterious World of Social Media Manipulation*, NEWSWEEK (Oct. 14, 2017, 8:40 AM), <http://www.newsweek.com/trolls-bots-and-fake-news-dark-and-mysterious-world-social-media-manipulation-682155> (describing bandwagon effect engendered by bots); Mary Papenfuss, *Russian Trolls Linked Clinton To 'Satanic Ritual' In Fake News Campaign Push: Report*, HUFFPOST (Dec. 1, 2017, 12:01 AM), https://www.huffingtonpost.com/entry/russian-trolls-fake-news-hillary-clinton_us_5a20c8afe4b03c44072c6b86 (providing examples of fake news stories created and disseminated by online Russian bots and trolls); Scott Shane, *The Fake Americans Russia Created to Influence the Election*, N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/us/politics/russia-facebook-twitter-election.html>; (describing the prevalence of fake Facebook and other social media profiles created by Russian operators to spread fake news in the 2016 election). Reports of the Justice Department's recent indictment of 13 Russians for a "multipronged, well financed and relentless" disinformation operation indicate that the indictment provides details of a "sophisticated network designed to subvert the 2016 election and to support the Trump campaign." Apuzzo & LaFraniere, *supra* note 41.

⁸⁸ Wu, *supra* note 14.

of “fake news”—particularly if they have spread virally online—can also be further amplified by recirculation through trusted media non-social media sources. This can happen when the information is not debunked through the press’s fact-checking systems.⁸⁹ When the press environment itself is fragmented and ideologically polarized, and when many people (particularly Republicans) think that the mainstream media intentionally lies or misleads, then any such errors on the part of any given press outlet will be characterized not as simple error, but as evidence of ideologically motivated strategic lying.⁹⁰

What is the impact of such weaponized false information?⁹¹ A December 2016 survey by Pew Research Center reflects that “most Americans suspect that made-up news is having an impact.”⁹² Almost 65% of U.S. adults in that survey—regardless of income, education level, or party affiliation—said that fabricated news stories “cause a great deal of confusion about the basic facts of current issues and

⁸⁹ For example, CNN falsely reported the existence of an investigation into an alleged pre-inauguration meeting between Trump ally and former communications director Anthony Scaramucci and Russian interests, and subsequently retracted the story. See, e.g., Sydney Ember & Michael Grynbaum, *At CNN, Retracted Story Leaves an Elite Reporting Team Bruised*, N.Y. TIMES (Sept. 5, 2017), <https://www.nytimes.com/2017/09/05/business/media/cnn-retraction-trump-scaramucci.html?mcubz=1> (describing CNN retraction and subsequent investigative team restructuring); see also Michael M. Grynbaum, *A Costly Retraction for CNN and an Opening for Trump*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/business/media/cnn-retracted-story-on-trump.html?mcubz=1&r=0> (detailing failure of CNN’s fact checking system that led to release of an inaccurate story).

⁹⁰ See, e.g., Grynbaum, *supra* note 89 (identifying such CNN critics); Sean Hannity, *Trump, Viewers, Hold CNN Accountable for ‘Fake News’*, FOX NEWS (June 28, 2017), <http://www.foxnews.com/opinion/2017/06/28/sean-hannity-trump-viewers-hold-cnn-accountable-for-fake-news.html> (criticizing legitimacy of CNN reporting in light of false stories).

⁹¹ Allcott and Gentzkow identify four major social costs of fake news: First, consumers who mistake a fake outlet for a legitimate one have less-accurate beliefs and are worse off for that reason. Second, these less-accurate beliefs may reduce positive social externalities, undermining the ability of the democratic process to select high-quality candidates. Third, consumers may also become more skeptical of legitimate news producers, to the extent that they become hard to distinguish from fake news producers. Fourth, these effects may be reinforced in equilibrium by supply-side responses: a reduced demand for high-precision, low-bias reporting will reduce the incentives to invest in accurate reporting and truthfully report signals. These negative effects trade off against any welfare gain that arises from consumers who enjoy reading fake news reports that are consistent with their priors.

Allcott & Gentzkow, *supra* note 64, at 219.

⁹² Barthel, Mitchell, & Holcombe, *supra* note 65.

events.”⁹³ Responses to the survey indicated that 23% of the participants admitted to sharing fabricated news stories themselves.⁹⁴ “Fake news” appears to figure in political polarization, whether for reasons of selective exposure or filter bubbles.⁹⁵ Perhaps reflecting a cognitive bias, 84% of the respondents expressed “a fair amount of confidence in their own ability to detect fake news”⁹⁶ Unfortunately, subsequent surveys suggest that this confidence is in fact misplaced.⁹⁷ Analysts argue that such “fake news” exacerbate polarization (due to the echo chambers and filter bubbles created by people’s tendencies to follow those who share their world-view) and stand in the way of shared reality.⁹⁸ This, in turn, can lead to scapegoating, reification of prejudices, enhancing “us versus them” mentalities, and even violence.⁹⁹ If fabricated stories are believed by the voting public, they could affect voters’ views of candidates and sway choices at the voting booth. Such misinformation can also infect the long-term cultural and political discourse. Even if any particular item of “fake news” is not thought credible by the public, the fact that the information ecosystem is awash in fabricated content is likely to lead to confusion and generalized distrust—as people increasingly do not know how to tell true from false.

C. Trump’s Relentless Critique of the Mainstream Press as “Fake News”

In addition to characterizing individual stories as “fake news” to shift electoral results, politicians now use the “fake news” charge as a way of casting doubt on mainstream news

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ For a description of the two major explanations for political polarization, see Dominic Spohr, *Fake News and Ideological Polarization: Filter Bubbles and Selective Exposure on Social Media*, 34 BUS. INFO. REV. 150, 157 (2017) (articulating the potential role that filter bubbles and selective exposure play in the public’s exposure to fake news); see also Guess, Nyhan, & Reifler, *supra* note 60, at 1 (asserting view that the extent of echo chambers is overstated).

⁹⁶ Barthel, Mitchell, & Holcombe, *supra* note 65 (“Americans express a fair amount of confidence in their own ability to detect fake news, with about four-in-ten (39%) feeling very confident that they can recognize news that is fabricated and another 45% feeling somewhat confident.” This may reflect the third party effect.).

⁹⁷ A recent study by scientists at Stanford showed that even tech-savvy young people are “easily . . . duped” by fake news. See Brooke Donald, *Stanford Researchers Find Students Have Trouble Judging the Credibility of Information Online*, STANFORD GRADUATE SCH. OF EDUC.: NEWS CTR. (Nov. 22, 2016), <https://ed.stanford.edu/news/stanford-researchers-find-students-have-trouble-judging-credibility-information-online>.

⁹⁸ See Lazer et al., *supra* note 17, at 5; see also Guess, Nyhan, & Reifler *supra* note 60, at 1.

⁹⁹ See Lazer et al., *supra* note 17, at 5.

organizations’ journalistic coverage as a whole. President Trump, for example, has consistently demonized the mainstream press, claiming that particular news organizations are themselves organs of “fake news” and “enemies of the American people.”¹⁰⁰ This kind of claim goes beyond characterizing a single story as factually inaccurate. It goes to the whole journalistic enterprise of the criticized entities—indeed, of all major media.¹⁰¹ It is a way of signaling to the public that whatever stories are published by the targeted outlets should be presumed false because the organization itself is partisan and consistently engaged in a knowing dissemination of untruth. In this sense, the Trump attack constitutes calling “real news” fake.¹⁰² It is a governance technique designed to identify Trump as the only authoritative source of information and to delegitimize any critical source of news.¹⁰³

Obviously, Trump is not the first president to dislike the press.¹⁰⁴ But he is the first president who has felt free to attack the press as consistently and viciously,¹⁰⁵ to target particular reporters and news organizations by name,¹⁰⁶ to threaten

¹⁰⁰ See Grynbaum, *supra* note 89.

¹⁰¹ Jones & Sun, *supra* note 6, at 14 (characterizing Trump’s rhetoric as “feed[ing] a narrative that the media as a whole, or at least in very large part, ought to be thought of as an enemy”).

¹⁰² This is not to say that such “real news” is not sometimes erroneous, overstated, or misleading. See *supra* text accompanying notes 89–90. Conservatives claim that the mainstream media is a liberal machine fundamentally constrained by its coastal ideology and liberal bias. On the other side, liberal critics of mainstream news reporting challenge the “he said-she said” character of much modern reporting as fundamentally mistaken. See, e.g., Chris Edelson, *Lies, Damned Lies, and Journalism: Why Journalists Are Failing to Vindicate First Amendment Values and How a New Definition of “The Press” Can Help*, 91 Or. L. Rev. 527, 530 (2012) (describing journalistic comfort with he said-she said journalism as resulting from a desire not to look biased). Without expressing approval for the operations of the modern press (which I have myself criticized in prior scholarship), I still believe that Trump’s blunderbuss characterization of the mainstream press’ news coverage as virtually all fake (particularly in ironic contrast to his inaccurate Twitter statements) is both undeserved and very dangerous to the standing of the press.

¹⁰³ For a powerful analysis of government speech as a tool to manufacture doubt and thereby resist oversight, see Helen Norton, *The Government’s Manufacture of Doubt*, 16 FIRST AMEND. L. REV. 342 (2018).

¹⁰⁴ See, e.g., Jones & Sun, *supra* note 6, at 21–25 (describing prior press-president tensions); Jon Marshall, *Nixon Is Gone but His Media Strategy Lives On*, THE ATLANTIC (Aug. 4, 2014), <https://www.theatlantic.com/politics/archive/2014/08/nixons-revenge-his-media-strategy-triumphs-40-years-after-resignation/375274/> (describing subsequent uses of Nixonian anti-press tactics).

¹⁰⁵ Jones & Sun, *supra* note 6, at 25–28 (distinguishing between presidential characterizations of the press as “legitimate-but-bothersome” and Trump’s blunderbuss attack on the press as illegitimate).

¹⁰⁶ *Id.* at 8–10; Jones & West, *supra* note 20, at 68–69.

retaliation openly and directly,¹⁰⁷ and to roll back customary norms of press access.¹⁰⁸ His demeaning characterizations of the press—as a “pile of garbage” and “among the most dishonest human beings on earth,”¹⁰⁹—are not just crude, but “violate[] existing customs of publicly treating the press with respect[.]”¹¹⁰

Trump’s choice to declare war on the mainstream press is not attributable solely to his combative personality, however. Instead, there are structural factors at play that have empowered his broadside attacks. First, the press of today is far more fragmented and far less powerful—economically and otherwise—than the press bedeviling presidents such as Richard Nixon.¹¹¹ The identity of the press is fundamentally contested; its economic future uncertain; its reputation in question; its attitude largely defensive. Second, the press is no longer the sole intermediary able to package and disseminate the words of politicians to the public. As Trump has shown with his use of Twitter, presidents today can communicate directly with the public—without any need for press intermediation. Third, demonizing the mainstream press is not likely to lead to as many negative consequences for a politician today—and might even serve as a unifying focus for his base.¹¹² This is at least in part because public trust in the institutional press, while increasing slightly among Democrats, appears to be at an all-time low.¹¹³ Non-stop attacks with charges of “fake news” and the criticism lobbed at the mainstream media by conservative talk radio since the 1990s¹¹⁴ surely have some impact on public trust.

¹⁰⁷ See, e.g., Chris Cillizza, *Donald Trump Just Issued A Direct Threat to the Free And Independent Media*, CNN: THE POINT (Oct. 12, 2017, 8:51 AM), <http://www.cnn.com/2017/10/11/politics/donald-trump-media-tweet/index.html> (reporting Trump threat of license non-renewal in retaliation for network’s criticisms).

¹⁰⁸ See *infra* Section II.B; see also Jones & West, *supra* note 20, at 64–72 (describing Trump’s use of access as a way to “punish or control press coverage”).

¹⁰⁹ Jones & West, *supra* note 20, at 68.

¹¹⁰ *Id.* at 68 (“In stark contrast to past administrations, he has failed to model respect for the institution of the press and for its importance to American democracy.”).

¹¹¹ Gaughan, *supra* note 40, at 64 (describing how the 2016 American election highlighted that the press is more fragmented today in contrast to the 1970s).

¹¹² See Jones & Sun, *supra* note 6, at 38 (“Trump appears to be employing the press-enemy rhetoric to consolidate support among his base and to reinforce his narrative that only he can be trusted to tell the real story The more people come to view the mainstream press as the enemy, the more Trump can control the narrative.”).

¹¹³ Art Swift, *In U.S., Confidence in Newspapers Still Low But Rising*, GALLUP (June 28, 2017), <http://news.gallup.com/poll/212852/confidence-newspapers-low-rising.aspx>.

¹¹⁴ See, e.g., NICOLE HEMMER, *MESSENGERS OF THE RIGHT: CONSERVATIVE MEDIA AND THE TRANSFORMATION OF AMERICAN POLITICS* 46–47 (2016) (describing conservative talk radio); Issie Lapowsky, *Old-School Talk Radio is Still Big Enough to Break Candidates*, WIRED (Apr. 13, 2016, 7:00 AM),

President Trump’s incessant refrain of mainstream news organizations as organs of “fake news” seeking to dupe and mislead the public has made it acceptable for people to think of the press as the enemy—and to treat journalists as such. Professors Andersen Jones and Sun have recently explained that the powerful delegitimizing effect of casting the press as an outsider, rather than as a legitimate (if sometimes wrong) participant in public debate.¹¹⁵ This move not only defuses the power of the press and brings it under the thumb of executive authority, but it also encourages the process of undermining other social and governmental institutions that might serve as counterweights to authoritarian executives.¹¹⁶

The press itself is far from monolithic now; there was doubtless little surprise when President Obama identified a “balkanized” media as contributing to “partisan rancor and political polarization.”¹¹⁷ President Trump’s technique for undermining the mainstream press depends in part on exploiting fissures within the press itself and relying on the drumbeat of distrust that right-wing talk radio has generated in mainstream media.¹¹⁸ His war against the press takes advantage of a public already primed to believe the worst of at least some parts of the media marketplace. Studies show increasing levels of distrust in the press since the glory days of Watergate.¹¹⁹

<https://www.wired.com/2016/04/conservative-talk-radio-survived-social-media-age/> (same).

¹¹⁵ Jones & Sun, *supra* note 6, at 8 (“Trump is consistently and unrelentingly delineating the press as an enemy—an ‘other’ that threatens the political unity of the state and that ought to be distrusted, countered, and perhaps ultimately stripped of ordinarily observed rights and liberties because of this exceptional status.”).

¹¹⁶ *See id.* (considering impact of enemy construction of the press on other democratic institutions).

¹¹⁷ David Nakamura, *Media Critic Obama is Worried That ‘Balkanized’ Media is Feeding Partisanship*, WASH. POST (Mar. 27, 2016),

https://www.washingtonpost.com/politics/media-critic-obama-is-worried-that-balkanized-media-are-feeding-partisanship/2016/03/27/8c72b408-f1e3-11e5-89c3-a647fccc95e0_story.html?utm_term=.aa3269fe08ca.

¹¹⁸ *See, e.g.*, Ken Miller, *As Hyper-Conservative Media Surged, Republicans’ Trust in News Cratered*, TECHCRUNCH (Mar. 19, 2017), <https://techcrunch.com/2017/03/19/as-hyper-conservative-media-surged-republicans-trust-in-news-cratered/> (attributing increasing distrust of the media by Republicans in part to the influence of conservative talk radio).

¹¹⁹ Jones & Sun, *supra* note 6, at 30. For studies on public attitudes toward news media, see Swift, *supra* note 113 (referencing trend of declining public trust in the media, which hit a historic low in 2016); *see also* Art Swift, *Democrats’ Confidence in Mass Media Rises Sharply From 2016*, GALLUP (Sept. 21, 2017), http://news.gallup.com/poll/219824/democrats-confidence-mass-media-rises-sharply-2016.aspx?g_source=MEDIA&g_medium=topic&g_campaign=tiles [hereinafter Swift, *Democrats’ Confidence*] (illustrating rise of Democratic confidence in the media since 2016 and the overall higher levels trust in media from Democrats than Republicans); Art Swift, *Americans’ Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://news.gallup.com/poll/195542/americans-trust->

Whether because of right-wing radio's refrain that the mainstream media has a strongly liberal bias,¹²⁰ and/or because of negative views of television news on news satire programs such as Jon Stewart's *The Daily Show* or Steve Colbert's *Colbert Report*,¹²¹ many Americans do not believe that the mainstream media will report the truth without fear or favor. There is some asymmetry with respect to this view, with more Republicans than Democrats convinced of liberal media bias.¹²²

Empirical data in this connection are worrisome. Public opinion surveys show a widening partisan gap in perceptions of the media,¹²³ particularly in connection with "fake news." Trust and confidence in the media "varies dramatically by party identification and approval of President Trump's job performance."¹²⁴ Forty-four percent—almost half—of Americans (and 74% of Republicans) believe that the news media fabricate stories about Trump.¹²⁵ A substantial minority—31%—in a recent survey indicate agreement with Trump's tweet that the media are the "enemy" and "keep political leaders from doing their jobs."¹²⁶ The survey also shows that "one in four Americans (25%) endorses draconian limitations on press freedom."¹²⁷

Obviously, this is just one survey and even it does not indicate a belief by the majority of Americans that the press is the enemy of the public. Even if many incorrectly believe that one or another story is false or unfairly biased against the president, they will not all necessarily generalize from that to a conclusion that all the mainstream news media are illegitimate. Furthermore, it is possible that the constant refrain will itself backfire, with people beginning to doubt whether every criticism of the Trump Administration could possibly be "fake news." A recent poll indicates that 83% of Americans think the tension between the White House and the news media is

mass-media-sinks-new-low.aspx?g_source=MEDIA&g_medium=topic&g_campaign=tiles [hereinafter Swift, *Americans' Trust*] (describing 2016 study diagnosing public distrust of the media as at its highest point).

¹²⁰ See Jones & Sun, *supra* note 6, at 32 (describing "sustained attack by conservative media—particularly talk radio—on the credibility and trustworthiness of the mainstream media").

¹²¹ See Littau & Stewart, *supra* note 53.

¹²² Andrew Dugan & Zac Auter, *Republicans', Democrats' Views of Media Accuracy Diverge*, GALLUP (Aug. 25, 2017), <http://news.gallup.com/poll/216320/republicans-democrats-views-media-accuracy-diverge.aspx>.

¹²³ Guess, Nyhan, & Reifler, *supra* note 39, at 2.

¹²⁴ *Id.*

¹²⁵ See *id.*

¹²⁶ *Id.* at 5.

¹²⁷ *Id.*

unhealthy, and 73% say that these tensions impede their access to important national political news and information.¹²⁸ Still, the combination of “real ‘fake news’” and President Trump’s use of the “fake news” slogan to engage in scorched earth institutional delegitimation both undermine the press and potentially manipulate individual political beliefs and/or behavior.¹²⁹ The Administration’s rhetoric about the press, when combined with public concern about massive circulation of false information online, suggests at a minimum that Americans will feel increasingly confused about what is true in politics and commerce and increasingly uncertain about where to turn to find out. Any information market participants who understand both the limited attention of audiences and the character of the public’s appetite for emotion-triggering information will understand that they can use the distraction of “fake news,” drama, personal attacks, and labeling the press as the enemy as ways of distracting coverage from the “real” news in politics.¹³⁰

D. The Threat of “Fake News” Beyond Politics

Virtually all of the public discussion about “fake news” has focused on the electoral and political context in which its various guises have become a problem. But we have already begun to see instances in which “fake news” has been used to manipulate commercial markets and the dissemination of false information in attempts to influence regulatory policy.

On the commercial front, for example, the SEC has already acted to shut down several “fake news” websites dedicated to spreading false commercial information¹³¹—but it

¹²⁸ See Michael Barthel, Jeffrey Gottfried & Amy Mitchell, *Most Say Tensions Between Trump Administration and News Media Hinder Access to Political News*, PEW RESEARCH CTR. (Apr. 4, 2017), <http://www.journalism.org/2017/04/04/most-say-tensions-between-trump-administration-and-news-media-hinder-access-to-political-news/>.

¹²⁹ The technique is one of throwing doubt on any mainstream news narrative. See James Warren, *Right-wing Media is Losing its Mind Over Las Vegas, A Reflexive Drive to Poke Holes in the Mainstream Narrative Has “Opened The Floodgates” to Unhinged Conspiracy Theorizing*, VANITY FAIR (Oct. 5, 2017, 10:30 AM), <https://www.vanityfair.com/news/2017/10/right-wing-media-is-losing-its-mind-over-las-vegas> (quoting the view that “It doesn’t matter if the audience believes any of it, per se. What’s important is to make the situation so muddled that the average person, already primed over years to distrust the traditional media, can shrug their shoulders about what ‘the real truth’ is and move on.”).

¹³⁰ Indeed, the Trump Administration has been accused of using such distraction methods to avoid coverage and discussion of its substantive policy moves. See, e.g., Charles Blow, *Attacking Media as Distraction*, N.Y. TIMES (Oct. 9, 2017), https://www.nytimes.com/2017/10/09/opinion/trump-attacks-twitter-media.html?_r=0.

¹³¹ See, e.g., Wailin Wong, *The FTC Just Shut Down All Those Fake News Websites Hawking Diet Products*, BUS. INSIDER (Mar. 21, 2012, 7:42 PM).

stands to reason that there are many more. As for the financial markets,¹³² there are a few notable examples. For example, the intentional dissemination of a hoax statement about the asserted death of Ethereum's chief executive reportedly led to a \$4 billion market value drop for the company.¹³³ Forbes reports that "[i]n 2013, \$130 billion in stock value was wiped out in a matter of minutes following an AP tweet about an 'explosion' that injured Barack Obama."¹³⁴ This was one example of how misinformation on social media "can be manipulated to impact high-frequency trading algorithms that rely on text to make investment calls."¹³⁵ Such manipulation, unlike the political kind, is likely to have extensive individual economic repercussions.¹³⁶

In light of the apparently easy availability of "fake news" tools on the dark web,¹³⁷ and the immense amount of

<http://www.businessinsider.com/the-ftc-just-shut-down-all-those-fake-news-websites-hawking-diet-products-2012-3>; Press Release, Fed. Trade Comm'n, FTC Permanently Stops Fake News Website Operator that Allegedly Deceived Consumers about Acai Berry Weight-Loss Products (Feb. 7, 2013), <https://www.ftc.gov/news-events/press-releases/2013/02/ftc-permanently-stops-fake-news-website-operator-allegedly>; see also Renae Merle, *Allegations of 'Fake News' Stretch Beyond Politics*, WASH. POST (July 4, 2017), https://www.washingtonpost.com/business/economy/company-moved-market-with-fake-news-stories-sec-alleges/2017/07/04/419a3bd4-54f9-11e7-b38e-35fd8e0c288f_story.html?utm_term=.dcd81003fca9.

¹³² See Merle, *supra* note 58; see also Kenneth Rapoza, *Can "Fake News" Impact The Stock Market?*, FORBES (Feb. 26, 2017, 9:05 AM), <https://www.forbes.com/sites/kenrapoza/2017/02/26/can-fake-news-impact-the-stock-market/#4d7a180c2fac>; Chris Versace, *"Fake News" Has Not Spared the Financial Markets*, BUS. INSIDER (Jan. 1, 2017, 9:08 AM), <http://www.businessinsider.com/fake-news-impact-on-financial-markets-2016-12>.

¹³³ See Anderson & Rainie, *supra* note 21; Jeff John Roberts, *Hoax Over "Dead" Ethereum Founder Spurs \$4 Billion Wipe Out*, FORTUNE (June 26, 2017), <http://fortune.com/2017/06/26/vitalik-death/>. Similarly, a false claim that Gary Cohn, the White House economic adviser, was resigning led to stock drops and market unease over the summer. See, e.g., Bob Bryan, *False Rumors that Gary Cohn is Leaving the White House Just Spooked Wall Street—For Good Reason*, BUS. INSIDER (Aug. 17, 2017, 11:46 AM), <http://www.businessinsider.com/gary-cohn-false-tweet-leaving-trump-white-house-stock-market-reaction-2017-8>. Notably, a momentary Dow Jones Newswire headline falsely claiming that Google planned to buy Apple led to an uptick in Apple's stock price and, more importantly, demonstrated that the bots responsible for executing 90% of daily trading on the stock markets could easily be fooled by false information into "mov[ing] markets significantly." Merle, *supra* note 58 (quoting Professor Tom Lin); see also Lin, *supra* note 11, at 1292–94.

¹³⁴ Rapoza, *supra* note 132.

¹³⁵ *Id.* Such trading systems often use algorithms to analyze news, social media and tweet activity to assess market sentiment. See *id.*

¹³⁶ See Barry Ritholtz, *Why Fake News Is So Harmful to Investors*, BLOOMBERG (Oct. 23, 2017, 10:59 AM), <https://www.bloomberg.com/view/articles/2017-10-23/why-fake-news-is-so-harmful-to-investors>.

¹³⁷ See, e.g., Lion Gu, Vladimir Kropotov, and Fyodor Yarochkin, *Fake News and Cyber Propaganda: The Use and Abuse of Social Media*, TREND MICRO (June 13, 2017), <https://www.trendmicro.com/vinfo/us/security/news/cybercrime-and-digital-threats/fake-news-cyber-propaganda-the-abuse-of-social-media>.

hyper-personalized data for psychometric purposes that is available in auction markets, economic “fake news” might become an attractive second front to political “fake news” for a variety of market participants. Indeed, it is not hard to imagine exponential growth in market-focused “fake news” under such circumstances. Market-affecting “fake news” could be deployed both for financially-motivated reasons (by competitors and/or criminals),¹³⁸ for politically-motivated ends (by partisans and/or governments), and as weapons of terror. Some strategic actors could easily wield combinations of directly electoral and public policy-oriented “fake news” and directly market-affecting “fake news” to achieve maximal disruption.

Concerns about the market threats posed by the phenomenon of “fake news” will doubtless become increasingly common in American boardrooms. Just as cybersecurity has become a central board matter in response to widespread hacking of corporate databanks, issues regarding market impacts of disinformation are likely to rise in salience for corporate management. Shareholders have already filed proposals with Facebook, Alphabet (Google’s parent), and Twitter requesting “in depth reports” about Russian use of their platforms during the 2016 election and what they are doing with respect to the dissemination of “fake news.”¹³⁹ Commercial entities have already begun to develop detection algorithms that could provide users with reliability odds as to the accuracy of the disseminated content.¹⁴⁰ Of course, investment algorithms “use machine learning to try and weed out unreliable sources, but the systems are not perfect and can still fall victim to the same misinformation as humans.”¹⁴¹

The strategic use of inaccurate factual information for policy advantage has also recently come to light in connection with regulatory processes. For example, the Federal Communications Commission’s recent review of the net neutrality rules generated the submission of 21.7 million public

¹³⁸ See Rapoza, *supra* note 132 (“If you can lower the price of a stock by one percent by purposefully manipulating the news flow by producing content and if you have the right trading mechanism in place, you can capitalize on that,” says Gordon. “Imagine if you can recognize that the story is not the least bit credible and you know the stock will recover, you can really capitalize on that knowledge.”).

¹³⁹ See, e.g., Emily Chasan, *Shareholders Press Twitter, Facebook and Google on Fake News*, BLOOMBERG (Oct. 30, 2017, 5:16 PM), <https://www.bloomberg.com/news/articles/2017-10-30/shareholders-press-twitter-facebook-and-google-on-fake-news>; see also *‘Fake News,’ Hate Speech & Free Expression: Corporate Responsibility in an Age of Alternative Facts*, OPENMIC (May 2017), <http://fakenews.openmic.org/OpenMIC-Fake-News.pdf>.

¹⁴⁰ Rapoza, *supra* note 132.

¹⁴¹ *Id.*

comments on the Commission's website.¹⁴² One Commissioner publicly expressed concern that a majority of the public comments—which expressed opposition to net neutrality—were “fake.”¹⁴³ A subsequently released Pew Research Center report¹⁴⁴ confirms that many submissions “seemed to include false or misleading personal information” and “some share . . . may have been submitted in bulk using automated processes, such as bot campaigns.”¹⁴⁵ This manipulation of the public comment process during regulatory agency rulemaking is not unique,¹⁴⁶ but presents another instance of the potentially disruptive effect of false information outside the explicitly political context.

These developments show that “fake news” presents viable threats not only to political life, but to markets and governmental administration—indeed, to the entire spectrum of human enterprise.

II. INCREASED INSTABILITY IN FORMAL AND INFORMAL PRESS PROTECTIONS

The distrust engendered by press-delegitimizing “fake news” charges worsens the many already-existing challenges to press functions today. The “fake news” crisis has been a major challenge for the press—which has faced a double whammy. On the one hand is the extensive flow of “fake news” with which the mainstream media cannot adequately keep up with correctives. On the other hand is the apparently increasing public distrust engendered by the “fake news” charge. The

¹⁴² See, e.g., Hitlin, Olmstead, & Toor, *supra* note 8; Aaron Mak, *Study Finds Most Public Comments to the FCC on Net Neutrality Were Duplicates*, SLATE (Nov. 29, 2017, 10:00 AM),

http://www.slate.com/blogs/future_tense/2017/11/29/net_neutrality_public_comments_to_fcc_contain_millions_of_duplicates_inaccurate.html.

¹⁴³ April Glaser, *Trump's FCC Is About to Destroy Net Neutrality, and a Democratic Commissioner is Calling Foul*, SLATE (Nov. 17, 2017, 6:29 PM),

http://www.slate.com/blogs/future_tense/2017/11/17/trump_s_fcc_is_about_to_destroy_net_neutrality.html.

¹⁴⁴ Hitlin, Olmstead, & Toor, *supra* note 8.

¹⁴⁵ *Id.*

¹⁴⁶ The comments filed in response to the FCC's notice and comment proceedings relating to broadcast indecency are a notable prior example of the strategic capture of public commenting by ideological groups using new technology to inflate the appearance of public consensus on the regulatory policy. See, e.g., Lili Levi, *First Reports: The FCC's Regulation of Indecency*, FIRST AMEND. CTR. 28–29 (2008), http://www.newseuminstitute.org/wp-content/uploads/2016/10/FirstReport.Indecency.Levi_final_.pdf (describing the influence of Parents Television Council's form letters on the FCC's stated rationale for tightening its indecency rules).

press’s ability to serve as a check on “fake news” has been compromised by media’s own behavior and economic circumstances, by the rise of an aggressive new right-wing press,¹⁴⁷ and by a reduction in press protections in the United States.

Scholars identify a decline in protections for journalistic activities both in courts and in the political sphere.¹⁴⁸ President Trump’s viral tweets¹⁴⁹ provide ammunition for a public already showing distrust of the media.¹⁵⁰ Although the press is at present under attack principally from the right, the left too is increasingly adding its critical voice.¹⁵¹ The economic pressures facing American journalism have received too much ink to warrant further description here.¹⁵² These pressures have already led modern news organizations to problematic commitments to native advertising,¹⁵³ increasing

¹⁴⁷ In addition to conservative-leaning mainstream news outlets like Fox News and right-wing talk radio, a “distinct right-wing media network . . . made up of relatively new outlets” has grown since the 2008 election. See Emily Bell & Taylor Owen, *The Platform Press: How Silicon Valley Reengineered Journalism*, TOW CTR. FOR DIGITAL JOURNALISM (Mar. 29, 2017), <https://towcenter.org/research/the-platform-press-how-silicon-valley-reengineered-journalism/>. Included in the agenda of right-wing media was discrediting the mainstream media and develop an alternative narrative, using Facebook to distribute their stories. *Id.*; see also Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online*, DATA & SOC’Y 1, 26, 44 (May 15, 2017), https://datasociety.net/pubs/oh/DataAndSociety_MediaManipulationAndDisinformationOnline.pdf.

¹⁴⁸ See, e.g., Amy Gajda, *The Present of Newsworthiness*, 50 NEW ENG. L. REV. 145 (2016); see also Jones & West, *supra* note 20, at 49 (“[O]ur free press sits atop an increasingly fragile edifice. This edifice is supported by a number of legal and nonlegal pillars, such as the institutional media’s relative financial strength, the goodwill of the public, a mutually dependent relationship with government officials, and the backing of sympathetic judges. Each of these supports, however, has weakened substantially in recent years . . .”).

¹⁴⁹ On how President Trump uses Twitter to engage directly with his base, end-running intermediaries, and how bashing the media as “fake news” is a common thread in his tweets, see Tony Lee, *Bannon Praises Trump’s Twitter Use: POTUS ‘Disintermediates Media,’ Speaks Directly to Voters*, BREITBART (Sept. 10, 2017), <http://www.breitbart.com/big-government/2017/09/10/bannon-praises-trump-twitter-use-potus-disintermediates-media-speaks-directly-to-voters/>; Barthel & Mitchell, *supra* note 18.

¹⁵⁰ See, e.g., Jonathan Easley, *Poll: Majority Says Mainstream Media Publishes Fake News*, THE HILL (May 24, 2017, 10:10 AM), <http://thehill.com/homenews/campaign/334897-poll-majority-says-mainstream-media-publishes-fake-news>; see also Swift, *Americans’ Trust*, *supra* note 119; *Faking News*, *supra* note 44; see also Jones & Sun, *supra* note 6, at 30.

¹⁵¹ See, e.g., Glenn Greenwald, *WashPost Is Richly Rewarded for False News About Russia Threat While Public Is Deceived*, THE INTERCEPT (Jan. 4, 2017, 9:28 AM), <https://theintercept.com/2017/01/04/washpost-is-richly-rewarded-for-false-news-about-russia-threat-while-public-is-deceived/>.

¹⁵² For recent articles describing the terrain, see Jones & West, *supra* note 20, at 55–58; see also Jones & Sun, *supra* note 6, at 29–31.

¹⁵³ See, e.g., Tamara R. Piety, *Killing the Golden Goose: Will Blended Advertising and Editorial Content Diminish the Value of Both?*, Paper Presented at Yale Law

sensationalism,¹⁵⁴ abandonment of important beats,¹⁵⁵ and simple distraction. The media sector itself reflects internal conflicts as to news values.¹⁵⁶ At a minimum, the viral distribution of “fake news” encourages and provides cover for increasing reductions in press rights and privileges. In turn, the press’s increasingly endangered position diminishes its ability to promote accountability—by both government actors and powerful private intermediaries. When the press is paralyzed in its ability to respond effectively, the environment presents opportunities for corruption, unchecked authoritarianism, and a profoundly diminished version of democracy.¹⁵⁷

At the same time as the “fake news” developments, the press has been facing reduced or at least increasingly unstable protections for its journalistic work. This is particularly evident in the newsgathering context. This development did not emerge from the Trump Administration, of course. Journalists have characterized the Obama Administration’s approach to press protection as lukewarm at best.¹⁵⁸ Courts as well have undergone a shift.¹⁵⁹ At a minimum, there has been a significant

School Information Society Conference Commercial Speech II: Creeping Commercial Speech and Its Impact (2017) (transcript available at https://law.yale.edu/system/files/area/center/isp/documents/killng_the_golden_goose_2016_last.pdf); Lili Levi, “*A Faustian Pact*”? *Native Advertising and the Future of the Press*, 57 ARIZ. L. REV. 647 (2015).

¹⁵⁴ See, e.g., AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* (2015) (criticizing the modern press for its sensationalism and diagnosing judicial push-back as a result).

¹⁵⁵ On the print press’ reduction of local and state-side news coverage, see Joyce Dehli, *Rebuilding Local Journalism as an Essential Democratic Force*, NEIMAN: REPORTS (Nov. 15, 2016), <http://niemanreports.org/articles/rebuilding-local-journalism-as-an-essential-democratic-force/>.

¹⁵⁶ See, e.g., Bill Keller, *Is Glenn Greenwald the Future of News?*, N.Y. TIMES (Oct. 27, 2013), <http://www.nytimes.com/2013/10/28/opinion/a-conversation-in-lieu-of-a-column.html>.

¹⁵⁷ Skeptics might contend that President Trump’s attacks on the mainstream press have ironically revived a dying industry. After all, the Washington Post has been hiring reporters. See, e.g., Ken Doctor, ‘Profitable’ *Washington Post* Adding More Than Five Dozen Journalists, POLITICO (Dec. 27, 2016, 11:13 AM), <http://www.politico.com/media/story/2016/12/the-profitable-washington-post-adding-more-than-five-dozen-journalists-004900>. Moreover, subscriptions are up significantly for the New York Times since the presidential election. See, e.g., Joe Concha, *NY Times Subscriptions Doubled in 2016*, THE HILL (Feb. 2, 2017, 11:09 AM), <http://thehill.com/media/317531-ny-times-subscriptions-doubled-in-2016>. Yet this flurry of support by liberal critics of the Trump Administration cannot eliminate the overall negative impact of both the epidemic of false news stories and the consistent political attacks on the institutions of the press.

¹⁵⁸ See, e.g., Hadas Gold, *Risen: Obama Administration is Greatest Enemy of Press Freedom*, POLITICO (Feb. 17, 2015, 11:36 PM), <https://www.politico.com/blogs/media/2015/02/risen-obama-administration-is-greatest-enemy-of-press-freedom-202707>.

¹⁵⁹ See, e.g., GAJDA, *supra* note 154; Jones & Sun, *supra* note 6; Jones & West, *supra* note 20.

doctrinal recognition of counter-interests to newsworthiness, such as privacy, in news-related lawsuits. “Fake news” is the newly added ingredient to this increasingly press-constraining mix. Donald Trump’s deployment of the “fake news” trope, which challenges both individual stories and also the legitimacy of the journalistic project as a whole, has served the Trump Administration as an articulated justification—or at least a cover or support—for reduced press protections. Long-term customs promoting press access have been disrupted. This has doubtless increased the press’s reliance on leaks, which in turn has placed the press in government’s bulls-eye. The Trump Administration’s anti-press rhetoric also appears to have emboldened other actors to threaten journalists and put roadblocks in the way of their operations.

A. A Press-Skeptical Legal Turn

Many claim that the First Amendment has not been interpreted to provide any special protections for journalists.¹⁶⁰ The Supreme Court, for all its dicta lauding the constitutional and democratic centrality of the press, has not established a robust press-protective jurisprudence under the First Amendment Press Clause.¹⁶¹ Indeed, recently, the Court has moved from “largely favorable and praising depictions of the press to largely distrusting and dismissive ones.”¹⁶² It has asserted that media corporations are not different from any other type of corporation with respect to constitutional speech rights.¹⁶³

Moreover, scholars have noted a long-established disparity between the constitutional protection afforded to publication and the far-less-robust protection recognized by the courts with respect to the press’s newsgathering activities.¹⁶⁴

¹⁶⁰ See, e.g., Dorf & Tarrow, *supra* note 12.

¹⁶¹ See, e.g., Jones & West, *supra* note 20, at 52.

¹⁶² RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 255 (2014); see also Jones & West, *supra* note 20, at 58–59 (cataloguing evidence for the conclusion that the Court “has also grown less interested in press protections”).

¹⁶³ See *Citizens United v. FEC*, 558 U.S. 310 (2010).

¹⁶⁴ See, e.g., Dorf & Tarrow, *supra* note 12 (“Taken as a whole, First Amendment doctrine produces a startling juxtaposition. Stings—defined here to mean efforts to uncover hidden information that the public has an interest in knowing—are legally vulnerable, while scams—the propagation of opinions and purported statements of fact that rest on false information—are generally protected.”); Jones & West, *supra* note 20, at 53 (“Despite recognizing in dicta that news gathering is not without its First Amendment protections and noting that ‘without some protection for seeking out the news, freedom of the press would be eviscerated, the Court has almost never actually protected the process of gathering information.’”) (internal quotation marks omitted); see also Lyrissa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TULANE L. REV. 173 (1998).

Although anonymous sources have been central to journalistic revelations of government criminality, the Supreme Court rejected a First Amendment-based journalist privilege in *Branzburg v. Hayes*.¹⁶⁵ Admittedly, there appeared to be a subsequent lower court consensus reading Justice Powell's "enigmatic"¹⁶⁶ concurrence in the case to reflect judicial recognition of a constitutionally grounded journalists' privilege.¹⁶⁷ Recent cases, however, suggest a turn away from that stance, featuring courts less disposed toward constitutional claims by journalists seeking to protect sources.¹⁶⁸ Current scholarship as well purports to undermine, through analysis of the *Branzburg* Justices' papers, the theory used by lower courts to read *Branzburg* broadly and more press-protectively than Justice White's opinion does on its face.¹⁶⁹ Moreover, sometimes reporters claim the need to engage in newsgathering by subterfuge, undercover reporting, attack video—sometimes known as "the dark arts."¹⁷⁰ At this time, there is very little protection for journalists who are caught engaging in these activities.¹⁷¹ Some courts have even gone so far as to find that

¹⁶⁵ 408 U.S. 665 (1972).

¹⁶⁶ *Id.* at 725 (Stewart, J. dissenting).

¹⁶⁷ See, e.g., William E. Lee, *A Revisionist View of Journalist's Privilege: Justice Powell, Branzburg and the "Proper Balance"*, 34 CARDOZO ARTS & ENT. L.J. 113, 116, nn. 17, 18, 19 (2016) and cases cited therein.

¹⁶⁸ The most famous of such recent cases involved New York Times reporter James Risen's refusal to name his source for his revelation, in his book *State of War*, of a secret CIA plan to foil Iran's nuclear program. See *United States v. Sterling*, 724 F.3d 482 (4th Cir. 2013) (rejecting Risen's assertion of First Amendment reporter's privilege). See also *infra* text accompanying note 199.

¹⁶⁹ See, e.g., Lee, *supra* note 167.

¹⁷⁰ These are, of course, not universally accepted as ethical practices, and many journalism best practices codes frown on them as a rule. See, e.g., BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION (2012). In England, the tabloid press' phone hacking practices led to a massive scandal, an independent inquiry, and a new type of press regulation. See, e.g., Lili Levi, *Journalism Standards and "the Dark Arts": The U.K.'s Leveson Inquiry and the U.S. Media in the Age of Surveillance*, 48 GA. L. REV. 907 (2014). Still, undercover reporting has a long history and has led to numerous revelations in the public interest. See e.g., Alan K. Chen & Justin F. Marceau, *High Value Lies, Ugly Truths, and the First Amendment* 19–25 (Univ. Denver Sturm College of Law, Working Paper No. 15-07, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2585089 (describing the "long tradition of using deception as a means of gaining access to knowledge that would otherwise be obscured from public view."); see also Dorf & Tarrow, *supra* note 12 (on the legal dangers to activists of engaging in investigative newsgathering).

¹⁷¹ See Dorf & Tarrow, *supra* note 12, at 9 ("[T]he case law generally permits the application of laws governing property, contract, and other matters to be used to keep journalists and activists away from their targets."); Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 WM. & MARY BILL RTS. J. 1063, 1076–77, 1079–80 (2006). Numerous laws—such as trespass laws, invasion of privacy, limits on secret recordings, the new spate of "ag-gag" laws, business torts—all make undercover reporting more chancy. See Chen & Marceau, *supra* note 170, at 29–33.

journalists engaging in undercover reporting by, for example, accepting employment from the subjects of their undercover reporting implicates not only the usual tort and privacy claims, but also breach of fiduciary duty.¹⁷² Similarly, the variation in laws regarding phone taping¹⁷³ makes it difficult for news organizations to engage lawfully in surreptitious recording. And although the Court in *Bartnicki v. Vopper*¹⁷⁴ found that a radio station’s publication of a cellphone conversation that had likely been illegally obtained was protected by the First Amendment, it did not offer broad newsgathering protection.¹⁷⁵

Even as to publication, some recent lower court developments indicate that courts are increasingly crediting plaintiffs’ privacy claims in order to justify constriction of press speech.¹⁷⁶ Similarly, at least some recent cases indicate that courts are becoming less deferential than in the past to journalists’ assertions about what should be considered newsworthy.¹⁷⁷ Losses for news media in defamation cases are more likely and more expensive than in the past.¹⁷⁸

It is important not to exaggerate. There are, of course, still many press protections in the law,¹⁷⁹ so the legal turn is far

¹⁷² See, e.g., *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F. 3d 505 (4th Cir. 1999).

¹⁷³ For a reference guide to such laws by journalists for journalists, see *The Legal Limits Of Recording Conduct And Conversations*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/browse-media-law-resources/digital-journalists-legal-guide/legal-limits-recording-conduct-and-conver> (last visited Mar. 14, 2018).

¹⁷⁴ 532 U.S. 514 (2001).

¹⁷⁵ Plus, *Bartnicki*’s impact in the lower courts “has been virtually nonexistent.” Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 453 (2006).

¹⁷⁶ Professor Amy Gajda has documented this development in her book, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* (2015), and in a more recent article. See Gajda, *supra* note 148; see also Ronnell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 255 (2014) (on Supreme Court’s shift from “largely favorable and praising depictions of the press to largely distrusting and dismissive ones”).

¹⁷⁷ See Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1041 (2009); see also Brian Murchison et al., *Sullivan’s Paradox: The Emergence of Judicial Standards of Journalism*, 73 N.C. L. REV. 7, 11–12 (1994) (making a similar argument in the defamation context).

¹⁷⁸ The massive Hulk Hogan verdict is one example. See Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761 (2017); see also Jones & West, *supra* note 20, at 58 (noting that the press has only prevailed in 39% of the libel and privacy cases that have gone to trial since 2010, by contrast to its 52% win rate a decade earlier).

¹⁷⁹ There are, of course, legal contexts in which the press has received significant protection. Most states have reporter privilege statutes and there are both federal and state documentary access protections. Although some courts have analyzed newsworthiness claims more rigorously and have taken privacy concerns more into account, other courts have continued to grant the press a presumption of newsworthiness for published material. Attempts to legislate to limit journalistic access—such as “ag-gag” laws—have faced daunting constitutional challenges. The

from complete. Still, such protections (and protective interpretations) are not writ in stone, and practices of government forbearance can just as easily be reversed.¹⁸⁰ Many existing press protections incorporate exceptions for extraordinary circumstances.¹⁸¹ If courts are convinced by combinations of national security and privacy arguments that press activity poses a threat to the public interest, those protections could be whittled, at least in application in particular cases. Thus, at a minimum, journalists and news organizations can no longer assume the degree of legal protection for the press on which they could have reasonably relied during the judicial “golden age” of press law.¹⁸²

In addition, President Trump and his Administration have very clearly set out to reduce the press’s legal protections. For example, during his campaign, Trump insisted that, if elected, he would “open up” libel law (and thereby reduce protections for the press).¹⁸³ Even though, as president, he cannot overrule the constitutionally grounded limits on defamation law recognized in *New York Times v. Sullivan*,¹⁸⁴ he *could* use his bully pulpit to influence both the filing of defamation actions and the attitude of juries deciding state defamation cases. He could also potentially reshape the Supreme Court in a way that might lead to a shift away from the protections of *New York Times v. Sullivan*, either doctrinally or in attitude.¹⁸⁵ Ideological third-party litigation funders can

Daily Mail principle is very helpful to news organizations when they choose to publish true information that they did not themselves collect illegally. Lower courts applying these principles have on numerous occasions chosen to apply the principle protectively even when journalists have had reason to know that the material that they are publishing was probably obtained illegally. And the government has engaged in forbearance vis-à-vis journalists even when they have arguably violated the law.

¹⁸⁰ See, e.g., Jones & Sun, *supra* note 6, at 44.

¹⁸¹ *Id.*

¹⁸² See Lyrissa Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819 (2012) (describing the “golden age”); see also Gajda, *supra* note 177 (arguing that news media lawyers’ assumptions about the press-protective character of the First Amendment are unrealistic and dangerous for the press in the current moment).

¹⁸³ See, e.g., Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html?mcubz=1>.

¹⁸⁴ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (constitutionalizing state defamation law and requiring public officials to prove actual malice by the press in defamation actions).

¹⁸⁵ But see Dorf & Tarrow, *supra* note 12, at 23 (“[A]s president there is little he can do to accomplish this goal [of ‘opening up’ libel law]”).

also reasonably interpret such signals as invitations to forge ahead.¹⁸⁶

Recently, President Trump publicly threatened to revoke NBC's broadcast licenses over the network's report that he had called for a tenfold increase in the U.S. nuclear arsenal.¹⁸⁷ Although the executive does not have the power to order the revocation of broadcast licenses (which are granted and renewed by the independent Federal Communications Commission), these threats were eerily reminiscent of then-President Nixon's desire to use the FCC's licensing process to threaten the Washington Post, which held broadcast licenses.¹⁸⁸ The license revocation threats have generated concerns about a chilling effect on the networks, especially if they are seen as a "dog whistle" for Trump supporters to file challenges to license renewals.¹⁸⁹

¹⁸⁶ For an exploration of the potential chilling effects of third party litigation funding in press contexts through discussion of the Hulk Hogan invasion of privacy case against Gawker, see Levi, *supra* note 178.

¹⁸⁷ See, e.g., Peter Baker & Cecilia Kang, *Trump Threatens NBC Over Nuclear Weapons Report*, N.Y. TIMES (Oct. 11, 2017), https://www.nytimes.com/2017/10/11/us/politics/trump-nbc-fcc-broadcast-license.html?_r=0. In another example of threatening a press organ, Trump promised during the campaign that Amazon—Washington Post owner Jeff Bezos' business empire—would "have such problems" if he became president. Tim Stenovec, *Donald Trump Just Said if He's Elected President Amazon Will Have Problems*, BUS. INSIDER (Feb. 26, 2016, 5:14 PM), <http://www.businessinsider.com/donald-trump-says-amazon-will-have-such-problems-2016-2>. Since the election, President Trump is reported to have "repeatedly suggested that Congress should look into Amazon's taxes." Jones & West, *supra* note 20, at 71.

President Trump has also threatened lawsuits against the press on numerous occasions. Jones & West, *supra* note 20, at 70–71 (listing the news entities he threatened with legal action during the campaign). His threats of legal action were taken seriously at least by the American Bar Association, which "spiked" a planned article about Trump's history of meritless lawsuits. The article was slated to appear in an ABA publication but was removed because of "the risk of the ABA being sued by Mr. Trump." Jonathan Peters, *What Trump Could (and Couldn't) Do to Restrict Press Freedom if Elected*, COLUM. J. REV. (Oct. 27, 2016), https://www.cjr.org/united_states_project/donald_trump_lawsuits_press_freedom.php.

¹⁸⁸ See, e.g., James Warren, *Trump's Threat to Yank TV Licenses Looks a Lot Like a Nixon Move. Here's Why.*, POYNTER (Oct. 11, 2017), <https://www.poynter.org/news/trumps-threat-yank-tv-licenses-looks-lot-nixon-move-heres-why/>; Thomas W. Hazlett & David W. Sosa, "Chilling" the Internet? Lessons from FCC Regulation of Radio Broadcasting, 4 MICH. TELECOMM. & TECH. L. REV. 35, 47–50 (1998).

¹⁸⁹ See Baker & King, *supra* note 187 (quoting former FCC Chairman). Only one FCC Commissioner so far has explicitly criticized President Trump's comments. See Andrew Rafferty, *First Amendment Advocates Push Back on Trump's Licensing Threat*, NBC NEWS (Oct. 12, 2017, 12:32 AM), <https://www.nbcnews.com/politics/politics-news/first-amendment-advocates-push-back-trump-s-licensing-threat-n809941> (reproducing FCC Commissioner Rosenworcel's tweet on the subject).

The signaling effect of Trump's statements in this regard is clear in his statement that "[i]t[] is frankly disgusting the way the press is able to write whatever

The Trump Administration has also been very vocal about its intention to “stem leaks” to the press from government.¹⁹⁰ As has been frequently noted, governments often govern by leak¹⁹¹ and are sometimes rendered accountable by leak.¹⁹² This Administration has announced a war on leaks—not only of classified information, but of “controlled unclassified” material.¹⁹³ Attorney General Sessions was reported to recommend polygraph testing of government

they want to write . . . [a]nd people should look into it.” David Nakamura, *Trump Escalates Threats Against Press, Calls News Coverage ‘Frankly Disgusting’*, WASH. POST (Oct. 11, 2017), https://www.washingtonpost.com/politics/trump-escalates-threats-against-press-calls-news-coverage-frankly-disgusting/2017/10/11/32996dba-ae9c-11e7-9e58-e6288544af98_story.html?utm_term=.c118e2865f8b.

¹⁹⁰ See, e.g., Helen Murillo, *Trump Is Going After Legal Protection for Journalists*, FOREIGN POLICY (Aug. 10, 2017, 11:36 AM), <http://foreignpolicy.com/2017/08/10/trump-is-going-after-legal-protections-for-journalists/>; Charlie Savage & Eileen Sullivan, *Leak Investigations Triple Under Trump*, Sessions Says, N.Y. TIMES (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/us/politics/jeff-sessions-trump-leaks-attorney-general.html?_r=0; Joe Pompeo, *In the Trenches of Trump’s Leak War*, VANITY FAIR (Aug. 29, 2017, 10:30 AM), <https://www.vanityfair.com/news/2017/08/donald-trump-leak-war-reporter-fear/>; see also Majority Staff Report, *State Secrets: How an Avalanche of Media Leaks is Harming National Security*, COMM. ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, U.S. SENATE (July 6, 2017), <http://www.hsgac.senate.gov/download/state-secrets-how-an-avalanche-of-media-leaks-is-harming-national-security> [<http://perma.cc/6T6T-94N7>].

¹⁹¹ See generally David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosure of Information*, 127 HARV. L. REV. 513 (2013).

¹⁹² President Trump habitually lambasts leaks and leakers now. See, e.g., Shannon Pettypiece, Margaret Talev & Chris Strohm, *Trump’s Focus on Leaks and Loyalty Puts Sessions in Crosshairs*, BLOOMBERG (July 26, 2017, 12:11 PM), <https://www.bloomberg.com/news/articles/2017-07-26/trump-s-focus-on-leaks-and-loyalty-puts-sessions-in-cross-hairs>; Trevor Timm, *Beware of the Trump Administration’s Coming Crackdown on Leaks—and Journalism*, FREEDOM OF THE PRESS FOUND. (Aug. 3, 2017), <https://freedom.press/news/trump-administrations-coming-crackdown-leaks-and-journalism/>. However, Trump’s administration—like all preceding executives—surreptitiously offers information to the press. See, e.g., Matthew Yglesias, *The Trump Administration’s New Anti-Leak Memo Leaked Last Night*, VOX (Sept. 14, 2017, 10:00 AM), <https://www.vox.com/policy-and-politics/2017/9/14/16305384/mcmaster-memo-leaks> (“[I]n the Trump administration everything leaks”); Michael Grynbaum & John Koblin, *After Reality Winner’s Arrest, Media Asks: Did ‘Intercept’ Expose a Source?*, N.Y. TIMES (June 6, 2017), <https://www.nytimes.com/2017/06/06/business/media/intercept-reality-winner-russia-trump-leak.html> (“Journalism in the Trump era has featured a staggering number of leaks from sources across the federal government, providing bombshell revelations . . .”). Ironically, however, President Trump often praised WikiLeaks during his campaign. See, e.g., David Choi, *5 Times Trump Praised Wikileaks During His 2016 Election Campaign*, BUS. INSIDER (Nov. 13, 2017, 10:41 PM), <http://www.businessinsider.com/trump-wikileaks-campaign-speeches-julian-assange-2017-11>.

¹⁹³ See Yglesias, *supra* note 192 (quoting McMaster anti-leak memo); see also Chris Geidner, *Trump Administration Launches Broad New Anti-Leak Program*, BUZZFEED (Sept. 13, 2017, 9:00 PM), https://www.buzzfeed.com/chrisgeidner/trump-administration-launches-broad-new-anti-leak-program?utm_term=.mlomLyGqx#.ayDNp85X4.

employees to identify leakers.¹⁹⁴ Recently, National Security Advisor McMaster reportedly circulated a memo asking the heads of all federal agencies to engage in an "organization-wide event to engage their workforce in a discussion on the importance of protecting classified and controlled unclassified information, and measures to prevent and detect unauthorized disclosures."¹⁹⁵ Trump's signing of an executive order establishing new whistleblower protections at the Office of Veterans Affairs signals that it is *leaking information to the media* with which his Administration is most concerned.¹⁹⁶ To the extent that the Trump Administration's efforts to eliminate government leaks are successful, the press will be denied access to important information that would enable it to do its job. This is particularly the case now because other avenues of access to information by the press are being intentionally constrained.¹⁹⁷

Will the current Administration continue the traditional practice of not prosecuting the press under espionage laws over the publication of leaked national security material and information? Reports that President Trump, in a private meeting with former FBI director James Comey, recommended that the agency consider jailing journalists who publish classified information¹⁹⁸ suggests not. The uptick in the number of prosecutions of leakers of national security information under the Obama Administration, as well as that Administration's focus on the reporters to whom the leakers

¹⁹⁴ See Geidner, *supra* note 193 (citing to Axios report).

¹⁹⁵ *Id.* (quoting McMaster memo). Ironically, the memo was leaked to BuzzFeed.

See Geidner, *supra* note 193.

¹⁹⁶ This is not to say that leakers outside the federal government will be protected under the current Administration. For example, NSA contractor Reality Winner is currently being prosecuted under the Espionage Act for revealing classified information. See, e.g., Charlie Savage, *Intelligence Contractor is Charged in First Leak Case Under Trump*, N.Y. TIMES (June 5, 2017),

<https://www.nytimes.com/2017/06/05/us/politics/reality-winner-contractor-leaking-russia-nsa.html>. Nor is it to suggest that the whistleblower-protective rhetoric is actually matched in practice. For a skeptical account, see Joe Davidson, *Victims Say VA Whistleblower Retaliation is Growing Under Trump, Despite Rhetoric*, WASH. POST (Oct. 30, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/10/30/victims-say-va-whistleblower-retaliation-is-growing-under-trump-despite-rhetoric/?utm_term=.950723e15cc1.

¹⁹⁷ See *supra* note 130 and accompanying text; see also *infra* Section II.B. Government efforts to stop leaks also doubtless have parallels in the private context. Many potential leakers in private companies whose businesses affect public life are doubtless afraid of liability under broadly worded non-compete and confidentiality agreements.

¹⁹⁸ See, e.g., Michael M. Grynbaum, Sydney Ember & Charlie Savage, *Trump's Urging That Comey Jail Reporters Denounced as an 'Act of Intimidation'*, N.Y. TIMES (May 17, 2017), <https://www.nytimes.com/2017/05/17/business/media/trumps-urging-that-comey-jail-reporters-denounced-as-an-act-of-intimidation.html>.

provided their information,¹⁹⁹ lead to worries that the Obama Administration has “handed [Trump] a road map”²⁰⁰ for increasingly aggressive use of the Espionage Act to keep reporters in check.²⁰¹ Even if the journalists to whom whistleblowers leak their information are not themselves prosecuted—at least in notable numbers—it is nevertheless likely that the Trump Administration will continue the Obama Administration’s expanded use of media subpoenas and surveillance under cover of concerns about national security.²⁰²

Prosecutorial discretion, when coupled with less-protective internal government guidelines and a brash rhetoric delegitimizing the press, is likely to expand “as applied” threats to the press. Federal policy about subpoenaing reporters to testify as to their sources is determined by the guidelines of the Department of Justice. Those guidelines were significantly revised during the Obama Administration to be more press-protective in response to controversies over a seizure of Associated Press’s telephone records and a search warrant for a

¹⁹⁹ Jones & Sun, *supra* note 6, at 46–47. The Obama Administration deployed the Espionage Act against reporters on two occasions. In one instance, the government attempted to use the Espionage Act prosecution in order to force New York Times reporter James Risen to reveal a source. *See, e.g.*, Matt Apuzzo, *Times Reporter Will Not Be Called to Testify in Leak Case*, N.Y. TIMES (Jan. 12, 2015), <https://www.nytimes.com/2015/01/13/us/times-reporter-james-risen-will-not-be-called-to-testify-in-leak-case-lawyers-say.html>. In the other instance, the government identified Fox News reporter James Rosen as an unindicted co-conspirator in an Espionage Act prosecution of a government advisor for leaking national security materials, and searched his personal emails. *See, e.g.*, Brian Stelter & Michael D. Shear, *Justice Dept. Investigated Fox Reporter Over Leak*, N.Y. TIMES (May 30, 2013), <http://www.nytimes.com/2013/05/21/us/politics/white-house-defends-tracking-fox-reporter.html>. In these kinds of situations, the press is used as a cat’s paw in order to achieve other goals. To the extent that the press’ sources are not in government—and not even in jurisdictions where the US can exercise jurisdiction—pressuring the press can provide benefits in multiple ways. Even if the actual provider of the information can’t be prosecuted, the next-best alternative is public pressure on the press, which can aid the government’s own propaganda effort.

²⁰⁰ *See, e.g.*, Jones & Sun, *supra* note 6, at 47; *see also* James Risen, *If Donald Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), <https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html>.

²⁰¹ *See, e.g.*, Apuzzo, *supra* note 199.

²⁰² In addition to prosecution or the threat of prosecution under the Espionage Act, the Obama Administration monitored journalists and obtained journalists’ records using secret subpoenas. *See, e.g., id.* For a report about the Obama Administration’s treatment of the press, see Leonard Downie & Sara Rafsky, *The Obama Administration and the Press*, COMM. TO PROTECT JOURNALISTS (Oct. 10, 2013), <https://cpj.org/reports/2013/10/obama-and-the-press-us-leaks-surveillance-post-911.php>. There is little reason to believe that the Trump Administration, with its declared war on leakers, will not amplify those practices in the attempt to identify leakers through journalists’ records and communications.

Fox News reporter’s emails.²⁰³ In August 2017, however, assertedly in response to concerns about leaks of classified information, Attorney General Jeff Sessions (a presidential appointee who serves at the President’s will)²⁰⁴ announced that the DOJ would be reviewing the guidelines with respect to news organizations and media subpoenas in such cases.²⁰⁵

There is currently no federal shield law, although press organizations have called for one. Proposed legislation of that kind almost passed a few years ago,²⁰⁶ and a current bill has been introduced.²⁰⁷ To the extent that prior federal shield legislation was scuppered by massive leaks,²⁰⁸ recent floods of leaked confidential data such as the Paradise Papers raise questions about the likely passage of current proposed legislation. That leaves journalists at the mercy of state law. Although most states have reporter shield laws in place,²⁰⁹ they differ in their scope of protection and coverage.²¹⁰ There will be increased ambiguity in journalistic protections under such legislation as both the nature of reporting and the identity of reporters further changes. For example, how will courts interpreting these state statutes deal with journalism practiced algorithmically, by robots? How will they deal with journalism produced in teams with members of many news organizations

²⁰³ For links to the relevant documents, see *Amending the Department of Justice Subpoena Guidelines*, REPORTERS COMM. FOR FREEDOM OF THE PRESS, <https://www.rcfp.org/attorney-general-guidelines> (last visited Mar. 14, 2018).

²⁰⁴ See Jones & Sun, *supra* note 6, at 46 (on reporter subpoena protections as a matter of custom subject to change under Attorneys General who serve at the pleasure of the President).

²⁰⁵ Federal policy on reporter subpoenas can be found in the Department of Justice’s guidelines. Policy Regarding Obtaining Information From, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 28 CFR § 50.10 (2015). The Attorney General, who is appointed by and serves at the pleasure of the President, has control over those guidelines. See Jones & Sun, *supra* note 6, at 46. Over the summer, Attorney General Sessions stated that the DOJ was reviewing policies regarding journalist subpoenas, and announced Administration efforts to battle what he called a “staggering number of leaks undermining the ability of our government to protect this country.” Julia Edwards Ainsley, *Trump Administration Goes on Attack Against Leakers, Journalists*, REUTERS, (Aug. 4, 2017, 11:24 AM), <https://www.reuters.com/article/us-usa-trump-sessions-leaks/trump-administration-goes-on-attack-against-leakers-journalists-idUSKBN1AK1UR>.

²⁰⁶ See Dorf & Tallow, *supra* note 12.

²⁰⁷ See, e.g., Paul Fletcher, *Sessions’ Testimony Prompts New Federal Shield Law Bill Protecting Journalists*, FORBES (Nov. 29, 2017, 8:45 AM), <https://www.forbes.com/sites/paullfletcher/2017/11/29/sessions-testimony-prompts-new-federal-shield-law-bill-protecting-journalists/#4f555a374912>.

²⁰⁸ See, e.g., William E. Lee, *The Demise of the Federal Shield Law*, 30 CARDOZO ARTS & ENT. L.J. 27, 34 (2012) (noting that support for a federal shield law “evaporated” in 2010 when Wikileaks “began posting a trove of classified documents”).

²⁰⁹ See Dorf & Tallow, *supra* note 12 and sources cited therein.

²¹⁰ See Jones & West, *supra* note 20, at 55 and sources cited therein.

across state lines? In any event, state shield laws typically provide qualified rather than absolute protection.²¹¹

In addition to uncertainty about the degree of protection provided by the patchwork of state reporter's privilege laws, other non-legal factors also have a likely impact on source protection. There is evidence that governments engage in surveillance of journalistic activity (often in order to promote other policy goals, such as fighting terror).²¹² Many reporters believe that they are constantly under surveillance. Technology now provides tools that will permit governments and/or private intermediaries to use reporters' electronic activities to reveal information about their sources. Still, this does not make law irrelevant, and does not eliminate the dangers for newsgathering posed by the lack of legal protection. Technology deflecting surveillance exists as well. May journalists use encryption, tradecraft, burner phones, and other anti-surveillance behavior in order to avoid unintentionally revealing their sources or areas of investigative focus?²¹³ Indeed, many mainstream news organizations have begun to solicit anonymous material and provide technological protection to sources.²¹⁴

The Washington Post's new slogan is *Democracy Dies in Darkness*.²¹⁵ What casts light is access to information, documents, and persons. Currently, news organizations have some amount of access to government information under both state and federal law. Some states have extensive sunshine laws

²¹¹ See Dorf & Tallow, *supra* note 12, at 15–16 and sources cited therein.

²¹² See, e.g., *With Liberty to Monitor All: How Large-Scale US Surveillance is Harming Journalism, Law, and American Democracy*, HUMAN RIGHTS WATCH (July 28, 2014), <https://www.hrw.org/report/2014/07/28/liberty-monitor-all/how-large-scale-us-surveillance-harming-journalism-law-and>; see also Trevor Timm, *Lawsuit Aims to Uncover How Government Surveils Journalists*, COLUM. J. REV. (Nov. 29, 2017), <https://www.cjr.org/watchdog/government-surveillance-journalists.php>.

²¹³ See, e.g., Carl Fridh Freberg, *The Death of Source Protection? Protecting Journalists' Sources in a Post-Snowden Age*, LONDON SCH. ECON. & POLITICS (Aug. 2015), http://eprints.lse.ac.uk/63140/1/_lse.ac.uk_storage_LIBRARY_Secondary_libfile_shared_repository_Content_POLIS_Death%20of%20source%20protection_Kleberg_Death%20of%20source%20protection_2015.pdf; Julie Posetti, *The Eroding State of Source Protection*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (May 29, 2017), <https://gijn.org/2017/05/29/the-eroding-state-of-source-protection/>.

²¹⁴ The front page of the New York Times now asks: "Got a confidential news tip?" and provides a variety of secure ways to contact the paper. See N.Y. TIMES, <https://www.nytimes.com/newsgraphics/2016/newstips/?WT.nav=topnews&action=click&clickSource=story-heading&hp&module=first-column-region&pgtype=Homepage®ion=top-news> (last visited Dec. 19, 2017).

²¹⁵ See Paul Farhi, *The Washington Post's New Slogan Turns Out to Be an Old Saying*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/lifestyle/style/the-washington-posts-new-slogan-turns-out-to-be-an-old-saying/2017/02/23/cb199cda-fa02-11e6-be05-1a3817ac21a5_story.html?utm_term=.ca75811f8de7.

for government activity, while others are much more limited.²¹⁶ As for the federal Freedom of Information Act (FOIA), that legislation has significant limits—both in its wording and its application.²¹⁷ Reduction of press protections can be seen in the administrative context as well, particularly in the interpretation of exceptions and statutory implementation. For years, journalists have complained of delays in compliance with FOIA requests.²¹⁸ Stories also reveal incompleteness and increased costs in government responses to documentary access.²¹⁹ And this is in prior years, when presidents paid at least lip service to the value of government transparency. What impact might a changed approach have at the Department of Justice’s Office of Information Policy, which oversees agency compliance with the FOIA?²²⁰ In addition to reducing public access to government data, scholars also note the Trump Administration’s reduced information-collecting (so that there is less information for journalists and analysts to parse).²²¹ Further problems are posed by journalist access to some but not all documents or information when documentation is produced by and/or held in a variety of hands. All this becomes particularly problematic as technology presents opportunities for news organizations to analyze data sets in order to reveal new types of explanatory journalism. Access to data becomes increasingly important in an environment where stories are based in data, and where news organizations will increasingly seek to support their reporting by making the underlying data available to readers should they wish to see it. Finally, to the

²¹⁶ For links, see <https://www.nfoic.org/coalitions/state-foi-resources/state-freedom-of-information-laws>.

²¹⁷ The statute contains 9 important exceptions that government agencies can use to withhold document access or provide partial access. For prominent criticisms of the FOIA regime, see Margaret B. Kwoka, *FOIA, Inc.*, 65 DUKE L. J. 1361, 1361–1437 (2016); David E. McCraw, *The “Freedom From Information” Act: A Look Back at Nader, FOIA, and What Went Wrong*, YALE L.J.F. (Nov. 21, 2016), <https://www.yalelawjournal.org/forum/the-freedom-from-information-act-a-look-back>; David Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097 (2017).

²¹⁸ See, e.g., *Delayed, Denied, Dismissed: Failures on the FOIA Front*, PROPUBLICA (July 21, 2016, 8:01 AM), <https://www.propublica.org/article/delayed-denied-dismissed-failures-on-the-foia-front>. Public records have also been denied by state government officials. See Chad G. Marzen, *Public Records Denials*, N.Y.U. J.L. & LIBERTY (forthcoming 2018) (arguing for increased penalties).

²¹⁹ See, e.g., *Delayed, Denied, Dismissed: Failures on the FOIA Front*, *supra* note 218; see also Josh Gerstein, *Obama Administration in FOIA Fees Fight*, POLITICO (May 28, 2015, 7:51 AM), <https://www.politico.com/blogs/under-the-radar/2015/05/obama-administration-in-foia-fees-fight-207810>.

²²⁰ See Peters, *supra* note 187.

²²¹ See, e.g., Norton, *supra* note 103. The flip side of that strategy is to enhance “infoglut.” See Julie Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 382–89 (2016).

extent that newspapers have in the past spearheaded not only freedom of information requests, but also litigation to effectuate informational access rights, the financial conditions of newspapers and the reduction in reporters necessarily undermine those practices.²²²

In sum, with respect to legal rights, an overview of the environment suggests—at best—greater instability for the press today.

B. Reductions in Customary Privileges

In addition to legal rights as such, the press has in the past benefited from access privileges based on custom.²²³ President Trump and his Administration have significantly reduced such customs and traditional safeguards. This has been particularly notable in the area of access. For example, during the campaign, Trump revoked the press credentials of some press organizations,²²⁴ blacklisted particular reporters and news organizations on the basis of their coverage of Trump,²²⁵ and made it difficult for reporters to cover him in numerous practical ways.²²⁶ Both Trump and his campaign staff refused to talk to certain reporters, whether on or off the record, and declined to abide by traditional norms for designated press pools.²²⁷

Once in office, the Trump White House greatly upended customs previously expected by the press. For example, the White House specifically excluded disfavored journalists from press briefings.²²⁸ President Trump did not permit the American press to attend some important diplomatic meetings attended by the foreign press.²²⁹ He changed the traditions pursuant to which press routinely traveled with the president and were informed of presidential plans to go out in public.²³⁰ President

²²² See RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557 (2011) (describing the role of newspapers in information-forcing legislation and litigation).

²²³ On the press' non-legal safeguards, see RonNell Andersen Jones & Sonja R. West, *Don't Expect the First Amendment to Protect the Media*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/opinion/dont-expect-the-first-amendment-to-protect-the-media.html>; see also Jones & West, *supra* note 20.

²²⁴ See, e.g., Jones & Sun, *supra* note 6, at 15.

²²⁵ See, e.g., Jones & West, *supra* note 20, at 64.

²²⁶ See *id.* (cataloguing transactions costs).

²²⁷ See *id.*

²²⁸ See, e.g., Callum Borchers, *White House Blocks CNN, New York Times from Press Briefing Hours After Trump Slams Media*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/24/white-house-blocks-cnn-new-york-times-from-press-briefing-hours-after-trump-slams-media/?utm_term=.15d804058c83.

²²⁹ Jones & West, *supra* note 20, at 65–6.

²³⁰ *Id.*

Trump has also held few press conferences himself, breaking with long-standing presidential tradition.²³¹ He has consistently refused to take questions from reporters he saw as hostile or employed by news organizations he dislikes.²³² When he has met with the press in such conferences where he or his aides expect tough questions, Trump has called on “sycophantic news outlets” instead.²³³ Trump and his Administration have retaliated against news organizations seen as reporting negatively on him.²³⁴ Recently, it was reported that the White House Press Secretary had threatened a CNN reporter with exclusion if he asked any questions during a recent presidential bill-signing ceremony.²³⁵

In addition to reducing the press’s access to the President and his Administration, these kinds of reversals to custom send a clear message both to the public and to elites who might otherwise be wary of crossing the press that the mainstream institutional press is now an enemy to be resisted and not feared.²³⁶

C. Harassment and Danger

Journalism in the U.S. has become more physically dangerous. Beginning during the presidential campaign, Trump “encouraged supporters to join him in taunts and jeers directed at the press corps.”²³⁷ The extreme rhetoric—a clear departure from norms observed even by candidates and prior presidents who disliked the press²³⁸—sent a clear signal. The drumbeat of press criticism by the Trump Administration appears to have emboldened people to attack journalists doing their jobs.²³⁹ The

²³¹ *Id.* at 67.

²³² Jones & Sun, *supra* note 6, at 15 (noting Trump’s belittling of journalists and their employers and refusing to take their questions at his first post-election press conference).

²³³ Jonathan Peters, *Trump and Trickle-down Press Persecution*, COLUM. J. REV. (2017), https://www.cjr.org/local_news/trump-and-trickle-down-press-persecution.php (quoting journalism professor).

²³⁴ Jones & West, *supra* note 20, at 70.

²³⁵ *CNN’s Jim Acosta Complains of White House Threat*, DENV. POST (Dec. 12, 2017, 5:01 PM), <http://www.denverpost.com/2017/12/12/cnns-acosta-complains-white-house-threat/>.

²³⁶ Agreeing with that conclusion, Professors Jones and West catalogue the ways in which the Trump Administration has violated previously-established norms of respect with which prior presidents treated the press. See Jones & West, *supra* note 20, at 68–70.

²³⁷ Jones & Sun, *supra* note 6, at 8–9 (“Mocking, criticizing, and verbally attacking individual reporters and media executives became a staple of Trump’s presentations.”); see also *Faking News*, *supra* note 44, at 11.

²³⁸ See Jones & Sun, *supra* note 6, at 10.

²³⁹ See, e.g., Martin Pengelly & Joanna Walters, *Trump Accused of Encouraging Attacks on Journalists with CNN Body-Slam Tweet*, THE GUARDIAN (July 2, 2017, 2:21 PM),

attitude toward the press of both the public and government officials influences the way in which reporters are treated. Recently, a reporter asking a question of a state political candidate was “body slammed” and physically hurt by the candidate; surprisingly, the candidate’s assault was minimized and the reporter’s attitude criticized by a troublesome number of people.²⁴⁰ When officials cannot tell the difference between activists and journalists covering protests, they respond by strong-arming the journalists as well.²⁴¹ This extends beyond political venues to academia as well; numerous stories recount the degree to which student journalists are harassed and excluded when covering campus protests.²⁴² To be sure, reporting in the United States is still significantly safer as a physical matter than in many places in the world—in which journalists are subject to threats, violence, physical harm, and death.²⁴³ Still, reports of physical altercations between government officials and journalists are deeply troubling.²⁴⁴

Beyond physical attacks, technology now permits the mobilization of human or bot mobs directing verbal attacks and threats at disfavored journalists.²⁴⁵ This is another example of increasingly effective harassment in response to speech, and it raises significant questions about a chilling effect on the press’s activity.

<https://www.theguardian.com/us-news/2017/jul/02/trump-body-slam-cnn-tweet-violence-reporters-wrestlemania>.

²⁴⁰ See, e.g., Michael Grynbaum, *A Journalist Was Body Slammed, but Some Conservatives Want the News Media to Apologize*, N.Y. TIMES (May 25, 2017), <https://www.nytimes.com/2017/05/25/us/journalist-body-slammed-republicans-apology-media.html>.

²⁴¹ See Jonathan Peters, *Journalists Arrested in DC Inauguration Protests Have Law On Their Side*, COLUM. J. REV. (Jan. 26, 2017), https://www.cjr.org/watchdog/journalist_arrested_inauguration_protest_felony.php.

²⁴² See Austin Huguely & Daniel Victor, *‘I Need Some Muscle’: Missouri Activists Block Journalists*, N.Y. TIMES (Nov. 9, 2015), <https://www.nytimes.com/2015/11/10/us/university-missouri-protesters-block-journalists-press-freedom.html>.

²⁴³ The Committee to Protect Journalists compiles attacks on the press. See *Attacks on the Press: 2017 Edition*, COMM. TO PROTECT JOURNALISTS <https://cpj.org/2017/04/attacks-on-the-press.php> (last visited Mar. 14, 2018); Elana Beiser, *Record Number of Journalists Jailed as Turkey, China, Egypt Pay Scant Price for Repression*, COMM. TO PROTECT JOURNALISTS (Dec. 13, 2017).

²⁴⁴ This is reminiscent of relations between government and journalists in countries with more authoritarian governments. Last summer, for example, persons in the employ of President Erdogan of Turkey beat up protesters picketing in front of a venue in Washington DC in which Erdogan was speaking.

²⁴⁵ See, e.g., Emma Green, *The Tide of Hate Directed at Jewish Journalists*, THE ATLANTIC (Oct. 19, 2016), <https://www.theatlantic.com/politics/archive/2016/10/what-its-like-to-be-a-jewish-journalist-in-the-age-of-trump/504635/> (describing anti-semitic tweet attacks).

D. Press Self-Censorship

It is doubtless the case that many journalists see this moment—when the press is under unprecedented attack by a sitting president—as an emboldening one. Indeed, it is precisely the cultivation of this attitude that this Article celebrates and recommends. At the same time, it would be naïve to believe that an economically burdened press, pressured by oligopolistic platforms on the one hand and unceasing threats by government officials on the other hand, would not step very gingerly into political quagmires. It is unsurprising, for example, that after a CNN story on Russian connections to Anthony Scaramucci was debunked as inaccurate, it was not enough for the three responsible reporters to tender their resignations.²⁴⁶ The rest of the team was purportedly taken off stories on potential ties between the Trump Administration and Russia.²⁴⁷ To be sure, a few examples like this do not unassailably reflect chill. Various national newspapers, like the *New York Times* and the *Washington Post*, have continued to report critically on the Trump Administration—indeed, to a degree that makes Trump supporters agree with the President that the Russia inquiry is no more than a “witch hunt.”²⁴⁸

Outside the strictly political and electoral contexts, there appears to be evidence that “the Gawker Effect”²⁴⁹ is leading to increased timorousness by news organizations regarding the publication of investigative stories.²⁵⁰ It was subsequently revealed that Hulk Hogan’s breach of privacy action against Gawker was bankrolled by Silicon Valley conservative billionaire Peter Thiel.²⁵¹ The \$140 million damage award in the case led to the bankruptcy and shuttering of Gawker.²⁵² Since that case, journalists report a significant increase in legal oversight of their investigative stories, and ultimate decisions to

²⁴⁶ See Ember & Grynbaum, *supra* note 89.

²⁴⁷ *Id.*

²⁴⁸ See, e.g., Mark Landler, *Trump, Citing a ‘Witch Hunt,’ Denies Any Collusion With Russia*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/us/politics/trump-back-on-twitter-complains-of-witch-hunt.html?mcubz=1>.

²⁴⁹ The “Gawker Effect” refers to the privacy lawsuit brought against Gawker Media by pro wrestler and entertainment personality Hulk Hogan over Gawker’s posting of a surreptitious sex video in which he appeared. See Levi, *supra* note 178; see also Margaret Sullivan, *That R. Kelly ‘Cult’ Story Almost Never Ran. Thank Hulk Hogan for That.*, WASH. POST (Jul. 30, 2017), https://www.washingtonpost.com/lifestyle/style/that-r-kelly-cult-story-almost-never-ran-thank-hulk-hogan-for-that/2017/07/30/19e1f8ea-72c5-11e7-8839-ec48ec4cae25_story.html?utm_term=.97013bc1bebe.

²⁵⁰ See Sullivan, *supra* note 249.

²⁵¹ See Levi, *supra* note 178.

²⁵² *Id.*

back away from stories of sexual misconduct in the music and entertainment industries.²⁵³ The possibility of ideologically motivated third party funding of lawsuits against the press must be perceived by news organizations as particularly threatening in an environment in which judges, juries and the public assess their processes with a jaundiced eye.²⁵⁴

Another worrisome aspect of the legal context concerns newspapers as litigation plaintiffs and law enforcers. Scholars have noted that current economic circumstances will likely significantly reduce newspapers' ability to serve as constitutional litigators and legal enforcers.²⁵⁵ The "new media" online are unlikely to step into the newspapers' historical role

²⁵³ See Sullivan, *supra* note 249 (quoting BuzzFeed's assistant general counsel as saying that "[t]here's a lot of uncertainty and fear out there, post-Gawker"); see also Kim Masters, *Fighting 'the Gawker Effect' in the Wake of Weinstein*, COLUM. J. REV. (Oct 13, 2017), https://www.cjr.org/first_person/amazon-roy-price.php (describing the numerous mainstream media organizations that refused to publish Masters' article on allegations of sexual impropriety involving Roy Price, the powerful head of Amazon Studios). Masters warned that

[i]n the wake of Hulk Hogan's successful lawsuit against Gawker, a case that essentially bankrupted the company, we seem to be at a point when the wealthy feel emboldened to try to silence reporters by threatening litigation even if they stand virtually no chance of winning. Some of the lawyers vetting my story expressed fears that even the weakest of legal claims could wind up being heard by a dangerously hostile judge or jury. Their usual caution seemed to have turned into very real fear.

Id. Masters' story was rejected by mainstream outlets and ultimately posted by the tech website The Information. *Id.* Unlike the R. Kelly story published by BuzzFeed, the Masters story on Roy Price at various points relied on unnamed sources. This suggests an increased risk-aversity with respect to publication of stories without sources willing to go on the record with their claims. This kind of attitude is likely to lead to particularly conservative reporting in the political context.

²⁵⁴ Charles Harder, the lawyer who represented Hulk Hogan in the lawsuit bankrolled by Peter Thiel, has threatened to sue the paper on behalf of Harvey Weinstein. See Masters, *supra* note 253. That the New York Times does not appear to have censored its coverage of Harvey Weinstein after it broke the story of the many sexual harassment assertions about him does not mean that the Gawker Effect does not lead to self-censorship by news organizations—and perhaps even by the New York Times in other contexts.

In addition to the likely chill portended by third party funding in press contexts, we can also predict a chilling effect on the press from aggressive litigation postures or boundary-pushing prosecutorial choices by government lawyers as well.

²⁵⁵ See Jones, *supra* note 222, at 559 ("For the past 100 years, newspapers and traditional media companies have played a critical role as legal instigators and enforcers." see also Jones & West, *supra* note 21, at 57. Jones and West note that "[s]truggling news organizations are . . . less able to afford to defend press freedoms in the courts or to lobby for favorable legislation." *Id.* see also Eric Newton, *A News Industry 'Less Able' to Defend Freedom*, KNIGHT FOUND. (Apr. 21, 2016), <https://knightfoundation.org/articles/news-industry-less-able-defend-freedom> ("Nearly two-thirds (65 percent) of the editors who responded rated the news industry as 'less able' to pursue legal activity around First Amendment-related issues than it was 10 years ago. A majority (53 percent) agreed with the statement, 'News organizations are no longer prepared to go to court to preserve First Amendment freedoms.'").

as litigant.²⁵⁶ The likely reduction in public interest First Amendment litigation undertaken by newspapers is principally attributable to the difficult financial circumstances in which newspapers find themselves. But increased risk-aversity toward litigation is doubtless also influenced by the increasing uncertainty of achieving press-protective results in litigation.

Ironically, press protection is at a low ebb doctrinally and in practice at the very moment that journalists need every tool in their arsenal to debunk “fake news” and revive their constitutional role. In fact, the insistence by the executive branch that the mainstream media should not be believed worsens the threat posed by “fake news.” By generating a narrative that delegitimizes real news and its purveyors as fake, and presiding over increasing instability in press protections, the Trump Administration adopts an approach that sacrifices not only the press, but also the public that is duped by real “fake news.”

III. SOLUTIONS TO THE PROBLEM OF “FAKE NEWS”?

The public discourse about how to deal with “fake news” generally seems to recommend technological solutions, audience empowerment solutions, and legal solutions. This Article as well follows that three-pronged convention, although it focuses in this Section specifically on platform technological experiments and audience media literacy suggestions. With respect to platforms, this Article calls for a reframing of the “fake news” problem to enhance the likely robustness of their self-regulatory efforts. With respect to audiences, it recommends granular engagement with empirical research in political science and cognitive psychology in order to enhance the likely effectiveness of information literacy programs.

With respect to legal solutions to the “fake news” problem, proponents domestically focus principally on regulating online intermediaries.²⁵⁷ This Article does not recommend mandatory regulations seeking to prohibit “fake news.” This is because there are reasons to suspect that self-regulation could lead to relatively equivalent results. Even if not required to do so, platforms are likely to adopt at least some of the kinds of technological and disclosure-focused solutions that would likely pass constitutional muster if adopted legislatively. Nor is legislation to prevent “fake news” beyond that likely to

²⁵⁶ Jones, *supra* note 222, at 561, 611–24.

²⁵⁷ See *infra* Section III.A.2.c.

be effective. Instead, the Article argues that affirmative legal intervention should be saved for something else. As is described in Section IV below, the Article argues that the adoption of legal and customary rules to privilege the press is more likely to stem the tide of the most dangerous type of “fake news” discourse than regulatory obligations potentially vulnerable to constitutional attack.

A. Platforms: Technological and Disclosure-Based Self-Regulatory “Fixes”

The major information platforms—such as Facebook and Google—are now engaged in attempts to curtail “fake news” technologically.²⁵⁸ With regard to technological fixes, this Article does not propose to second-guess the details of the various approaches being explored by Facebook’s software engineers. It does, however, recommend that, in addition to their recent “fake news”-curbing initiatives, social media platforms add sponsorship disclosure requirements to their ad sales contracts.²⁵⁹

In addition to platform technological initiatives, there is also scholarly experimentation with respect to developing computational methods and algorithmic tools to help in the identification and control of “fake news,”²⁶⁰ at least some in response to the Fake News Challenge competition.²⁶¹ The

²⁵⁸ See Balkin, *supra* note 25 (explaining the pressures put on such companies, by both governments (what he calls “new school” speech regulation) and end-users (what he calls “a feature of community governance”) to solve the problem of fake news).

²⁵⁹ Here I speak about sponsorship disclosure so that end-users can learn who has paid for the information they consume. But Balkin makes a broader point about transparency in this environment—that in today’s context of private speech governance, “due process becomes an increasingly important value.” *Id.*

²⁶⁰ See, e.g., Sebastian Tschiatschek et al., *Fake News Detection in Social Networks via Crowd Signals*, ARXIV (Nov. 24, 2017), <https://arxiv.org/pdf/1711.09025.pdf>; Jooyeon Kim, Behzad Tibbian et al., *Leveraging the Crowd to Detect and Reduce the Spread of Fake News and Misinformation*, ARXIV (Nov. 27, 2017), <https://arxiv.org/abs/1711.09918>.

For a collection of cites to initiatives attempting to tackle fake news, see Fergus Bell, *A Global Guide to Initiatives Tackling “Fake News”*, GLOBAL INVESTIGATIVE JOURNALISM NETWORK (May 8, 2018), <https://gijn.org/2017/05/08/a-global-guide-to-initiatives-tackling-fake-news/>.

²⁶¹ The Fake News Challenge describes itself as a “grassroots effort of over 100 volunteers and 71 teams from academia and industry around the world. Our goal is to address the problem of fake news by organizing a competition to foster development of tools to help human fact checkers identify hoaxes and deliberate misinformation in news stories using machine learning, natural language processing and artificial intelligence.” FAKE NEWS CHALLENGE, <http://www.fakenewschallenge.org/> (last visited Mar. 15, 2018) (“The goal of the Fake News Challenge is to explore how artificial intelligence technologies, particularly machine learning and natural language processing, might be leveraged to combat the fake news problem. We believe that these AI technologies hold promise

technology-focused approach has also now generated Civil, a fledgling experiment in blockchain-based journalism as a way to eliminate “fake news.”²⁶² For practical reasons having to do with the reach and power of the major communications platforms, the following Section principally focuses on Facebook.

1. Current Self-Regulatory Initiatives by Facebook

The code-based self-regulatory effort by the major platforms has various aspects and is evolving. Even though studies suggest that the largest volume of fabricated news during the 2016 election season was disseminated via Facebook, the company’s CEO Mark Zuckerberg initially denied both the extent of political misinformation distributed by Facebook and its likely impact on the election, calling the latter “a pretty crazy idea.”²⁶³ Zuckerberg also vehemently disputed the claim that Facebook was a media organization, consistently characterizing it as a technology company.²⁶⁴ This meant that Facebook saw itself simply as transmitting others’ speech, and not as having any kind of editorial or curatorial

for significantly automating parts of the procedure human fact checkers use today to determine if a story is real or a hoax.”).

²⁶² CIVIL, <https://joincivil.com/#who-are-you> (last visited Mar. 15, 2018); Ricardo Bilton, *Civil, The Blockchain-Based Journalism Marketplace is Building its First Batch of Publications*, NEIMAN: LAB (Oct. 25, 2017), <http://www.niemanlab.org/2017/10/civil-the-blockchain-based-journalism-marketplace-is-building-its-first-batch-of-publications/>.

It is beyond the scope of this Article to engage the argument that blockchain would, in one fell swoop, reverse the modern press’ woes with respect to both financing and “fake news.” Suffice it to say that the controversies over Bitcoin have shown that blockchain technology is still very early in its infancy, despite the hype, and that we are not yet in a position to address the issue with sufficient information. Moreover, even if the approach would be an economically effective alternative for advertising support for the press, its radically decentralized format raises questions about the downsides of eliminating the editorial and curatorial function in favor of individual contracting between readers and reporters. The institutional press has an important democratic value, and it is unclear how that would be leveraged in a blockchain journalism world.

²⁶³ See, e.g., Aarti Shahani, *Zuckerberg Denies Fake News on Facebook Had Impact on The Election*, NPR: ALL TECH CONSIDERED (Nov. 11, 2016), <http://www.npr.org/sections/alltechconsidered/2016/11/11/501743684/zuckerberg-denies-fake-news-on-facebook-had-impact-on-the-election> (quoting Zuckerberg); see also Dorf & Tarrow, *supra* note 12. For an extensive exploration of Zuckerberg’s initial and developing reactions to the issue, see Nicholas Thompson & Fred Vogelstein, *Inside the Two Years That Shook Facebook—and the World*, WIRED, Feb. 12, 2018 07:00 AM, <https://www.wired.com/story/inside-facebook-mark-zuckerberg-2-years-of-hell/>.

²⁶⁴ See, e.g., Jeff John Roberts, *Why Facebook Won’t Admit It’s a Media Company*, FORTUNE (Nov. 14, 2016), <http://fortune.com/2016/11/14/facebook-zuckerberg-media/>; Thompson & Vogelstein, *supra* note 263.

responsibility with respect to the information transmitted.²⁶⁵ Facebook took the position that it did not wish to be a censor or the arbiter of truth for society.²⁶⁶

Thereafter, under pressure as evidence of Russian election meddling via social media came increasingly to light, Facebook revised its approach toward “fake news.” The company became more active in attempting to reduce misinformation in three areas: disrupting economic incentives in the advertising space; calling out “fake news” in users’ news feeds; and helping provide tools for information literacy.²⁶⁷ With regard to advertising, Facebook announced steps to diminish the economic incentives for traffickers of misinformation, and decided to prohibit repeat offenders from advertising on the platform.²⁶⁸ Facebook has recently hired 1,000 additional employees to review and remove ads.²⁶⁹ In addition, to the extent that only a few sources generate much of the viral “fake news,” identifying those sources and engaging in a platform-based attempt to reduce promotion of information from those sources could reduce the distribution of “fake

²⁶⁵ See, e.g., Thompson & Vogelstein, *supra* note 263 (describing the history of Facebook’s self-perception as a platform and not a publisher).

²⁶⁶ Mark Zuckerberg Facebook Post, FACEBOOK (Nov. 12, 2016), <https://www.facebook.com/zuck/posts/10103253901916271>.

²⁶⁷ See Adam Mosseri, *A New Educational Tool Against Misinformation*, FACEBOOK: NEWSROOM (Apr. 6, 2017), <https://newsroom.fb.com/news/2017/04/a-new-educational-tool-against-misinformation/> (“At Facebook we have been focusing on three key areas: disrupting economic incentives because most false news is financially motivated; building new products to curb the spread of false news; and helping people make more informed decisions when they encounter false news.”) *see also Faking News*, *supra* note 44, at 29–40.

²⁶⁸ See Adam Mosseri, *Working to Stop Misinformation and False News*, FACEBOOK: NEWSROOM (Apr. 6, 2017), <https://newsroom.fb.com/news/2017/04/working-to-stop-misinformation-and-false-news/> (“When it comes to fighting false news, one of the most effective approaches is removing the economic incentives for traffickers of misinformation. We’ve found that a lot of fake news is financially motivated. These spammers make money by masquerading as legitimate news publishers and posting hoaxes that get people to visit their sites, which are often mostly ads. Some of the steps we’re taking include: Better identifying false news through our community and third-party fact-checking organizations so that we can limit its spread, which, in turn, makes it uneconomical . . . Making it as difficult as possible for people posting false news to buy ads on our platform through strict enforcement of our policies . . . Applying machine learning to assist our response teams in detecting fraud and enforcing our policies against inauthentic spam accounts . . . Updating our detection of fake accounts on Facebook, which makes spamming at scale much harder . . . [Making] updates so people see fewer posts and ads in News Feed that link to low-quality web page experiences . . . [Making] updates to address cloaking so that what people see after clicking an ad or post matches their expectations . . . [Making] an update in which repeat offenders that repeatedly share stories marked as false will no longer be allowed to advertise on Facebook.”).

²⁶⁹ Kurt Wagner, *Facebook is Hiring Another 1,000 People to Review and Remove Ads*, RECODE (Oct. 2, 2017, 11:00 AM), <https://www.recode.net/2017/10/2/16395342/facebook-mark-zuckerberg-advertising-policies-russia-investigation-election-moderators>.

news.”²⁷⁰ With regard to “helping people make more informed decisions,”²⁷¹ Facebook developed and disseminated educational tools for information literacy, inaugurated the Facebook Journalism Project to collaborate with news organizations in developing products to help journalists and citizens “make smart choices about what they read;”²⁷² and joined the News Integrity Initiative, “a global consortium focused on helping people make informed judgments about the news they read and share online.”²⁷³ In order to curb the spread of “fake news,” Facebook entered into partnerships with third-party fact-checking organizations—such as Snopes, PolitiFact, the Associated Press, and FactCheck.org—in order to fact-check shared news stories.²⁷⁴ The company announced, as part of a News Feed Update, that it would begin testing a “more info” button that users could click to obtain additional context about articles in their news feeds.²⁷⁵ Facebook has also promised to make available information to users indicating whether or not they followed Russian bot-generated “fake

²⁷⁰ See, e.g., Lazer et al., *supra* note 17.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.*; see also *Faking News*, *supra* note 44, at 64–69. Originally, Facebook sought to identify fact checker-identified false stories with a “disputed” label. In December 2017, however, Facebook announced that it would stop using the “disputed” tag on stories in light of its conclusion that the red “disputed” flag was actually counterproductive. See Catherine Shu, *Facebook Will Ditch Disputed Flags on Fake News and Display Links to Trustworthy Articles Instead*, TECHCRUNCH (Dec. 20, 2017), <https://techcrunch.com/2017/12/20/facebook-will-ditch-disputed-flags-on-fake-news-and-display-links-to-trustworthy-articles-instead/>; Sara Fischer, *Facebook Stops Putting “Disputed Flags” on Fake News Because it Doesn’t Work*, AXIOS (Dec. 27, 2017), <https://www.axios.com/facebook-drops-fake-news-flags-because-they-had-reverse-effect-2520310212.html>. Instead, Facebook said it would use “Related Articles” to provide context for fake news on the ground that this new strategy is likely to lead to fewer shares of fake news than the “disputed” flag. Fischer, *supra* (noting also that the company is “starting a new initiative to better understand how people decide what’s accurate based on the news sources they ‘[d]epend upon,’ or likely follow and engage with on Facebook.”); see also Shu, *supra* (on Facebook decision to show “Related Articles” or link to content from reputable publishers).

²⁷⁵ Andrew Anker, Sara Su & Jeff Smith, *News Feed FYI: New Test to Provide Context About Articles*, FACEBOOK: NEWSROOM (Oct. 5, 2017), <https://newsroom.fb.com/news/2017/10/news-feed-fyi-new-test-to-provide-context-about-articles/> (“For links to articles shared in News Feed, we are testing a button that people can tap to easily access additional information without needing to go elsewhere. The additional contextual information is pulled from across Facebook and other sources, such as information from the publisher’s Wikipedia entry, a button to follow their Page, trending articles or related articles about the topic, and information about how the article is being shared by people on Facebook. In some cases, if that information is unavailable, we will let people know, which can also be helpful context . . . Helping people access this important contextual information can help them evaluate if articles are from a publisher they trust, and if the story itself is credible. This is just the beginning of the test.”).

news” during the election period.²⁷⁶ More recently, the company announced that it would prioritize posts from friends and family (as opposed to media posts or posts from brands) in its News Feed.²⁷⁷ To mitigate possible increases in shared misinformation, Facebook also announced that it would ask users to identify trusted news sites and introduce “high quality” news into feeds.²⁷⁸

Other major information intermediaries have also announced their self-regulatory responses to the spread of disinformation online.²⁷⁹ And scholars have been generating a

²⁷⁶ See, e.g., Alex Hern, *Facebook to Tell Users if They Interacted with Russia's 'Troll Army'*, THE GUARDIAN (Nov. 23, 2017, 4:45 PM), <https://www.theguardian.com/technology/2017/nov/23/facebook-to-tell-users-if-they-interacted-with-russia-troll-army>.

²⁷⁷ Zuckerberg said that the point of the change was to shift back from passive consumption to engagement with personal posts that generate discussion. Mark Zuckerberg Facebook Post, FACEBOOK (Jan. 11, 2018), <https://www.facebook.com/zuck/posts/10104413015393571>.

²⁷⁸ Mark Zuckerberg Facebook Post, FACEBOOK (Jan. 19, 2018), <https://www.facebook.com/zuck/posts/10104445245963251>.

²⁷⁹ For example, Google, the predominant search engine, has announced changes to its search algorithm and the ways in which it presents results in order to combat “fake news.” Ben Gomes, *Our Latest Quality Improvements for Search*, GOOGLE: THE KEYWORD (Apr. 25, 2017), <https://www.blog.google/products/search/our-latest-quality-improvements-search/>; see also *Faking News*, *supra* note 44, at 40–48. Google representatives described the search engine update as blocking access to “offensive” sites and foregrounding more “authoritative content.” *Id.*; see also Alex Hern, *Google Acts Against Fake News on Search Engine*, THE GUARDIAN (Apr. 25, 2017, 10:00 AM), <https://www.theguardian.com/technology/2017/apr/25/google-launches-major-offensive-against-fake-news>; Danae Metaxa-Kakavouli & Nicolas Torres-Echeverry, *Google's Role in Spreading Fake News and Misinformation*, STANFORD LAW SCH.: LAW & POL'Y LAB (Oct. 2017), <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/11/SSRN-id3062984.pdf>. Google has also partnered with fact-checking groups to include links to their posts in Google News' story clusters and fact check labels in Google News articles. Frederic Lardinois, *Google's Fact Check Feature Goes Global and Comes to Google Search*, TECHCRUNCH (Apr. 7, 2017), <https://techcrunch.com/2017/04/07/fact-check-the-world-is-flat/>; see also Sheldon Burshtein, *The True Story on Fake News*, 29 INTELL. PROP. J. 397, 408–10 (2017); see also Heather Timmons, *Google Executives are Floating a Plan to Fight Fake News on Facebook and Twitter*, QUARTZ (Feb. 8, 2018), <https://qz.com/1195872/google-facebook-twitter-fake-news-chrome/> (describing possible notification system via Google's Chrome browser extension).

In addition to Google and Facebook, Twitter too has stated that it will try to fight fake news with “trust indicators.” See Seth Fiegerman, *Facebook, Google, Twitter to Fight Fake News with 'Trust Indicators'*, CNN: TECH (Nov. 16, 2017), <http://money.cnn.com/2017/11/16/technology/tech-trust-indicators/index.html>; see also *Faking News*, *supra* note 44, at 49–51.

Of the major social media players, it appears that Snapchat is the only one not to have a significant “fake news” problem. This is said to be due to Snapchat's structure. See Max Chafkin, *How Snapchat Has Kept Itself Free of Fake News*, BLOOMBERG (Oct. 26, 2017, 4:30 AM), <https://www.bloomberg.com/news/features/2017-10-26/how-snapchat-has-kept-itself-free-of-fake-news>.

variety of other code-based approaches to the identification and minimization of “fake news.”²⁸⁰

2. Assessing Platform Self-Regulation

How effective are these interventions likely to be? With respect to what kinds of “fake news”? Are there structural reasons to doubt them? Given the secrecy of the platforms’ processes and their proprietary algorithms, will there be adequate ways to assess the effectiveness of their efforts—or will we just have to trust in the accuracy of the platforms’ assurances? Even if platform initiatives will effectively reduce at least some types of harmful “fake news,” is it desirable to leave speech regulation to non-journalistic commercial platforms? Credible arguments can be made that Facebook’s “fake news” initiatives are either too good or not good enough.

a. Effectiveness

The likely effectiveness of self-regulation by these social media platforms is a complicated issue. On the one hand, their financial models rely on advertising and on scraping as much data as possible from the online activities of all their users to attract advertisers. Although Facebook will surely attempt to reduce the manipulation of its own platform for strategic political purposes, it still faces the imperatives of its own economic business model.²⁸¹ Some have argued that because virality (which increases profits for information intermediaries) is driven by emotional appeals and sensationalistic material rather than high-quality news reporting, entities like Facebook will have a fundamental ambivalence about their commitment to “fake news” reduction.²⁸² At a minimum, one could wonder

²⁸⁰ See, e.g., Verstraete, Bambauer, & Bambauer, *supra* note 42, at 28 (employing user feedback, fingerprinting known fake news items, source identification).

²⁸¹ The point has even been made in comedy, with the evil character Professor Chaos in a recent South Park episode saying, “I make money from Facebook for my fake content in order to pay Facebook to promote my fake stories.” Josh Constine, *South Park Slams Facebook for Selling Fake News*, TECHCRUNCH (Oct. 12, 2017), <https://techcrunch.com/2017/10/12/south-park-vs-zuckerberg/>; see also Thompson & Vogelstein, *supra* note 263 (on the economic rewards of sensationalistic content on social media). For a pessimistic view by an early Facebook investor about the possibility of effective self-regulation by the company for this reason, see Roger McNamee, *How to Fix Facebook—Before it Fixes Us*, WASH. MONTHLY (Jan./Feb./Mar. 2018), <https://washingtonmonthly.com/magazine/january-february-march-2018/how-to-fix-facebook-before-it-fixes-us/>.

²⁸² See, e.g., Josef Drex1, *Economic Efficiency Versus Democracy: On the Potential Role of Competition Policy in Regulating Digital Markets in Times of Post-Truth Politics*, in COMPETITION POLICY: BETWEEN EQUITY AND EFFICIENCY (forthcoming 2017) (manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2881191); see also Bell & Owen, *supra* note 147 (observing that “the structure and the economics of social

whether the platforms' cost/benefit calculus will prompt the most extensive and expensive efforts to reduce "fake news." After all, in light of the fact that they will never be able to eliminate "fake news" entirely and that both unsuccessful and semi-successful attempts will inevitably lead to harsh critique anyway, will the platforms have the incentive to invest maximally in trying to discipline "fake news" on social media?

Even without fundamental skepticism about the platforms' commitment to the reduction of misinformation online, it is obvious that self-regulatory models in which the platforms partner with other entities to check facts will best succeed if their partners are perceived as credible by readers. Are the fact-checking entities with which Facebook has partnered generally seen as credible? Studies suggest that there has been an uptick in the number of fact-checking organizations recently.²⁸³ At least some of them, however, have been characterized by the right-wing press as liberal propagandists,²⁸⁴ while others, such as the conservative *Weekly Standard*, Facebook's new fact-checking partner, have been attacked by liberals.²⁸⁵ In any event, because of the speed with which "fake

platforms incentivize the spread of low-quality content over high-quality material. Journalism with high civic value—journalism that investigates power, or reaches underserved and local communities—is discriminated against by a system that favors scale and shareability.”); Verstraete, Bambauer, & Bambauer, *supra* note 42, at 25 (describing some fake news as “a symptom of surveillance capitalism, the economic model underlying many Internet platforms that monetizes collecting data”); *see also* Farhad Manjoo, *Can Facebook Fix Its Own Worst Bug?*, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/magazine/can-facebook-fix-its-own-worst-bug.html?_r=0 (worrying about Facebook's ability to ignore the likes and dislikes of its users in order to address the pervasive climate of fake news when the whole basis of the social network is responsiveness to its users' likes and dislikes). A recent New America report, #Digitaldeceit, argues that “[t]he financial interests that drive the core technologies of the leading internet platforms and the objectives of disinformation campaigners are often aligned.”

²⁸³ *See, e.g.*, Michelle Ye Hee Lee, *Fighting Falsehoods Around the World: A Dispatch on the Growing Global Fact-checking Movement*, WASH. POST (July 14, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/07/14/fighting-falsehoods-around-the-world-a-dispatch-on-the-global-fact-checking-movement/?utm_term=.c8fe63144d6c.

²⁸⁴ *See, e.g.*, James Covert, *Facebook Under Fire for Picking 'Liberal' Outlets to Fact-check*, N.Y. POST (Dec. 16, 2016, 12:52 PM), <https://nypost.com/2016/12/16/facebook-under-fire-for-picking-liberal-outlets-to-fact-check/>; *see also* Guess, Nyhan, & Reifler, *supra* note 60 (study noting that fact-checking “may not effectively reach people who have encountered the false claims it debunks” and concluding that “[p]ositive views of fact-checking are less common among fake news consumers (48%), especially those who support Trump (24%)”).

²⁸⁵ Sam Levin, *Conservative Weekly Standard to Aid in Facebook Fact-Checks, Prompting Outcry*, THE GUARDIAN (Dec. 6, 2017, 4:07 PM), <https://www.theguardian.com/technology/2017/dec/06/facebook-weekly-standard-fake-news-fact-check> (“The Weekly Standard will be the first right-leaning news organization and explicitly partisan group to do fact-checks for Facebook, prompting backlash from progressive organizations, who have argued that the

news” can propagate on social media, it is very likely that fact checkers will find it difficult to provide real-time rebuttals. Recent reports suggest that Facebook fact-checkers themselves doubt the efficacy of the company’s initiative: “nearly a year after rolling out a new plan to fight misinformation, Facebook’s fact checkers are skeptical that their work is much more than hastily applied public-relations effort.”²⁸⁶

Social scientists have now publicized a new wrinkle—the “implied truth effect.”²⁸⁷ A recent study suggests that users who do not see a “disputed” label on an item of information on social media will therefore assume that the information must be true. Since fact-checking and “disputed” labeling can never be perfect in today’s information glut environment, the findings prompt the question whether “disputed” labeling can backfire—as Facebook itself concluded when it decided to switch away from such labeling recently.²⁸⁸

In addition, Facebook’s attempts to identify and isolate “fake news” purveyors is likely to become a game of whack-a-mole, or an arms race, as the identified websites morph to avoid identification. This means that the process will be an iterative one, requiring adaptation as “fake news” purveyors change their *modus operandi* in response to attempts to inhibit their success.²⁸⁹ Given Facebook’s blindness to past attempts to manipulate the platform,²⁹⁰ questions might be raised about likely competence going forward as well.

magazine has a history of publishing questionable content.”). *But see* Alexios Mantzarlis, *Conservative Websites Are Far More Likely to Attack Fact-Checkers Than Their Liberal Counterparts*, POYNTER, (June 8, 2017), <https://www.poynter.org/news/conservative-websites-are-far-more-likely-attack-fact-checkers-their-liberal-counterparts> (reporting earlier study).

²⁸⁶ Maya Kosoff, *Facebook’s Fact-Checkers Say They’re Little More Than a P.R. Ploy*, VANITY FAIR (Nov. 13, 2017, 5:37 PM), <https://www.vanityfair.com/news/2017/11/facebooks-fact-checkers-say-theyre-little-more-than-a-pr-ploy>.

²⁸⁷ Gordon Pennycook & David G. Rand, *The Implied Truth Effect: Attaching Warnings to a Subset of Fake News Stories Increases Perceived Accuracy of Stories Without Warnings* (Dec. 8, 2017) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3035384 (hypothesizing an “implied truth effect” in a study that found that “the presence of warnings caused untagged stories to be seen as more accurate than in the control.”).

²⁸⁸ See *supra* text accompanying note 274.

²⁸⁹ See Anderson & Rainie, *supra* note 21 (quoting Tom Rosenstiel: “Whatever changes platform companies make, and whatever innovations fact checkers and other journalists put in place, those who want to deceive will adapt to them. Misinformation is not like a plumbing problem you fix. It is a social condition, like crime, that you must constantly monitor and adjust to. Since as far back as the era of radio and before, as Winston Churchill said, ‘A lie can go around the world before the truth gets its pants on.’”).

²⁹⁰ For a description of how slow Facebook was to identify “fake news” manipulation, see Thompson & Vogelstein, *supra* note 263.

Moreover, recent changes to Facebook's News Feed have been contested by those who believe that a focus on posts that encourage engagement could amplify the spread of engagement-triggering hoaxes and conspiracy theories.²⁹¹ Even though Facebook has committed to the provision of "high quality" news to mitigate that possibility, its reliance on crowdsourcing source legitimacy from its users has been criticized.²⁹² And the deprioritization of news from media organizations might have "extinction-level" consequences for some small or niche news purveyors.²⁹³

A more optimistic narrative is also possible, however. Social media companies are doubtless sensitive to how their users and advertisers perceive them.²⁹⁴ To the extent that Facebook users feel manipulated by an onslaught of "fake news" on the platform, there is likely to be a dip in trust and a corresponding reputational impact on the company. In fact, several Facebook shareholders have attempted to use corporate law rules to recommend shareholder proposals requesting that Facebook report to the shareholders on the company's efforts to address the problem of "fake news."²⁹⁵ In addition to Facebook

²⁹¹ See, e.g., Matthew Ingram, *Facebook Changes Could Help the Media Kick its Algorithm Addiction*, COLUM. J. REV. (Jan. 12, 2018), <https://www.cjr.org/innovations/facebook-changes-news-feed.php>;

²⁹² See, e.g., Bernhard Clemm, *Facebook Wants Its Users to Drive out Fake News. Here's the Problem with That*, WASH. POST (Feb. 1, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/02/01/facebook-wants-to-drive-out-fake-news-by-having-users-rate-news-outlets-credibility-heres-the-problem-with-that/?utm_term=.5feb64a79ff1 (explaining that the "reliability of the 'trusted sources' measure is dubious, [because] people in superficial surveys of this kind often indicate trust in fake sources that have familiar and vaguely credible names [and because] partisan Facebook users with a high interest in promoting 'their' media could bias the results").

²⁹³ Matthew Ingram, *Facebook Changes Could Help the Media Kick its Algorithm Addiction*, COLUM. J. REV., (Jan. 12, 2018), <https://www.cjr.org/innovations/facebook-changes-news-feed.php> (quoting Mother Jones Senior Editor Ben Dreyfuss). Jonah Engel Bromwich & Matthew Haag, *Facebook Is Changing. What Does That Mean for Your News Feed?*, N.Y. TIMES (Jan. 12, 2018), <https://www.nytimes.com/2018/01/12/technology/facebook-news-feed-changes.html> (describing impact on brands and publishers).

²⁹⁴ It is instructive in this regard that Google's parent company, Alphabet, recently identified fake news as a reputational business risk. Jillian D'Onfro, *Google Now Lists Fake News and 'Objectionable Content' as Risks to its Business*, MSN (Feb. 6, 2018, 3:23 PM), <https://www.msn.com/en-us/money/technologyinvesting/google-now-lists-fake-news-and-objectionable-content-as-risks-to-its-business/ar-BBIMTqe>; see also Renee DiResta, *There are Bots. Look Around.*, RIBBONFARM (May 23, 2017), <https://www.ribbonfarm.com/2017/05/23/there-are-bots-look-around/> ("Becoming hosts of unchecked disinformation campaigns negatively impacts the three things businesses care most about: top line revenue, downstream profit, and mitigating risk. It will ultimately destroy the value of their networks.").

²⁹⁵ Amy Lee Rosen, *Shareholders Demand Google and Facebook Report on Fake News Policies*, CONG. QUARTERLY, (Feb. 3, 2017), 2017 WL 460653. But see Hasen, *supra* note 10, at 227 (noting that shareholder activism has thus far been unsuccessful).

users, brands that have advertised on Facebook have their own reputations to consider. Such advertisers have been increasingly vocal in refusing to have their ads run next to objectionable content.²⁹⁶ In order to retain such advertisers, Facebook has economic incentives to tweak its programmatic ad-buying algorithms to reduce the likelihood of embedding brands' ads in “fake news” or other commercially undesirable content. Furthermore, to the extent that social bots play a significant role in the dissemination of “fake news” soon after it is published, attempts to reveal and thus curb bot accounts might be a useful step in tackling the “fake news” problem.²⁹⁷

Another, more inchoate, element is the question of personal commitment to improvement on the part of the new platform lords. For example, media reports suggest that Facebook's Zuckerberg, after an initial period of denial about Facebook's role in political discourse, has revised his “personal techno-optimism” and made a personal commitment that Facebook “fix the problems swirling around it[.]”²⁹⁸ Arguably, Facebook's decision knowingly to adopt a News Feed strategy that would lead users to leave Facebook and have a downward impact on the company's share price²⁹⁹ indicates a more serious commitment to experimenting with ways to contain “fake news” and improve discourse online.³⁰⁰ At a minimum, the fact that the new media landscape is dotted with billionaire saviors³⁰¹ should prompt an expanded and more complex analysis of corporate incentives.

²⁹⁶ See, e.g., Sapna Maheshwari, *Facebook Moves to Keep Ads From Running on Objectionable Videos*, N.Y. TIMES (Sept. 13, 2017), https://www.nytimes.com/2017/09/13/business/media/facebook-ads.html?_r=0.

²⁹⁷ See Shao et al., *supra* note 54.

²⁹⁸ Thompson & Vogelstein, *supra* note 263.

²⁹⁹ Zuckerberg Facebook Post, *supra* note 278 (describing projected impact on time spent by users on Facebook); Edoardo Maggio & Matt Weinberger, *Facebook's Stock is Dropping After it Announced That it's Making Big Changes to its News Feed*, BUS. INSIDER (Jan. 12, 2018 7:01 AM), <http://www.businessinsider.com/facebook-stock-dropping-following-news-feed-announcement-of-the-changes-its-making-to-the-news-feed-2018-1> (describing impact on stock).

³⁰⁰ The point here is not to laud or criticize any of the particular approaches Facebook has been taking with respect to the proliferation of “fake news.” Nor is it to suggest that Zuckerberg's expressed commitments are entirely altruistic and unrelated to promoting long-term profit-maximizing business and legal strategies. It is to argue that allowing for—and studying the results of—such experimentation could bear some fruit in the “fake news” containment strategy.

³⁰¹ See Ryan Chittum, *Jeff Bezos' Landmark Purchase of the Washington Post*, COLUM. J. REV. (Aug. 5, 2013), https://archives.cjr.org/the_audit/jeff_bezos_landmark_purchase.php (“We've now officially entered the Billionaire Savior phase of the newspaper collapse—for good or ill.”); see also Alex Pareene, *Billionaires Gone Wild*, COLUM. J. REV. (Winter 2018), https://www.cjr.org/special_report/rich-journalism-media.php (criticizing a media landscape operating pursuant to the whims of the new “press barons”).

With respect to its new approach to the News Feed, Facebook may be attempting to shift from a strategy of prohibiting “fake news” as such to a strategy designed to crowd out “fake news” through personalized sharing of high quality, trusted content.³⁰² Such an approach might be more effective than a directly prohibitive approach if Facebook develops user surveys designed to assess user trust in a granular and sophisticated way.³⁰³ For example, questions that seek to determine the basis of user trust—whether the user trust is based on content or aligned political/ideological commitments or group identity or emotional reactions—could provide a rich picture of what sources are trusted and why. As has already been noted, the “trusted sources” metric’s dangers could be neutralized by “adjusting for the absolute level of familiarity.”³⁰⁴ It is not impossible that the wisdom of the crowd—if carefully collected and intelligently analyzed—could provide a path to better quality information on social media.

Facebook’s News Feed modification might also have some beneficial effects on publishers.³⁰⁵ Shifting some news consumption directly to publishers themselves might offer the possibility of enhanced reputational branding by press outlets.³⁰⁶ Moreover, as the new Facebook News Feed strategy reduces

³⁰² See Thompson & Vogelstein, *supra* note 263 (“For the past year, Facebook has been developing algorithms to hammer publishers whose content is fake; now it’s trying to elevate what’s good.”).

³⁰³ Of course, this would not be the case if Facebook simply used the two question survey that the company is reportedly proposing to use in assessing its users’ trust in news sources. See Shan Wang, Facebook’s trust survey, which will help determine News Feed ranking, is two questions. But it’s not as simple as it sounds. NIEMANLAB (Jan. 25, 2018 12:25 PM), <http://www.niemanlab.org/2018/01/facebooks-trust-survey-which-will-help-determine-news-feed-ranking-is-two-questions-but-its-not-as-simple-as-it-sounds/> (describing the survey and the fact that responses will be used in conjunction with other user data). Moreover, if Facebook continues to eschew any role in making editorial decisions—either because the company is afraid of being accused of leftward bias, see Thompson & Vogelstein, *supra* note 263, or because it does not want to become the world’s most powerful censor, see Samidh Chakrabarti, *Hard Questions: What Effect Does Social Media Have on Democracy?*, FACEBOOK: NEWSROOM (Jan. 22, 2018), <https://newsroom.fb.com/news/2018/01/effect-social-media-democracy/> (“[W]e don’t want to be the arbiters of truth”)—it might be difficult to ensure that high quality news will in fact crowd out the junk news that undermines democracy.

³⁰⁴ Clemm, *supra* note 292.

³⁰⁵ Reportedly, Facebook is “experimenting with giving publishers more control over paywalls and allowing them to feature their logos more prominently to reestablish the brand identities that Facebook flattened years ago.” Thompson & Vogelstein, *supra* note 263.

³⁰⁶ Admittedly, that may be better news for “traditional news brands than for digital-native ones.” Joshua Benton, If Facebook Stops Putting News in Front of Readers, Will Readers Bother to go Looking for It?, NIEMANLAB (Jan 12, 2018, 12:00 PM), <http://www.niemanlab.org/2018/01/if-facebook-stops-putting-news-in-front-of-readers-will-readers-bother-to-go-looking-for-it/>.

publishers’ incentives to tailor their news content to the ad-supported, click-based model that makes Facebook tick, they may recommit to an exploration of the kind of serious journalism that promotes democracy and the public interest.³⁰⁷

Given that total elimination of “fake news” on social media is an unattainable goal, Facebook representatives have claimed relative success. For example, Facebook recently asserted that it had successfully minimized the dissemination of misinformation during the German election of late September 2017.³⁰⁸ Previously, the company had employed various initiatives to reduce the dissemination of false information during the most recent French election and the U.K.’s Brexit vote.³⁰⁹ Facebook has also claimed that “future impressions on stories labeled false by third-party fact checkers dropped by 80 percent—ostensible proof that its fact-checking system works,

³⁰⁷ See Jason Koebler, *Facebook is Deprioritizing Our Stories. Good.*, MOTHERBOARD (Jan. 11, 2018, 9:32 PM), https://motherboard.vice.com/en_us/article/zmqgn4/facebook-algorithm-news-feed-change. The question of how to fund excellence in journalism in today’s economic climate is beyond the scope of this Article. Several possibilities can be mentioned, however. There has been a move toward paywalls of various kinds for digital media, and Facebook has recently changed its algorithms to recognize publisher paywalls. See Thompson & Vogelstein, *supra* note 263; Natalie Jarvey, *Facebook to Launch Publisher Paywalls*, VIDEO NEWS SECTION, HOLLYWOOD REPORTER (Feb. 12, 2018), <https://www.hollywoodreporter.com/news/facebook-launch-publisher-paywalls-video-news-section-1084144>. Suggestions to create incentives for subscriptions in the U.K. include tax deductions for media subscriptions. Amanda Meade, *Journalism Inquiry Recommends Tax Deductions for News Media Subscriptions*, THE GUARDIAN (Feb. 5, 2018 10:44 PM), <https://www.theguardian.com/media/2018/feb/06/journalism-inquiry-recommends-tax-deductions-for-news-media-subscriptions>. In addition, Rupert Murdoch recently proposed that Facebook pay publishers for use of their trusted content (along a cable television carriage model). Press Release, Statement of Rupert Murdoch, Executive Chariman of News Corp, on a Carriage Fee for Trusted Publishers (Jan. 22, 2018), <https://newscorp.com/2018/01/22/statement-of-rupert-murdoch-executive-chairman-of-news-corp-on-a-carriage-fee-for-trusted-publishers/>; Maya Kosoff, *Rupert Murdoch to Mark Zuckerberg: Shut Up, Pay Me*, VANITY FAIR (Jan. 22, 2018, 6:38 PM), <https://www.vanityfair.com/news/2018/01/rupert-murdoch-to-mark-zuckerberg-shut-up-pay-me>. A recent news report suggests that Facebook would not be unalterably opposed to such a scheme. Kurt Wagner & Theodore Schleifer, *Here Are the Ways Facebook Said it’s Trying to Help Publishers*, RECODE (Feb. 12, 2018, 8:23 PM), <https://www.recode.net/2018/2/12/17005058/facebook-help-publishers-news-feed-algorithm-campbell-brown-adam-mosseri-code-media> (“[F]acebook would not rule out paying publishers for content.”).

³⁰⁸ See Jeremy Kahn, *Facebook Touts Success in Fighting Fake News in German Election*, BLOOMBERG (Sept. 27, 2017, 1:53 PM), <https://www.bloomberg.com/news/articles/2017-09-27/facebook-touts-success-fighting-fake-news-in-german-election>.

³⁰⁹ See, e.g., Natasha Lomas, *Google and Facebook Partner for Anti-fake News Drive During French Election*, TECHCRUNCH (Feb. 6, 2017), <https://techcrunch.com/2017/02/06/google-and-facebook-partner-for-anti-fake-news-drive-during-french-election/>.

albeit not perfectly.”³¹⁰ Admittedly, Facebook’s partner fact-checking organizations complain that a lack of transparency by the company makes it difficult for them to assess accurately whether their fact-checking is in fact having a measurable impact on the dissemination of disinformation on Facebook.³¹¹ And a recent unpublished working paper by Pennycook and Rand suggests that while tagging news stories as disputed led to a reduction in their perceived accuracy, the effect was “modest.”³¹² Still, other studies reveal more optimistic results,³¹³ suggesting that more work needs to be done.

Nevertheless, although success is uncertain,³¹⁴ and although the very structure of the social media platforms’ economic model exerts counter-pressures, there are at least two reasons to believe that the platforms will take the effort seriously. First, such initiatives are taking place very much in the public eye and against a backdrop of both domestic and global regulatory interventions.³¹⁵ Second, if the “fake news” problem is understood not just as a problem for democracy,³¹⁶ but as an economic problem for markets as well, there may be more consistent commercial as well as consumer pressure on the platforms to persevere with self-regulatory efforts. The

³¹⁰ Kosoff, *supra* note 286. *But see* Guess, Nyhan, & Reifler, *supra* note 60 (disputing effectiveness of fact-checking during U.S. presidential election contest).

³¹¹ *See* Kosoff, *supra* note 286.

³¹² Pennycook & Rand, *supra* note 287.

³¹³ *See, e.g.*, Brendan Nyhan, *Why the Fact-Checking At Facebook Needs to be Checked*, N.Y. TIMES (Oct. 23, 2017), <https://www.nytimes.com/2017/10/23/upshot/why-the-fact-checking-at-facebook-needs-to-be-checked.html> (reporting findings that “the effects of Facebook-style ‘disputed’ banners on the perceived accuracy of false headlines are larger than those Mr. Pennycook and Mr. Rand observed. The proportion of respondents rating a false headline as ‘somewhat’ or ‘very accurate’ in our study decreased to 19 percent with the standard Facebook ‘disputed’ banner, from 29 percent in the unlabeled condition. It goes down even further, to 16 percent, when the warning instead states that the headline is ‘rated false.’”).

³¹⁴ *See, e.g.*, Anderson & Rainie, *supra* note 21 (reflecting split on experts’ views on the tractability of the fake news problem).

³¹⁵ *See, e.g.*, Thompson & Vogelstein, *supra* note 263 (describing Facebook’s sensitivity to the prospect of regulation).

³¹⁶ Casting the problem as principally one for democracy can enable business corporations (advertisers and otherwise) which are wary of seeming to take partisan political positions to sit out the political “fake news” brouhaha and simply leave policing to the platforms. That might be the case for government officials as well, particularly those concerned about being seen as engaging in censorship. Those who believe that their political fortunes would be enhanced by seeming to act to control “fake news” might propose regulatory moves unlikely to pass constitutional muster. And focusing on the audience—suggesting that the only true solution to the “fake news” problem is information literacy by the electorate—would surely be seen as an attractive way of diminishing responsibility for other participants in the dissemination of “fake news.” To the extent that “fake news” is cast as an exclusively political problem, then, many information market participants might be tempted to mouth platitudes about the democratic dangers of the phenomenon while doing very little as a practical matter.

existence of multiple nodes of pressure could be useful in promoting serious attempts to tackle the problem. “Fake news” today—and, more worryingly, tomorrow—is likely to disrupt not only elections and governments, but also markets. A clear recognition of that reality might help put pressure on the platforms and the rest of corporate America to engage the problem of “fake news” with seriousness.

b. Desirability

The reality of the platforms’ “fake news” initiatives makes almost irrelevant the question whether we *should* “outsource” the solution to our most important democratic challenge to private companies with no governmental nor fiduciary duties to the public and whose efforts are likely to be shrouded from public view. Still, we might worry, in characterizing themselves not as media companies but as simple transmitters or disseminators of information, social media platforms have told us a fundamental truth about their origin stories and their commitments. They did not rise from a journalistic past; they do not hew principally to journalistic values; they do not see themselves as the guarantors of an important constitutional tradition.³¹⁷ Using algorithms injects the issue of hidden skews and censorship.³¹⁸ Algorithmic decision making outsources gatekeeping and censorship to AI-powered filters whose decision making is neither transparent nor accountable.³¹⁹ And, as suggested by the story that Facebook employees admitted to routine suppression of conservative news last year,³²⁰ human involvement may have negative consequences—including implicit bias.

Of course, the imperfection of platform self-regulation begs the question “compared to what”? Could direct attempts

³¹⁷ See Bell & Owen, *supra* note 147.

³¹⁸ Recently, progressive news outlets have criticized the platforms’ efforts to reduce “fake news” on the ground that the adjusted algorithm in fact has significantly reduced web traffic to progressive and radical news sites. See, e.g., Don Hazen, *Google’s Threat to Democracy Hits AlterNet Hard*, ALTERNET (Sept. 28, 2017, 9:49 AM), <https://www.alternet.org/media/editorial-googles-threat-democracy-hits-alternet-hard> (referencing negative impact on AlterNet and dozens of other left-leaning or radical outlets); see also Bell & Owen, *supra* note 147.

³¹⁹ See Bell & Owen, *supra* note 147.

³²⁰ See, e.g., Michael Nunez, *Former Facebook Workers: We Routinely Suppressed Conservative News*, GIZMODO (May 9, 2016, 9:10 AM), <https://gizmodo.com/former-facebook-workers-we-routinely-suppressed-conser-1775461006>; see also Julia Angwin & Hannes Grasseger, *Facebook’s Secret Censorship Rules Protect White Men from Hate Speech But Not Black Children*, PROPUBLICA (Jun. 28, 2017, 5:00 AM), <https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms> (discussing Facebook’s rules for deciding when content should be disallowed on the platform).

by government to censor “fake news” be worse, if President Trump’s war against the press is an object lesson?³²¹ Would legislation be able to neutralize the concerns about private censorship, given that the platforms would have to operationalize the regulations anyway? Is it likely that even with direct government regulation, the increasingly central information intermediaries would not be pressed into modes of what Balkin has called “new school” speech regulation?³²² We should not imagine an ideal world in making policy choices.

In light of doubts about platform self-regulation, perhaps the platforms’ inability to eliminate “fake news” might in fact be a feature, not a bug.³²³ Even if self-regulatory efforts could be effective, an expansive metric for effectiveness in this context would be undesirable. Successful attempts to eliminate “fake news” completely would inevitably be overinclusive, censoring much content that should still be part of the public conversation.³²⁴ And to the extent that observers could identify when platform self-regulation appeared to be leading to skews, publicity could have corrective effects.³²⁵

One reason to have some hope in the self-regulation model is that the process of attempting to tackle “fake news” can make it difficult for the platforms to deny the fundamental editorial role they have adopted. A recognition of their role as media companies can trigger more serious attention to journalistic norms. As Jack Balkin has put it, the increasingly elaborate private governance of speech

is by no means guaranteed to be free speech
friendly. From the standpoint of free speech

³²¹ But see Julie Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. (forthcoming 2017).

³²² Balkin, *supra* note 25; Jack Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296 (2014).

³²³ It is in that sense that I worry about the suggestion that the platforms affirmatively take on the role of directly and explicitly taking positions about fake news stories. See Verstraete, Bambauer, & Bambauer, *supra* note 42, at 30–31 (arguing for an extension of Morozov’s alerting model and asking them to “leverage[e] their credibility against fake news). Should Facebook put itself in the position of being a truth arbiter, especially as it sees itself as a tech company rather than a press organ? Verstraete et al. recognize the drawbacks to such a proposal. *Id.* at 31–2.

³²⁴ PEN America has recently made a similar argument. See *Faking News*, *supra* note 44.

³²⁵ For example, publicity about the reduction of web traffic to progressive news sites as a result of algorithmic tinkering could lead to negotiations with Facebook and potentially helpful revisions to the relevant algorithms. Admittedly, this is an optimistic interpretation, but it is one grounded on the importance to Facebook of its reputation with its users and advertisers. Admittedly, the effectiveness of the consumer-irritation constraint depends to a great extent on whether there are other competitive options to which users can switch.

values, the best solution would be for large international infrastructure owners and social media platforms to change their self-perception. Ideally, they would come to understand themselves as a new kind of media company, with obligations to protect the global public good of a free Internet, and to preserve and extend the emerging global system of freedom of expression. Defenders of democratic values should work hard to emphasize the social responsibilities of digital infrastructure companies and help them both to understand and to accept their constitutive role in the emerging global public sphere.³²⁶

Such social responsibilities suggest the need for enhanced transparency—both with respect to disclosures about disseminated content and disclosures about the platforms’ own processes.³²⁷ For example, including sponsorship disclosure requirements for political advertising purchasers might help put the brake on some fabricated news viralization. By analogy, the Federal Communications Act requires the disclosure of the identities of purchasers of political airtime.³²⁸ Even if there were legal roadblocks to adopting such a disclosure regime legislatively, voluntary adoption should present far less of a

³²⁶ Balkin, *supra* note 256.

³²⁷ Admittedly, transparency with respect to Facebook’s own algorithms presents a complicated question. On the one hand, enhanced transparency could help outside observers analyze platform activities both as to effectiveness and as to unexpected consequences—thereby supporting accountability. See *Faking News*, *supra* note 44 (suggesting the need for greater transparency). On the other hand, both economic competitiveness concerns and concerns about not revealing too much information to strategic agents attempting to end-run platform initiatives suggests that platforms like Facebook will not willingly embrace radical algorithmic transparency. But short of that, public pressure can increase the scope of what the platforms make public. And they have begun committing to some kinds of transparency already, as noted in text. See Balkin, *supra* note 25 (framing of transparency obligations for platforms as akin to “due process”). Former FCC Chair Tom Wheeler has recently suggested, as a middle-ground approach, that social media platforms be required to adopt an open application software interface enabling third parties to build software to monitor the results of social media algorithms. Tom Wheeler, *How to Monitor Fake News*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/opinion/monitor-fake-news.html> (arguing that an open application programming interface would “threaten neither a social media platform’s intellectual property nor the privacy of its individual users” while allowing third party monitoring).

³²⁸ For a discussion of political ad disclosure requirements for broadcasting, see Lili Levi, *Plan B for Campaign Finance Reform: Can the FCC Help Save American Politics After Citizens United?* 61 CATH. L. REV. 97 (2011).

problem. Mark Zuckerberg has already publicly promised enhanced Facebook disclosures, as has Twitter.³²⁹

To be sure, the disclosure recommendation will raise the usual questions about the effectiveness of disclosure regimes.³³⁰ Still, there is reason to suspect that disclosure is actually likely to be effective in the “fake news” context, where anonymity is one element in hiding attempts to manipulate people’s opinions. Whatever the justifications for permitting anonymous speech in a First Amendment regime, strategic uses of “fake news” to manipulate vulnerable audiences cannot reasonably be included among them. A deeper problem may be a practical obstacle to effectiveness of such disclosure requirements. This is because of the ever-present likelihood that strategic “fake news” purveyors will find ways to game such disclosure requirements, *inter alia* by using corporate shells and anodyne-sounding group names or avoiding explicit ad buys as such. Requiring the platforms to search further, behind the names, to identify those “really” responsible for the content would present both practical and doctrinal difficulties. Nevertheless, news organizations and other third party entities can help unearth the true identities of strategic buyers of “fake news” spots (as, for example, they did with respect to the Kremlin connections of the shadowy Russian groups paying to post anti-Clinton ads on Facebook). There is also an argument that beyond obviously fabricated factual matter, the breadth of the notion of “fake news” is such that it would be difficult to distinguish among different kinds of “fake news.” Be that as it may, a general disclosure requirement for the purchases of political ads would not require the platforms to make such fine distinctions.³³¹

³²⁹ See, e.g., Alex Heath, *Twitter Says It Will Make All Its Ads Public, And Share Who is Behind Them*, BUS. INSIDER (Oct. 24, 2017, 4:00 PM), <http://www.businessinsider.com/twitter-will-make-all-ads-public-share-how-they-are-targeted-2017-10>.

³³⁰ For cites to disclosure skeptics and an argument for corporate-level disclosure in native advertising contexts, see Levi, *supra* note 153.

³³¹ To be sure, one of the difficulties in this area is that identifying a post as a political ad is likely to be problematic, at least on the margins. In other words, as evidenced by some of the pro-Trump ads purchased on Facebook by Russian interests, the content may not specifically name a political candidate and may just consist of policy recommendations or observations consistent with one or another candidate’s platform. Even though this is a real limitation for the disclosure approach, this Article does not claim that sponsorship disclosure is a cure-all with respect to “fake news” writ large. The fact that there will be “fake news” ads which sponsorship disclosure will not reveal does not mean that we should abandon the beneficial effects of sponsorship disclosure in the numerous situations in which it might be helpful.

c. *Regulatory Possibilities*

Self-regulatory efforts are often undertaken in the shadow of, and to forestall, possible regulatory creep.³³² Unsurprisingly, “fake news” has generated calls for reform from people spanning the political spectrum.³³³ Proposals range from state legislation prohibiting “fake news,” to pending federal legislation requiring sponsorship disclosure, and to a variety of scholarly recommendations for legal responses to “fake news.”

Domestically, a number of states have considered or passed laws seeking to prohibit false statements in political campaign speech.³³⁴ New federal legislation attempting to curb “fake news” is in the offing: John McCain recently joined Democratic Senators Warner and Klobuchar in introducing the Honest Ads Act, a bill that would, *inter alia*, extend FEC disclosure regulations for political ads to Internet ads.³³⁵

Scholars have argued that the platforms’ approach to “fake news” could be regulated pursuant to election law.³³⁶ There has also been discussion of expanded administrative regulation by the Federal Trade Commission (FTC),³³⁷ which has extensive jurisdiction to regulate deceptive practices and has already shut down “fake news” sites in commercial

³³² See, e.g., Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711 (1999) (on self-regulation in broadcasting).

³³³ Admittedly, the “fake news” charge has been deployed more consistently by conservatives against what they take to be the partisanship and liberal slant of the mainstream media (such as the broadcast networks, CNN, national newspapers such as the New York Times and the Washington Post). But liberals as well have been criticizing conservative outlets for peddling “fake news.” Moreover, both liberals and conservatives deploy the “fake news” trope when they are trying to make a point about political slant, rather than mere factual fabrication. It seems likely that both conservatives and liberals would dislike “fake news” as factual fabrication (even if they did not agree as to its salience in electoral politics).

³³⁴ See Catherine Ross, *Ministry Of Truth: Why Law Can’t Stop Prevarications, Bullshit, And Straight-Out Lies In Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 383-88 (2018) (discussing legislation in 16 states to prohibit lies in campaign speech). The Supreme Court has not opined on the constitutionality of such legislation. (The Court only addressed justiciability in *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014), which involved the Ohio legislation of this kind). “Lower and state courts have regularly overturned state campaign deception statutes.” Ross, *supra*.

³³⁵ See, e.g., Byron Tau, *Proposed “Honest Ads Act” Seeks More Disclosure About Political Ads*, WALL ST. J. (Oct. 19, 2017, 5:12 PM), <https://www.wsj.com/articles/proposed-honest-ads-act-seeks-more-disclosure-about-online-political-ads-1508440260>; see also Balkin, *supra* note 25 (arguing that the First Amendment should not be read to preclude regulation of information intermediaries in connection with algorithmic nuisances). The Honest Ads Act would amend the Federal Election Campaign Act of 1971.

³³⁶ See, e.g., Hasen, *supra* note 10, at 220–21.

³³⁷ See, e.g., Verstraete, Bambauer, & Bambauer, *supra* note 42 (discussing and questioning suggestion that the FTC could regulate fake news under its statutory authority).

contexts. As the FCC has reportedly been receiving complaints of “fake news” from television watchers,³³⁸ there may also be an analogy in the Federal Communications Commission (FCC)’s news distortion and hoax regulations.³³⁹ A number of scholars have also recommended varying degrees of roll-back for the social media platforms’ immunity from liability under Section 230 of the Communications Decency Act for content they simply transmit and do not operate or control.³⁴⁰ Other legal approaches focus on attentive enforcement of already-existing individual causes of action, such as defamation actions against “fake news” providers.³⁴¹ Still others focus on constitutional

³³⁸ Jonathan Peters, *TV Viewers Have Been Sending ‘Fake News’ Complaints to the FCC*, COLUM. J. REV. (Apr. 12, 2017), https://www.cjr.org/united_states_project/tv-viewers-have-been-sending-fake-news-complaints-to-the-fcc.php. The agency operates under the extremely broad statutory mandate of regulating in the “public interest, convenience and necessity.” Pursuant to its broad statutory powers, the Commission adopted a policy regulating news distortion in the broadcast medium.

³³⁹ For discussions of the FCC’s news distortion policy and its limits, see Lili Levi, *Reporting the Official Truth: The Revival of the FCC’s News Distortion Policy*, 78 WASH. U. L. Q. 1005 (2000); see also Chad Raphael, *The FCC’s Broadcast News Distortion Rules: Regulating By Drooping Eyelid*, 6 COMM. L. & POL’Y 485 (2001).

³⁴⁰ See, e.g., Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans Section 230 Immunity* (Univ. Md. Legal Studies Research Paper No. 2017–22, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007720; see also Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 1 (2017). This is contested territory. In addition to questions about what precise benefits would likely flow with respect to “fake news” by a repeal of immunity, recent scholarship suggests that limiting immunity would inhibit some viable attempts to combat “fake news” (such as through crowd-sourced presentation of accurate information via platforms such as Wikimedia). See, e.g., Jacob Rogers, *Wikipedia and Intermediary Immunity: Supporting Sturdy Crowd Systems for Producing Reliable Information*, 127 YALE L.J.F. 358 (2017). The *Identifying and Countering Fake News* report also took the position recently that we should consider expanding legal protections for Internet platforms, rather than reducing such immunities, to encourage them to pursue editorial functions. Verstraete, Bambauer, & Bambauer, *supra* note 42, at 22–23.

³⁴¹ Thus, for example, and depending on the content of the statement, the subject of a fake news report might be able to sue the fake news creator for defamation. See generally David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1 (2017) (providing a bird’s eye view of various possible legal claims, including defamation). The traditional defamation lawsuit is unlikely to have much of a constraining effect on fake news, however. First, many fake news items are couched in language that would skirt liability under state defamation laws. This can be because the claims are unlikely to be deemed defamatory, or because the speaker can claim protection under the constitutional privilege that requires the plaintiff to prove actual malice on the part of the speaker. Second, at least some of the originators of even defamatory fake news are not in the United States and are not subject to the jurisdiction of the US courts. Third, individual lawsuits, even if possible, are expensive to wage. It would be unrealistic to expect individuals with limited means to serve as the front guard of society’s efforts to stop the widespread problem of fake news. In any event, the defamation suit would not undo the harm of the original statement; it would simply offer the plaintiff damages, if successful. Fourth, the true harm of any item of fake news is accomplished by its dissemination and amplification. The problem is that Section 230 of the Communications Decency Act appears to protect those information intermediaries that effectuate that

challenges to government actors’ incitement of violence and discrimination to silence counterspeakers.³⁴²

It is beyond the scope of this Article to address these regulatory possibilities in any depth.³⁴³ It should be noted that the United Nations Special Rapporteur on Freedom of Opinion and Expression and representatives of the OSCE, OAS, and ACHPR issued a joint declaration concerning “fake news” this year, noting major concerns about the negative effects of disinformation, but limiting extensive regulatory responses on freedom of expression grounds.³⁴⁴ With respect to pending federal legislation, Goodman & Wajert have recently argued that the Honest Ads Act “is worth implementing because it could foster a culture of transparency”³⁴⁵ The existence of such regulation—as well as Congressional attention to the use of Facebook by Russian interests seeking to influence the U.S. presidential election—must surely have been a factor in Mark Zuckerberg’s promise of enhanced transparency with respect to

dissemination and amplification. For a discussion of defamation standards as applied to social media, see Lyrissa Barnett Lidsky & Ronnell Andersen Jones, *Of Reasonable Readers and Unreasonable Speakers: Libel Law in a Networked World*, 23 VA. J. SOC. POL’Y & L. 155 (2016).

In a new development attempting to address Trump’s own “fake news,” a number of law professors filed a complaint against Counselor to the President Kellyanne Conway with the Office of the Disciplinary Counsel for the District of Columbia for violation of the Rule of Ethics that deems it professional misconduct for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” MODEL RULES OF PROF’L CONDUCT r. 8.4 (AM. BAR ASS’N 2017).

³⁴² See, e.g., Norton, *supra* note 103.

³⁴³ The viability of attempts to regulate “fake news” under current law has been discussed elsewhere. See, e.g., Hasen, *supra* note 10, at 216–21 (discussing election law). With respect to the FCC, the limits of the agency’s news distortion policy and the limited application of its hoax policy to radio hoaxes some time ago, not to mention the fact that even the broad jurisdictional mandate of the Communications Act of 1934 is limited to broadcast regulation, suggest that the Commission would not seek to apply either of those policies in an attempt to regulate “fake news” on the Internet. On the FCC’s regulation of broadcast hoaxes, see Justin Levine, *A History and Analysis of the Federal Communications Commission’s Response to Radio Broadcast Hoaxes*, 52 FED. COMM. L.J. 273 (2000). As for FTC regulation, the Commission’s statutory mandate gives it jurisdiction to regulate deceptive advertising in connection with the sale of products—a limit that might exclude at least some political “fake news” stories.

Nor does the Article address the Verstraete et al. suggestion that a trusted media entity such as the BBC create a non-ad-supported social network that leverages the trusted entity’s “media expertise to make judgments about news content.”

Verstraete, Bambauer, & Bambauer, *supra* note 42, at 26 (itself noting the limitations of this kind of potential solution).

³⁴⁴ See *Joint Declaration*, *supra* note 22.

³⁴⁵ Ellen P. Goodman & Lyndsey Wajert, *The Honest Ads Act Won’t End Social Media Disinformation, But It’s A Start* (Nov. 3, 2017) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064451.

the identities of purchasers of political ads on Facebook.³⁴⁶ Still, such legislation invites a cost/benefit assessment in light of the limited scope of its effectiveness and the breadth and vagueness of some of its terms.³⁴⁷

Moreover, in its current reading, the First Amendment is likely to prove a stumbling block with respect to at least some of the potential regulatory solutions to the “fake news” problem in the United States.³⁴⁸ Despite decades of Supreme Court *dicta* indicating the low value of false factual speech,³⁴⁹ since *United States v. Alvarez*, false speech now no longer seems to be seen as plainly unprotected by the First Amendment as it was previously.³⁵⁰ Although the decision was fractured and its full implications uncertain, it is certain that lies no longer sit completely outside the protections of the First Amendment.³⁵¹ In keeping with that approach, lower federal courts have struck down state laws attempting to regulate false political campaign speech.³⁵² To be sure, *Alvarez* does not establish that strict

³⁴⁶ *Id.*; see also Tony Romm & Kurt Wagner, *Facebook is Taking a Stricter Stance on Political Advertising Ahead of Its Testimony to the U.S. Congress Next Week*, RECODE (Oct. 27, 2017, 1:00 PM), <https://www.recode.net/2017/10/27/16555926/facebook-political-advertising-ads-2016-russia>. On Facebook’s fear of regulation, see Thompson & Vogelstein, *supra* note 263.

³⁴⁷ Even Goodman & Wajert, who support the Honest Ads Act, recognize its potentially limited effectiveness and the dangers of some of its vague language:

If the bill passes, its effectiveness will come down to how the platforms and the FEC interpret the broad definition of “political advertising” and the FEC’s appetite for enforcement. A lax approach will mean that nothing will change. An overly-aggressive approach could frustrate free speech objectives, implicate privacy concerns, and push the most problematic spurious political advertising into unpaid forms of communication . . . [The bill’s] definitions are vague and will have to be narrowed through regulatory interpretation. The bill will only have a marginal impact—the extent of which will depend heavily on the will of the online platforms themselves—but impact at the edges can begin to build a culture of disclosure.

Goodman & Wajert, *supra* note 346.

³⁴⁸ See, e.g., Hasen, *supra* note 10, at 216–26; Wu, *supra* note 14.

³⁴⁹ See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (“[T]here is no constitutional value in false statements of fact.”).

³⁵⁰ *United States v. Alvarez*, 567 U.S. 709 (2012). In *Alvarez*, a plurality of the Court struck down the Stolen Valor Act (which made false claims of the award of military medals a crime). *Id.* at 730 (plurality opinion). The result was to protect under the aegis of the First Amendment *Alvarez*’ bare-faced lies about having been awarded the Congressional Medal of Honor. *Id.* at 714, 730.

³⁵¹ Both the plurality and concurring opinions suggest that even though falsity alone cannot be punished criminally, the government may regulate false speech when there is some intent to cause “a legally cognizable harm.” *Id.* at 719; *id.* at 734 (Breyer, J., concurring); see also Chen & Marceau, *supra* note 170, at 16 (“*Alvarez*, then, reflects a turning point: a lie of little or no value and that arguably caused some harm was nonetheless deemed to protect speech.”).

³⁵² See, e.g., 281 *Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014) (striking down a Minnesota law making the intentional participation in “the preparation,

scrutiny applies as the standard of review of all government regulation of lies.³⁵³ Still, these doctrinal developments suggest at a minimum that any attempts to regulate against “fake news” would be drafted very narrowly and with great care. Query, then, whether—as a practical matter—self-regulatory efforts by platforms wouldn’t likely track the sort of regulation that a mandatory approach sensitive to current First Amendment doctrine would invoke.

The reality of U.S. constitutional constraints does not mean, however, that the platforms’ self-regulatory efforts will proceed without any fear of governmental regulation. This is not only because of the likelihood that legislators will see political advantage in proposing regulations regardless of what courts will make of them, but because information intermediaries like Facebook and Google are participants in a global marketplace. To the extent that there are laws in non-U.S. jurisdictions that seek to curtail “fake news,” the companies’ compliance approach will be taking place in the shadow of—and will likely be responsive to—non-U.S. regulation. Some countries have explored extensive regulation of “fake news” on social media platforms. European governments, for example, are putting some significant teeth into these platform self-regulatory efforts.³⁵⁴

dissemination, or broadcast of paid political advertising or campaign material . . . with respect to the effect of a ballot question, that is designed or tends to . . . promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false[]” is a misdemeanor); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015) (striking down Massachusetts’ false political speech law); *Rickert v. State Pub. Disclosure Comm’n*, 168 P.3d 826, 829–31 (Wash. 2007) (striking down Washington’s political false-statements law); *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2338 (2014) (striking down as unconstitutional Ohio’s false campaign statements laws on the grounds that they “are content-based restrictions targeting core political speech that are not narrowly tailored to serve the state’s admittedly compelling interest in conducting fair elections.”). *Susan B. Anthony List v. Driehaus*, which involved an Ohio law that criminalized certain speech in political campaigns, went up to the Supreme Court on justiciability grounds, and the Court held unanimously that the petitioners had alleged sufficiently grave injury for Article III purposes. *Susan B. Anthony List*, 134 S. Ct. at 2347; see also Nat Stern, *Judicial Candidates’ Right to Lie*, 77 MD. L. REV. (forthcoming 2018) (noting that at least 18 states penalize false political speech and suggesting that states’ attempts to bar falsehoods by judicial candidates “stand on tenuous footing and are probably unconstitutional.”).

³⁵³ The decision was “fractured[,] . . . resulting in a legal framework that remains uncertain.” Chen & Marceau, *supra* note 170, at 16; see also *id.* at 43.

³⁵⁴ Germany, for example, adopted an Act to Improve Enforcement of the Law in Social Networks. For an English translation of the Act, see *An Act to Improve Enforcement of the Law in Social Networks*, BMJV, https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2 (last visited Mar. 15, 2018). Pursuant to this Act, social networks could be fined up to 50 million Euros for failure to take down

Still, domestically, the modern First Amendment would likely stand in the way of particularly invasive content-based regulation of “fake speech.”³⁵⁵ It is true that liberal and progressive constitutional scholars have identified and criticized the Roberts Court’s libertarian First Amendment.³⁵⁶ Recently, prominent scholars have raised the question whether the information glut enabled by the Internet and today’s radically different modes of coercive control over political speech create an environment that renders the traditionally identified core focus of the First Amendment increasingly irrelevant.³⁵⁷ Such

unlawful material (apparently including fake news) within the prescribed statutory period of 24 hours for “manifestly” unlawful content, and 7 days for other unlawful content. *Id.*; see also Anya Schiffrin, *How Europe Fights Fake News*, COLUM. J. REV. (Oct. 26, 2017), <https://www.cjr.org/watchdog/europe-fights-fake-news-facebook-twitter-google.php>. In the United Kingdom, the Committee on Standards in Public Life, which advises the prime minister on ethics, recently released a report calling for legislation to impose liability on social media platforms for hosting illegal content. See Rajeev Syal, *Make Facebook Liable For Content, Says Report On UK Election Intimidation*, THE GUARDIAN (Dec. 12, 2017, 7:01 PM), https://www.theguardian.com/society/2017/dec/13/make-facebook-liable-for-content-says-report-on-uk-election-intimidation?utm_source=esp&utm_medium=Email&utm_campaign=Media+briefing+2016&utm_term=256396&subid=3924084&CMP=ema_546. French President Emmanuel Macron has also sought legislation to fight online “fake news.” Pascal-Emmanuel Gobry, *France’s ‘Fake News’ Law Won’t Work*, BLOOMBERG (Feb. 14, 2018, 11:44 AM), <https://www.bloomberg.com/view/articles/2018-02-14/fake-news-france-s-proposed-law-won-t-work>. That 11 members of the U.K. Parliament came to Washington DC to “grill witnesses from U.S.-based technology companies as part of an inquiry into “fake news” by the Digital, Culture, Media and Sport Committee” surely sent notable signals to the heads of these companies (such as Google and Facebook). See Evelyn Douek, *U.K. Committee Grills Big Tech on Fake News*, LAWFARE (Feb. 13, 2018, 2:00 PM), <https://www.lawfareblog.com/uk-committee-grills-big-tech-fake-news> (describing hearing).

³⁵⁵ Progressive scholars claim that modern First Amendment doctrine does not help, and indeed could be used to evade, proper responses to the “fake news” crisis—allowing the First Amendment to stand as a barrier to attempts to improve the health of the information environment. See, e.g., Wu, *supra* note 14; see also Helen Norton, *The Government’s Lies and the Constitution*, 91 IND. L.J. 73 (2015) (describing the limits to legal challenges to government’s destructive speech); Norton, *supra* note 103.

³⁵⁶ See, e.g., Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133 (2016); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205 (2014); Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015). For an early diagnosis of “ideological drift” in First Amendment doctrine, see Balkin, *supra* note 25; see also Wu, *supra* note 14 (questioning whether a First Amendment focused on government censorship in an information-poor world is well-adapted to the digital context of infoglut and weaponized cheap speech used as a tool of speech control). For an attempt to unpack the meaning of the First Amendment Lochnerism charge, see Wasserman, *supra* note 175. For an argument in support of information libertarianism, see Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CAL. L. REV. 335 (2017).

³⁵⁷ See, e.g., Wu, *supra* note 14 (focusing on the scarcity not of speech but of attention, and concerned about the skewing impacts of the “cheap speech” enabled by technology enables). For an excellent critique of the consequences of “cheap speech” on the Internet, see Hasen, *supra* note 10, at 202–16. Recently, Jack Balkin

skeptics would find willing ears in progressive public movements that seek to balance commitments to free speech with other constitutional and human values. These scholars’ skepticism about the modern First Amendment’s speech doctrine is joined by many citizens.³⁵⁸

While there is much appeal in these arguments, “caution is in order”³⁵⁹—it is also important to note that the “fake news” phenomenon is currently being used as an excuse or cover to justify repressive speech initiatives by authoritarian leaders around the world (including Donald Trump in the United States). Speech management called for by “fake news” can take (and has taken) many forms. Widespread global calls to eliminate “fake news” have generated a spectrum of direct and indirect speech control initiatives around the world. Governments have used concerns about “fake news” to justify direct crackdowns on speech.³⁶⁰ On the indirect front, speech-suppressing activity online has increased dramatically, with troll armies, information flooding, and propaganda robots—

has demonstrated that in today’s Algorithmic Society, we face a pluralist model of speech control, reflecting a struggle among states, information intermediaries and speakers, and a regime of private governance—all of which stretch beyond the state censorship focus of pre-digital First Amendment theory. See Balkin, *supra* note 25; see also Nabihah Syed, *Real Talk About Fake News: Towards a Better Theory for Platform Governance*, 127 YALE L.J.F. 337 (2017).

³⁵⁸ Today, for example, large numbers of young people seem to reject an absolutist approach to free speech protections, opting instead for views that balance interests in free speech with concerns about the harms of such free speech. The current debate over free speech on campus implicates these issues. See, e.g., *Free Expression on Campus: A Survey of U.S. College Students and U.S. Adults*, GALLUP (2016), https://www.knightfoundation.org/media/uploads/publication_pdfs/FreeSpeech_campus.pdf; see also *Debating Free Speech on Campus*, BILL OF RIGHTS INST., <https://www.billofrightsinstitute.org/educate/educator-resources/lessons-plans/debating-free-speech-on-campus/> (last visited Mar. 15, 2018). On the issue of hate speech, see Jacob Poushter, *40% of Millennials OK with Limiting Speech Offensive to Minorities*, PEW RESEARCH CTR. (Nov. 20, 2015) <http://www.pewresearch.org/fact-tank/2015/11/20/40-of-millennials-ok-with-limiting-speech-offensive-to-minorities/>.

³⁵⁹ Hasen, *supra* note 10, at 216 (“First Amendment doctrine may serve as a bulwark against censorship and oppression that could be enacted by the government in the name of preventing ‘fake news.’”).

³⁶⁰ See, e.g., Steven Erlanger, *Fake News, Trump’s Obsession, Is Now a Cudgel for Strongmen*, N.Y. TIMES (Dec. 12, 2017, 7:30 PM), <https://www.nytimes.com/2017/12/12/world/europe/trump-fake-news-dictators.html>; see also William Gallo, *Cambodia Threatens Media Outlets, Using Trump as Justification*, VOA (Feb 27, 2017), <https://www.voanews.com/a/cambodia-threatens-media-outlets-using-donald-trump-justification/3742602.html>; CPJ Chairman Says Trump Is Threat To Press Freedom, COMM. TO PROTECT JOURNALISTS (Oct. 13, 2016 12:30 PM), <https://cpj.org/2016/10/cpj-chairman-says-trump-is-threat-to-press-freedom.php>; Jason Schwartz, *Trump’s ‘Fake News’ Mantra a Hit with Despots*, POLITICO (Dec. 8, 2017 05:03 AM), <https://www.politico.com/story/2017/12/08/trump-fake-news-despots-287129>.

launched by both states and individuals—harassing and seeking to silence speakers with whom they disagree.³⁶¹

It is for these reasons that this Article recommends a shift in the treatment not of free *speech*, but of the free *press*, and an initiative to promote social media platforms' recognition of themselves as media companies with public interest responsibilities.

B. Audience Empowerment—Information Literacy and Improving the Effectiveness of Corrections

Those who have little confidence in platform self-regulation and doubt the viability of large scale regulatory interventions in controlling fabricated news might argue that the real backstop is the news consumer, and that people need to be given the tools with which to assess information critically. On this view, the principal answer to the “fake news” problem, if any, lies with informed and empowered audiences.³⁶² This approach therefore emphasizes the desirability of media or information literacy³⁶³ to fight “fake news.” Although there is controversy over the precise meaning of media or information literacy in application, the general idea is to provide the audience with the tools to understand the frames, biases, and inaccuracies in news reports, and to be able to evaluate the likely truth of factual allegations. A casual search on Google reveals dozens of new media literacy programs designed to counteract the harms of “fake news.”³⁶⁴ And arguably no new law would be required here, as virtually all states have media literacy in one form or another in their education-oriented legislation or rules.³⁶⁵ Recent polls show that the public has an appetite for training on how to find online resources for trustworthy information.³⁶⁶

The challenges to the notion of media literacy as the solution to the “fake news” problem, however, all have to do

³⁶¹ For a recent description of these effects, see Hasen, *supra* note 10, at 209–16; Wu, *supra* note 14.

³⁶² See, e.g., *Faking News*, *supra* note 44, at 70–75.

³⁶³ I use the terms “media literacy” and “information literacy” interchangeably here.

³⁶⁴ See Search Results for “Media Literacy Fake News”, GOOGLE, <https://www.google.com/search?q=media+literacy+fake+news&ie=utf-8&oe=utf-8&client=firefox-b-1> (last visited Mar. 15, 2018).

³⁶⁵ See, e.g., MEDIA LITERACY NOW, <https://medialiteracynow.org/your-state-legislation/> (last visited Mar. 15, 2018) (website of media literacy advocacy group listing legislative developments).

³⁶⁶ See John B. Horrigan & John Gramlich, *Many Americans, Especially Blacks and Hispanics, Are Hungry for Help as They Sort Through Information*, PEW RESEARCH CTR. (Nov. 29, 2017), <http://www.pewresearch.org/fact-tank/2017/11/29/many-americans-especially-blacks-and-hispanics-are-hungry-for-help-as-they-sort-through-information/>.

with the question of effectiveness in current circumstances. How will we be able to design media literacy programs that will work to debunk the “fake news” that is circulating virally on the Internet? Empirical research has begun to explore that question, although there is much yet to be studied and consensus does not yet appear to have been achieved.³⁶⁷ Studies are already exploring these issues, although more work needs to be done.³⁶⁸

One obstacle is that, to the extent media literacy programming is focused on young people in public schools, existing media literacy programs arguably have not been particularly effective.³⁶⁹ To the extent that universities are developing media literacy programs, many different flowers are growing without any easy way to compare and assess them.³⁷⁰ And these educationally grounded interventions are limited in their audiences, and do not address voters as a whole.

There is an even more powerful objection to the traditional type of media literacy approach, however—one that is being revealed by studies in political science and cognitive

³⁶⁷ See, e.g., Lazer et al., *supra* note 17; see also Gordon Pennycook, Tyrone Cannon, & David G. Rand, Implausibility and Illusory Truth: Prior Exposure Increases Perceived Accuracy of Fake News but Has No Effect on Entirely Implausible Statements (Dec. 12, 2017) (unpublished manuscript), available at https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2958246; Gordon Pennycook & David Rand, Who Falls for Fake News? The Roles of Analytic Thinking, Motivated Reasoning, Political Ideology, and Bullshit Receptivity (Sept. 15, 2017) (unpublished manuscript), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3023545; Verstraete, Bambauer, & Bambauer, *supra* note 42;

³⁶⁸ See, e.g., Lazer et al., *supra* note 17 (calling for additional “study of social and cognitive interventions that minimize the effects of misinformation on individuals and communities”).

³⁶⁹ See, e.g., Renee Hobbs, *Seven Great Debates in the Media Literacy Movement—Circa 2001*, CTR. FOR MEDIA LITERACY, <http://www.medialit.org/reading-room/seven-great-debates-media-literacy-movement-circa-2001> (last visited Mar. 15, 2018); see also *Alarmed by Fake News, States Push Media Literacy in Schools*, VOA (Dec. 30, 2017, 8:52 PM), <https://www.voanews.com/a/alarmed-fake-news-states-push-media-literacy-schools/4186222.html> (reporting bipartisan push by lawmakers to have public school systems do more to teach media literacy skills). Query whether media literacy should be considered a First Amendment issue and government responsibility on a reoriented First Amendment model. See Rebecca Tushnet, *Not Waving but Drowning: Saving the Audience from the Floods* (response to Wu), KNIGHT FIRST AMEND. INST. (Fall 2017), <https://knightcolumbia.org/content/not-waving-drowning-saving-audience-floods>.

³⁷⁰ See, e.g., Kitson Jazynka, *Colleges Turn ‘Fake News’ Epidemic Into a Teachable Moment*, WASH. POST (Apr. 6, 2017), https://www.washingtonpost.com/lifestyle/magazine/colleges-turn-fake-news-epidemic-into-a-teachable-moment/2017/04/04/04114436-fd30-11e6-99b4-9e613afeb09f_story.html?utm_term=.dfb90c11b945; see also Michael Rosenwald, *Making Media Literacy Great Again*, COLUM. J. REV. (Fall 2017), https://www.cjr.org/special_report/media-literacy-trump-fake-news.php.

psychology.³⁷¹ The typical reaction to correcting false information is to show the falsity of the false information and provide the true alternative instead. The difficulty is that studies by political scientists have shown that instead of reversing political misperceptions, simply correcting misinformation by repeating the original false statements and offering corrective truthful information does not seem to correct false beliefs effectively.³⁷² Indeed, some studies suggest that this kind of corrective approach might even backfire to reinforce the false beliefs.³⁷³

One of the possible reasons for this is that people are subject to a variety of heuristics and cognitive biases³⁷⁴—such as confirmation bias³⁷⁵ and repetition bias—and exposure to accurate information “may not be enough” to counteract

³⁷¹ See Strong, *supra* note 33 (arguing that empirical research has demonstrated “that conventional means of responding to legal and political misconceptions (i.e., content-oriented speech aimed at those who are believed to have simply failed to hear the relevant information) are not longer capable of fostering and promoting rational discourse.”).

³⁷² See, e.g., Brendan Nyhan & Jason Reifler, *The Roles of Information Deficits and Identity Threat in the Prevalence of Misperceptions* (Feb. 24, 2017) (unpublished manuscript), available at <https://www.dartmouth.edu/~nyhan/opening-political-mind.pdf> [hereinafter Nyhan & Reifler, *The Roles of Information Deficits*]; see also Strong, *supra* note 33, at 138; Edward Glaeser & Cass Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65 (2014); Lazer et al., *supra* note 17, at 6; Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEH. 303 (2010) [hereinafter Nyhan & Reifler, *When Corrections Fail*]; DJ Flynn, Brendan Nyhan & Jason Reifler, *The Nature and Origins of Misperceptions: Understanding False and Unsupported Beliefs About Politics*, 38 POL. PSYCHOL. 127 (2017).

³⁷³ See, e.g., Nyhan & Reifler, *When Corrections Fail*, *supra* note 373. Nyhan and Reifler’s first study suggested that attempts to correct the misperceptions of people who are strongly committed to their viewpoints might in fact reinforce their false beliefs. The more recent studies, however, suggest that the backfire effect may not be as common as originally thought. See Giovanni Luca Ciampaglia, *Fighting Fake News: A Role for Computational Social Science in the Fight Against Digital Misinformation*, 1 J. COMPUTATIONAL SOC. SCI. 147, 149 (2017).

³⁷⁴ See, e.g., DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2013); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1125 (1974). See also David Z. Hambrick & Madeline Marquardt, *Cognitive Ability and Vulnerability to Fake News*, SCI. AM. (Feb. 6, 2018), <https://www.scientificamerican.com/article/cognitive-ability-and-vulnerability-to-fake-news/> (reporting on study that suggests some people scoring low on tests of cognitive ability may be more vulnerable to misinformation).

³⁷⁵ Confirmation bias refers to people’s tendencies to filter out and ignore information that conflicts with their preexisting beliefs while retaining information confirming their beliefs. Strong, *supra* note 33 and sources cited therein. Many cognitive biases have been identified, of which a number can apply in the context of evaluating fake news. Confirmation bias is a type of anchoring bias (a human tendency to rely on the first thing we learn about an event). See *id.* at 1128 (on how the ultimate judgment is influenced by the anchor). For a listing of recognized cognitive biases, see Jeff Desjardins, *This Infographic Lists All The Cognitive Biases Humans Experience*, BUS. INSIDER (Sept. 26, 2017), <http://www.businessinsider.com/infographic-list-of-cognitive-biases-2017-9>.

people’s false beliefs.³⁷⁶ Familiarity- and fluency-biases in people’s cognitive processing can lead misinformation to persist even if the hearer believes the correction.³⁷⁷ Social science data reveals that “belief echoes” based on false information can affect people’s political attitudes even though they recognize the falsity of the information.³⁷⁸ Furthermore, people often have a “bias blind spot” (which makes them unaware of their own biases even when they recognize those of others).³⁷⁹

Research shows that “source credibility profoundly affects the social interpretation of information[,]” and that people prefer to receive information that confirms the hearers’ existing views.³⁸⁰ On Facebook, people trust news they receive from people they trust as credible, rather than examining the sources of the news stories themselves.³⁸¹ Social media users tend to be less critical of stories they receive from sources they perceive as credible or that confirm their prior views.³⁸² They tend to discount information that is inconsistent with their beliefs or that comes from an opposition source.³⁸³ Some evidence confirms Eli Pariser’s now-famous “filter bubbles” and the fear that personalized news enables people to operate within their own echo chambers. Studies show that when they are not exposed to facts and ideas of people with whom they disagree—when they are insulated within their echo chambers—their views can also become more extreme.³⁸⁴ On the other hand, still other recent studies suggest that concerns about echo chambers may be overstated, that people in their behavior have exposure to different sources even if their reports indicate group-based filters,³⁸⁵ and that the more accurate observation may be our vulnerability as human beings to believing misinformation of all sorts.³⁸⁶ In the view of those

³⁷⁶ See Nyhan & Reifler, *supra* note 373, (manuscript at 2); see also Flynn, Nyhan, & Reifler, *supra* note 373, at 138–39.

³⁷⁷ See Lazer et al., *supra* note 17; see also Pennycook, Cannon, & Rand, *supra* note 368.

³⁷⁸ Emily Thorson & Stephan Stohler, *Maladies in the Misinformation Marketplace*, 16 FIRST AMEND. L. REV. 442 (2018).

³⁷⁹ See Strong, *supra* note 33, at 140–41.

³⁸⁰ Lazer, et al., *supra* note 17, at 6.

³⁸¹ See *‘Who Shared it?’: How Americans Decide What News to Trust on Social Media*, AM.. PRESS INST. (Mar. 20, 2017, 8:00 AM), <https://www.americanpressinstitute.org/publications/reports/survey-research/trust-social-media/>.

³⁸² See Lazer et al., *supra* note 17, at 6.

³⁸³ See *id.*

³⁸⁴ See, e.g., CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017) (*inter alia* on how echo chambers breed extremism).

³⁸⁵ See Guess, Nyhan, & Reifler, *supra* note 39.

³⁸⁶ See, e.g., Brendan Nyhan & Yasaku Horiuchi, *Homegrown ‘Fake News’ is a Bigger Problem Than Russian Propaganda. Here’s a Way to Make Falsehoods More Costly for*

who are persuaded by the power of these cognitive heuristics, media literacy initiatives might well fail if they do not take into account the powerful insights of cognitive psychology about human behavior. The problem, of course, is that “it is not clear how to best protect people from believing false claims.”³⁸⁷

Media literacy initiatives face the additional daunting hurdles that technology can make falsity seem indistinguishable from truth, and that sophistication in data mining and psychometric analysis can end-run the audience’s ability to put media literacy tools into effect before being swept along into mistaken belief. Those wishing to influence how those individuals behave (politically or otherwise) have increasingly sophisticated AI machine tools to deploy in doing so. To the extent that these appeals—to people’s emotions and their psychological tendencies and weaknesses—are successful, they are likely to end-run and undermine any attempts to achieve media literacy through rational analytic processes. When the “weaponized AI propaganda machine”³⁸⁸ stealthily manipulates people’s reactions without their even recognizing the effect, media literacy projects directed to the rational mind are unlikely to fare well. This suggests that information literacy theories should take into account the powerful targeting effects of data-driven and persistent AI communications of false information.

These observations do not mean that information literacy campaigns are useless and not to be explored. While the lessons of cognitive psychology are powerful, it must be remembered that not everyone is fungible, and that the described biases are generalizations. Moreover, there are likely to be ways to offer effective feedback to digital users that particular stories are fake and that further sharing them would have negative reputational effects on the sharers.³⁸⁹ For example, social pressure can impact the acceptance of information, and people are concerned with their reputations in their circles. To the extent that they worry about the embarrassment and reputational effects of being found to have shared news thought to be fake by their peers, they may be

Politicians, WASH. POST (Oct. 23, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/23/homegrown-fake-news-is-a-bigger-problem-than-russian-propaganda-heres-a-way-to-make-falsehoods-more-costly-for-politicians/?utm_term=.c4f60b523c0b.

³⁸⁷ *Id.*

³⁸⁸ See Anderson & Horvath, *supra* note 29.

³⁸⁹ See, e.g., Lazer et al., *supra* note 17.

open to the use of “fact-checking tools on social media.”³⁹⁰ Moreover, to the extent that “fake news” is spread virally by celebrities and media sources, it is possible to focus the information literacy initiatives on helping those influencers become more skeptical news sharers.³⁹¹ Even if a small number of corrections would not dislodge a false belief, there is evidence that a large enough number of challenges can make people doubt whether they have made a bad decision.³⁹² There is reason to believe that exposing people to fact checks can have positive impacts over the long term.³⁹³ Similarly, summary fact-checking—which “presents an overview of the fact-checking ratings for a politician” (as opposed to focusing on the truth or falsity of a single statement)—might be a useful tool.³⁹⁴ This is apparently an increasingly popular type of fact-checking format.³⁹⁵ A recent set of experiments suggests that study participants who saw summary fact-check ratings “viewed the legislators in question less favorably and rated their statements as less accurate” than study participants who were shown fact-checks of individual statements by politicians.³⁹⁶ This is notable not only because it indicates some degree of effectiveness for summary fact-check ratings (effectiveness on the demand side), but also because the increasing adoption of the format might deter some false statements by politicians (effectiveness on the supply side).³⁹⁷ To the extent that “people fall for fake news because they *fail* to think [and] not because they think in a motivated or identity-protective way, . . . interventions that are

³⁹⁰ See *id.* at 5. Query, however, whether such tools will have long lasting effects on beliefs.

³⁹¹ See *id.* at 8.

³⁹² See, e.g., David P. Redlawsk, Andrew J. W. Civettini, & Karen M. Emmerson, *The Affective Tipping Point: Do Motivated Reasoners Ever “Get It”?*, 31 POL. PSYCHOL. 563, 589 (2010).

³⁹³ See, e.g., Jane Elizabeth & Alexios Mantzarlis, *Surprise! Readers May Actually Pay Attention to Fact-Checking*, POYNTER (Sept. 2, 2016), <https://www.poynter.org/news/surprise-readers-may-actually-pay-attention-fact-checking>; see also Michael Barthel & Jeffrey Gottfried, *Majority of U.S. Adults Think News Media Should Not Add Interpretation to the Facts*, PEW RESEARCH CTR. (Nov. 18, 2016), <http://www.pewresearch.org/fact-tank/2016/11/18/news-media-interpretation-vs-facts/> (on public approval of fact-checking by news organizations).

³⁹⁴ See Nyhan & Horiuchi, *supra* note 387.

³⁹⁵ See *id.*

³⁹⁶ See *id.*; see also Brendan Nyhan et al., *Counting the Pinocchios: The Effect of Summary Fact-Checking Data on Perceived Accuracy and Favorability of Politicians*, DARTMOUTH, <http://www.dartmouth.edu/~nyhan/summary-fact-checking.pdf>.

³⁹⁷ See Nyhan & Horiuchi, *supra* note 387 (“Summary fact-checking won’t persuade everyone, of course. But if we can make politicians fear the political costs of a pattern of false claims a little bit more, there may be less misinformation to report in the first place.”).

directed at making the public more thoughtful consumers of news media may have promise.”³⁹⁸

There is also evidence that “the format in which information is delivered could substantially affect misperceptions” according to researchers in this area.³⁹⁹ Attempts to help people navigate their overwhelming informational environment can be designed to be aware of and responsive to what cognitive psychologists and behavioral economists have discovered about how people learn, who and how they trust, and how they change their minds. One positive sign is that people may be more likely to believe that something consistent with their worldview is in fact false if they are advised of its falsity by “surprising validators”—people who they would consider to be of like mind.⁴⁰⁰ Thus, for example, Republicans would be more likely to believe that Hillary Clinton was not involved in a sex trafficking ring if they heard that it was “fake news” from a trusted Republican rather than from a Democratically inclined news organization. Therefore, some scholars suggest that more conservatives should be invited into the discussion of political misinformation.⁴⁰¹ So, building trust among different constituencies, through finding common goals and common ground, might help limit the cognitive biases that inhibit information literacy at a time of pervasive misinformation in public discourse.⁴⁰² Finally, recent research suggests that knowledge about the structure of the media ecosystem and the “nuts and bolts of everyday journalism” can help dispel misinformation and reduce belief in conspiracy theories.⁴⁰³

³⁹⁸ Pennycook & Rand, *supra* note 368.

³⁹⁹ Nyhan & Reifler, *supra* note 373 (manuscript at 2); *see also* Strong, *supra* note 33, at 141.

⁴⁰⁰ Strong, *supra* note 34, at 141–42; *See also* Glaeser & Sunstein, *supra* note 353, at 67; *see also* Glaeser & Sunstein, *supra* note 353, at 91 (“Surprising validators have special credibility to precisely the people who would otherwise be inclined to dismiss them.”).

⁴⁰¹ *See* Guess, Nyhan & Reifler, *supra* note 60 (on skew in fake news exposure during presidential election contest).

⁴⁰² *See* Strong, *supra* note 33 (discussing usefulness of empirical research in both social and hard sciences to help address the “problems created by the proliferation of alternative facts.”). Strong argues for a “robust interdisciplinary approach to ensure the development of a process that is capable of addressing psychological, neurological and social factors driving the alternative fact phenomenon,” and calls for coordination among the legal community and other sectors of civil society as well as the use of data from a wide range of disciplines to overcome the “the challenges of a post-truth society.” *Id.* at 145. On the positive normative effects of speaking out against government attempts to monopolize the narrative by sowing doubt, *see* Norton, *supra* note 103.

⁴⁰³ *See, e.g.,* Jackie Spinner, *Study: Educating News Consumers About The Media Can Curb Conspiracy Theory Appeal*, COLUM. J. REV. (Dec. 20, 2017), https://www.cjr.org/united_states_project/news-media-literacy-conspiracy-

In any event, the remaining uncertainty in the social science argues in favor of exploring a variety of corrective mechanisms, without adoption of a single one-size-fits-all combination. More empirical work needs to be done in this area, including dealing with the fact that the possibility of AI learning will lead “fake news” bots to evolve in the way they operate.

With respect to audience empowerment, then, this Article proposes that audience-focused solutions be responsive to: 1) the type of “fake news” at issue; 2) the lessons to be learned from cognitive psychology for effective media literacy; 3) reputational solutions allowing audiences to distinguish among news organizations; and 4) structural and disclosure-based responses to the potentially manipulative uses of “fake news” in coordination with big-data-grounded psychometric targeting.⁴⁰⁴

Importantly, though, studies of what kind of information literacy techniques are likely to be effective in arming audiences against “fake news” must confront an underlying question about legitimacy. To the extent that media literacy tools are designed to end-run the effects of people’s cognitive short-cuts, will they thereby themselves manipulate the audience and replicate the manipulation problem posed by the strategies of data-mining persuaders?⁴⁰⁵ Information literacy design will not generate consensus without addressing that issue.

IV. A COUNTERINTUITIVE OPTION? EMPOWERING THE PRESS TO ENHANCE PUBLIC TRUST

The solutions discussed in Section III, *supra*—focusing on technological fixes and audience information literacy—are attempts to minimize the flow of fabricated content and to arm news consumers with tools to assess information critically. They do not address the use of the “fake news” charge as a tool of delegitimation deployed in the service of criticism-deflecting governance. A third piece to the puzzle, then, should address

theory.php; see generally Stephanie Craft, Seth Ashley & Adam Maksl, *News Media Literacy and Conspiracy Theory Endorsement*, 2 COMM. & PUB. 388 (2017) (survey finding that “greater knowledge about the news media predicted a lower likelihood of conspiracy theory endorsement, even for conspiracy theories that aligned with their political ideology”).

⁴⁰⁴ See *supra* notes 42, 371, 295-96, 327, and accompanying text.

⁴⁰⁵ Questions about the ethical dimensions of behavioral law and economics’ “nudge”-based regulatory approaches have faced these questions as well. See Cass Sunstein, *The Ethics of Nudging*, 32 YALE J. REG. 413 (2015).

how to reverse the decline in the public's trust in the institution of the press.⁴⁰⁶

There seems to be agreement that “fake news” has found fruitful soil precisely because of such a decline in public trust in what should be authoritative institutions. When the mainstream press is trusted less than “friends” on Facebook to curate one's exposure to news, and when party affiliation drives belief, unverified and fabricated news can flourish. Thus, the conversation has turned to exploring ways of increasing public trust. This Article takes the position that giving the press broad freedom to unearth news and disseminate it without fear, joined with some changes in press behavior, could be a central element in a broad trust-building strategy. This Article suggests, therefore, that an affirmative commitment to enhanced protection for press activities should join technological solutions and information literacy in order to respond to the crisis of “fake news.” This way forward is revealed by the limitations in the proposed responses to “fake news” described in Section III above.⁴⁰⁷

A. Press Preferences

The crisis of “fake news” should serve as a clear justification for the adoption of expansive protections for the institutions that could combat “fake news”—protections not directly about “fake news” as such, but designed to scaffold the institutions that can positively affect public and political discourse. The epidemic of “fake news,” and the rise of the weaponized AI-aided propaganda machine, are wake-up calls to why the law should more clearly help press-workers and journalistic institutions to perform their job as watchdogs. Thus, this Article asserts that the “fake news” crisis is a perfect justification for press preferences,⁴⁰⁸ especially in connection

⁴⁰⁶ See Swift, *supra* note 113.

⁴⁰⁷ For example, if media literacy initiatives face uphill battles because of human cognitive tendencies (and their manipulability through modern automated propaganda), then perhaps we should focus less on individuals and more on institutions. Similarly, to the extent that the current legal landscape does not offer rich resolutions to fake news, then perhaps the answer is to look at what tools the law might offer to affect fake news indirectly through focusing on legal rules beyond “fake news” as such.

⁴⁰⁸ Some scholars are already engaged in the work of promoting a more robust reading of the Press Clause. See, e.g., Sonja West, *Awakening the Press Clause*, 2012 BYU L. REV. 1953 (2011). This Article argues that “fake news”—of all the types described in the taxonomy above—provides a modern explanation and justification in support of such readings. The Article does not specifically argue that the institutional protections for the press it recommends are implicit in the Press Clause. It simply claims that—whether as a matter of constitutional principle, legislation, regulation, or common law interpretation—the institutional press should receive

with newsgathering broadly conceived.⁴⁰⁹ Explicit recognition of a preferred constitutional and social status for the press would lead to enhancing journalistic tools to reveal and report in order to accomplish the press’s constitutional watchdog function. This is obviously not the only path to invigorate trust in the press; it is simply the one explored in this Article.⁴¹⁰

certain kinds of newsgathering protections (and not be limited to the constitutional protections associated with publication). The main point is less doctrinal than attitudinal—the recognition of the press as a constitutionally protected institution would justify protections as to which there is no clear consensus today.

⁴⁰⁹ See Elizabeth Jensen, *Looking to the Future: Restoring Public Trust in the Media*, NPR (May 15, 2017 2:06 PM), <http://www.npr.org/sections/ombudsman/2017/05/15/528158488/looking-to-the-future-restoring-public-trust-in-the-media>.

⁴¹⁰ For example, many have argued that the only way to really increase the public’s trust in the press is to eliminate the advertising-support model of press funding in favor of subscription models. This Article does not take a position on such suggestions, preferring to first address a less foundational set of reforms.

News organizations and those who believe in a press renaissance in today’s fake news climate have begun to explore various tools and methods to enhance modern journalism and enhance public trust. For example, Wikipedia founder Jimmy Wales recently unveiled WikiTribune, a news service providing free, donation-supported factual, “evidence-based journalism” with articles sourced by professional and volunteer journalists. See WIKITRIBUNE, <https://www.wikitribune.com/> (last visited Mar. 15, 2018); see also Elizabeth Jensen, *Looking to the Future: Restoring Public Trust in the Media*, NPR (May 15, 2017 2:06 PM), <http://www.npr.org/sections/ombudsman/2017/05/15/528158488/looking-to-the-future-restoring-public-trust-in-the-media>. Universities are exploring what it takes for news organizations to win public trust, including adoption of best practices for journalism. Jensen, *supra* (discussing Santa Clara University’s The Trust Project.); see also Lazer et al., *supra* note 17 (on academics collaborating with journalists to “make the truth ‘louder.’”). One recent report designed to distill the proceedings of a high-level conference on fake news recommends closer collaboration between researchers and the media, pursuant to which journalists would have access to curated data for news stories, “cheap and reliable” sources of information, lists of experts, and help with statistical analysis and relevant background information. Lazer et al., *supra* note 17, at 10. The Knight Foundation has recently granted several million dollars in support to a variety of projects seeking to rebuild trust in journalism, and has established the Knight Commission on Trust, Media and Democracy, to study the erosion of trust in institutions such as the press. Paul Fletcher, *Knight Foundation Makes Grants Of \$2.5M to Projects Seeking to Rebuild Trust in Journalism*, FORBES (Sept. 30, 2017), <https://www.forbes.com/sites/paulfletcher/2017/09/30/knight-foundation-makes-grants-of-2-5m-to-projects-seeking-to-rebuild-trust-in-journalism/#33b98abe3273>. Many of the projects supported by the Knight Foundation involve various ways to enhance verification. These are only the tip of the iceberg. Substantive improvement in press coverage is also suggested as another way of enhancing public trust. On that score, some emphasize a reengagement with local and regional coverage by the press. See, e.g., Hasen, *supra* note 10, at 202, 230; see also Mark Little, *Here Comes Somebody: Journalism and the Trust Economy*, NIEMANREPORTS (Apr. 3, 2017), <http://niemanreports.org/articles/here-comes-somebody-journalism-and-the-trust-economy/> (arguing for personalized news feed that does not make the reader feel like a commodity and is offered by journalists, rather than ad-supported social media).

This Article adds to those suggestions an experiment with allowing the press to use the best tools available—without fear of extensive legal concerns—in the exercise of genuine, public interested accountability journalism. Under this approach, the crisis of “fake news” and the President’s attempt to delegitimize the

Offering the press better legal protection to engage in newsgathering and resist censorship would be a useful adjunct in the project of rebuilding the public's trust in the "real" news. At a minimum, those protections—formal and informal—that have been eroded should be restored and made more certain.⁴¹¹ The details remain to be determined, though the following are some possibilities. In broad brush, the press should have greater protections in connection with its newsgathering activities because access to information becomes increasingly necessary when politicians and government officials attempt to use a variety of techniques to avoid public interest scrutiny though accountability journalism.⁴¹² The law should give the press more access to the information it needs to cover the news in depth and accurately, including through enhancing FOIA and state sunshine laws.⁴¹³ One important protection for the press would be a clear commitment to immunity from prosecution for such aggressive newsgathering techniques when they are undertaken for purposes of accountability journalism.⁴¹⁴ The government should explicitly reject the possibility of prosecuting journalists under the Espionage Act for refusing to name their sources and for publishing national security information they did not themselves obtain illegally. Another possibility would be a broad scope for existing reporter's privileges.⁴¹⁵ Courts should be sensitive to the potentially skewing impact of third party litigation funding of defamation or privacy actions and should return to a more deferential interpretation of newsworthiness than is currently in vogue today.⁴¹⁶ Furthermore, the "fake news" phenomenon could be addressed if the press had better and more consistent access to

institutional press are to be seen as invitations for the press to embrace its watchdog role with vigor. If constraints on journalists' ability to tell the truth without fear or favor are reduced, then perhaps they will do so.

⁴¹¹ See generally *supra* Section II.

⁴¹² Newsgathering activities include, *inter alia*, dealing with sources reporters cannot name and with individuals, groups or organizations engaged in leaking; undertaking documentary and data investigations; and engaging in subterfuge, lying, and undercover reporting.

⁴¹³ See generally David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835 (2017) (discussing public access to court records); see also Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 195 (2016) (arguing that the nature of the preferences given the press should change and expand, including "[p]roviding faster and better access to information about government activity").

⁴¹⁴ See *supra* Section II.

⁴¹⁵ For such an argument, see Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515 (2007).

⁴¹⁶ For a contrary argument in the context of assessing newsworthiness in litigation against the press, see Erin C. Carroll, *Making News: Balancing Newsworthiness and Privacy in the Age of Algorithms*, 106 GEO. L.J. 69 (2017).

documents and information that it could use to fact check and tell counter-stories. On the informal front, the President should not communicate inflammatory anti-press rhetoric unleashing violence and harassment against the press. More indirect changes might also be useful. For example, to the extent that net neutrality rules enhance local journalism,⁴¹⁷ their recent rollback by the FCC⁴¹⁸ should be reconsidered. News organizations should be granted exemptions from antitrust rules prohibiting joint activity when they seek to negotiate collectively with the platforms.⁴¹⁹

Why is recognition of a preferred role for journalists important today? Don't they already have sufficient legal protections to do their jobs? Since they can wield the threat of publication if crossed, don't they have powerful extra-legal recourse if thwarted? Perhaps most importantly, haven't they forfeited any legitimate claim to special treatment by their own behavior? Do we really trust that entities accused of partisanship to use press privileges wisely in the public interest? Is the recommendation here simply "arming the criminal"? After all, the modern press is criticized by both right and left. Media watchers diagnose and bemoan sensationalism, bias, false objectivity, limited sourcing, and "he-said-she-said" journalism.⁴²⁰ Why take away any accountability by giving journalists permission to become even worse, particularly in light of the economic pressures on news organizations?⁴²¹ In

⁴¹⁷ See, e.g., Matthew Ingram, *The Media Today: The Loss of Net Neutrality Threatens Local Journalism*, COLUM. J. REV. (Dec. 13, 2017), https://www.cjr.org/the_media_today/net-neutrality-local-news.php.

⁴¹⁸ See, e.g., Cecilia Kang, *F.C.C. Repeals Net Neutrality Rules*, N.Y. TIMES (Dec. 14, 2017), https://www.nytimes.com/2017/12/14/technology/net-neutrality-repeal-vote.html?_r=0.

⁴¹⁹ See, e.g., Jim Rutenberg, *News Outlets to Seek Bargaining Rights Against Google and Facebook*, N.Y. TIMES (Jul. 9, 2017), <https://www.nytimes.com/2017/07/09/business/media/google-facebook-news-media-alliance.html>; see also NEWS MEDIA ALL., <https://www.newsmediaalliance.org/> (last visited Mar. 15, 2018); see also Bell & Owen, *supra* note 147 (on how "[t]he rebundling of publishing power is arguably responsible for a mass defunding of journalistic institutions").

⁴²⁰ See, e.g., Edelson, *supra* note 102 (arguing that protections and prestige should only be granted to journalists "whose work actually advances First Amendment values" by vindicating the "values of truth and democratic competence").

This is not even mentioning the shocking revelations of sexual improprieties at the highest levels of print and electronic news organizations. See, e.g., Ellen Gabler et al., *NBC Receives at Least 2 New Complaints About Matt Lauer*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html>; see also Alexandria Neason, *What We Found When We Asked Newsrooms About Sexual Harassment*, COLUM. J. REV. (Dec. 1, 2017), <https://www.cjr.org/analysis/sexual-harassment-newsrooms-misconduct.php>.

⁴²¹ What about the press' own "fake" news? Those who distrust the institutional press will ask whether it makes sense to further empower the "fake news"—the

addition, today's press is less of a unitary institution than a variety of very different kinds of players, some of which—like the right wing/alt-right mediasphere—in fact amplify President Trump's attack on the mainstream press. More broadly, how can we justify a preferred place for journalism when technology has changed the informational ecosystem so much that we can no longer even define who should count as a journalist? And what would a preferred position mean in operation? What additional rights should the press have beyond what is permitted to all speakers? What is likely to serve as a viable constraint on news organizations' abuse of additional press privileges? There is, of course, no guarantee that any press privileges will not be abused. Still, there are reasons to believe that the vast majority of journalists and press institutions would take their roles seriously.

*B. Revised Press Practices*⁴²²

Journalists doubtless already realize that achieving increased public trust is practically an existential requirement. Admittedly, though, public trust is hard to come by in light of the news media's self-inflicted wounds.⁴²³ For this perhaps-counter-intuitive experiment to work, the press as a whole must develop and adhere to professional journalistic norms. They must not allow partisanship to trump their professional obligations.⁴²⁴ News organizations must recognize that if they

purveyors of ideological and biased information? They will claim that it is precisely because the mainstream press is untrustworthy and biased that the fake news crisis was able to snowball. This argument is common not only as deployed by politicians like President Trump, but also in the right-wing mediasphere. Progressives as well criticize the mainstream media, *inter alia* for their "he said, she said" type of coverage—"treating both sides of the argument equally [even] when one is demonstrably false." Edelson, *supra* note 102 (labeling this the "balance trap").

⁴²² One of the major impediments to improved press performance (particularly in terms of investigative reporting) and increased constitutional salience (*inter alia* through litigation) is obviously financial constraints. A variety of proposals for funding accountability journalism have been proposed. See Carroll, *supra* note 414, at 219–22 (describing several). This Article does not address the funding issue and takes no position on the matter.

⁴²³ Jones & Sun, *supra* note 6, at 30. Even the venerable Gray Lady has "shifted from a 'paper of record model' to a crowd-sourced conversational model," reducing its copy editor staff, eliminating its public editor position, and opening the door to opinionated headlines. See Paul Horwitz, *Breaking the News*, COMMONWEAL (Nov. 5, 2017), <https://www.commonwealmagazine.org/breaking-news-1>.

⁴²⁴ Recently, for example, in a "fake news" sting, a woman apparently working for right wing activist group Project Veritas, attempted to entrap the Washington Post into publishing her false claim that she had obtained an abortion at 15 after then-Senate candidate Roy Moore had impregnated her. See, e.g., Callum Borchers, *A Botched Sting with a Phony Roy Moore 'Accuser' Was Supposed to Discredit the Media. Like Similar Schemes, it Did the Opposite.*, WASH. POST (Nov. 27, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/11/27/a-botched-sting-with-a-phony-roy-moore-accuser-was-supposed-to-discredit-the-media-like-similar->

are given additional protections for their newsgathering activities, they will further lose the public’s trust if they misuse their new protections. They must commit to engaging in serious journalism and investigative work enabled by the enhanced press protections recommended here. They must recognize that consumer expectations for brand sites require them to build trust on a number of fronts.⁴²⁵ Professionalism, expertise, transparency, and a commitment to disinterestedness and listening would go a long way to enhancing trust for all but those most wedded to conspiracy theories.⁴²⁶ Journalists and news organizations must also see beyond their individual interests and build on their identities collectively as “the press.” It is time for journalists to recognize that if they continue to see themselves as a snarling pack of competitive individual reporters and outlets fighting over scraps in a free-for-all information marketplace, they will all face existential dangers. Being targeted by the highest governmental actors should itself be enough to make the press see itself as such—as an accountability-seeking institution with a role deep in the structure of the Constitution.

Political scientists’ empirical studies suggest that mainstream news organizations must work to “avoid being drawn into alignment with either of the parties.”⁴²⁷ To the extent that there is ideological or party-based asymmetry in people’s susceptibility to “fake news,” solutions should be

schemes-it-did-the-opposite/?utm_term=.ae8acab37c1. Instead of discrediting the press, as the sting was supposed to do, it was subjected to rigorous vetting and ignored. *Id.* (describing other such examples directed to other media organizations as well). For a less positive view of the *Washington Post* (and mainstream press as a whole), see Greenwald, *supra* note 151.

⁴²⁵ Rande Price, *Trust As A Proxy for Brand Value*, DIGITAL CONTENT NEXT (Dec. 6, 2017), <https://digitalcontentnext.org/blog/2017/12/06/dcns-new-research-trust-proxy-brand-value/>.

⁴²⁶ See Horwitz, *supra* note 424; Margaret Sullivan, *Polls Show Americans Distrust the Media. But Talk to Them and It’s a Very Different Story.*, WASH. POST (Dec. 28, 2017), https://www.washingtonpost.com/lifestyle/magazine/polls-show-americans-distrust-the-media-but-talk-to-them-and-its-a-very-different-story/2017/12/27/ed9bbabe-ce3b-11e7-81bc-c55a220c8cbe_story.html?utm_term=.b917cb578ba1.

⁴²⁷ Guess, Nyhan, & Reifler, *supra* note 39; see also Barthel & Gottfried, *supra* note 394. This is particularly critical at a time of increasing “partyism.” See generally Cass R. Sunstein, *Partyism*, 2015 U. CHI. LEGAL F. 1 (describing party-based hostility).

Such party-neutrality is of course, difficult to recommend for explicitly partisan news outlets—those that define themselves as conservative or liberal. As to those, what might be helpful is transparency as to point of view. See Carrie Brown-Smith, *Transparency Finally Takes Off*, NEIMANLAB, <http://www.niemanlab.org/2017/12/transparency-finally-takes-off/> (last visited Mar. 15, 2018); see also Mathew Ingram, *Glenn Greenwald vs. the NYT’s Bill Keller on Objectivity and the Future of Journalism*, GIGAOM (Oct. 28, 2013, 9:47 AM), <https://gigaom.com/2013/10/28/glenn-greenwald-vs-the-nyts-bill-keller-on-objectivity-and-the-future-of-journalism/>.

tailored in response. In that spirit, press outlets should seriously consider eliminating the op-ed page. Especially in light of the fact that newspaper content is unbundled when accessed on social media, the organizational structure of the traditional newspaper—with its clear delineation between the news and the op-ed pages—is no longer available to help readers distinguish the news organizations' own factual reporting from its service as platform for opinion. News organizations might also consider focusing more on substantive news reporting and debunking fabricated news, and less on every White House insult to journalists. This is not to minimize the danger posed by the attempt to delegitimize the press as an institution. Rather, it is to suggest that the press should not itself become Trump's anti-press megaphone.

Changes in operations are also likely to be needed. For example, because research suggests that it is local involvement that enhances trust⁴²⁸ and that corruption in local and regional governments flourishes without local media as watchdogs,⁴²⁹ news organizations should revive commitments to the coverage of local and regional news and the statehouse.⁴³⁰ In addition, increasing the transparency of the press's own documents, processes, and editorial work would likely help assure audiences of journalists' good faith.⁴³¹ Would this entail development of best practices for leaks and anonymous sourcing? Clearly, news organizations must try to get the story right the first time,⁴³² identify errors quickly, resolve them, and publicize their correcting processes. The development of additional trusted fact-checking outfits would also likely be helpful. Attention must be paid also to whether the needle could be moved on public trust by a public education campaign distinguishing between social media platforms and news organizations. These are just a few possibilities. Attention is now turning to the issue of building public trust, although

⁴²⁸ See, e.g., *supra* note 409 and accompanying text; see also Shereta Williams, *In the Age of Fake News, Local Media Scores Greater Trust*, MEDIAPOST, <http://www.videa.tv/news/age-fake-news-local-media-scores-greater-trust/> (last visited Feb. 8, 2018).

⁴²⁹ See, e.g., Hasen, *supra* note 10, at 209–10.

⁴³⁰ See, e.g., Jensen, *supra* note 411; Lazer et al., *supra* note 18, at 10.

⁴³¹ See also *Faking News*, *supra* note 44, at 60–63 (on building credibility through enhanced transparency); Raney Aronson-Rath, *Transparency is the Antidote to Fake News*, NIEMANLAB (Dec. 2017), <http://www.niemanlab.org/2017/12/transparency-is-the-antidote-to-fake-news/>.

⁴³² For a list of such recommendations, see Brendan Nyhan & Jason Reifler, *Misinformation and Fact-Checking: Research Findings from Social Science*, NEW AM. FOUND. 1, 1 (Feb. 2012), http://www.dartmouth.edu/~nyhan/Misinformation_and_Fact-checking.pdf.

empirical assessments of the various projects are not yet complete.⁴³³

The very fact that the President of the United States has commenced a public war against the press (while himself publishing lies and overstatements) is likely to awaken in journalists the recognition that their role is empowering the public in a democracy, and not merely entertaining an audience. At a minimum, this kind of situation invites the development of product-differentiating branding strategies. To the extent that some news outlets will not take the opportunity to retake political journalism, the market for information presents opportunities for product differentiation.⁴³⁴ News organizations can develop reputations for truthful reporting and effective fact-checking. They can continue to partner with independent fact-checking organizations. They can create incentives for collaboration within the press and among publishers and news organizations. To the extent that economics will drive increased collaboration, journalist and news organization reputations for accuracy and veracity could well play important roles in cooperative ventures.⁴³⁵ There is

⁴³³ See, e.g., Fletcher, *supra* note 411.

⁴³⁴ One recent suggestion of that sort is the possibility of developing a nongovernmental, voluntary accreditation system to help people distinguish between reliable information and “fake news.” See Anna Gonzales & David Schulz, *Helping Truth With Its Boots: Accreditation as an Antidote to Fake News*, 127 YALE L.J.F. 315 (2017). While initially attractive, such a proposal raises a number of questions. For example, it assumes without question that the existing accreditation systems that exist in other fields, such as university accreditation, in fact work to achieve their aims of ensuring quality. Moreover, as the proposal would focus “on the conduct and standards used to produce a story, rather than the accuracy of a given report,” *id.* at 323, it could invite the camel’s nose into the tent to a potentially problematic degree.

⁴³⁵ Admittedly, branding-focused trust strategies are not a panacea and finances still pose a high hurdle to improved press functions. It is likely that strategic attacks will be made against any collaborative verification initiatives. Fact-checking organizations have already been subjected to criticism for being ideological and having political agendas. See, e.g., *id.* Perhaps more problematically, news organizations today have increasingly ceded their control over their content to the platforms. See Bell & Owen, *supra* note 147. It is unclear at this point how many news publishers will be able to develop real brands, given how people now receive their news online. Facebook’s incorporation of news publishers is both dangerous to the publishers’ independent brands, and it also succeeds in starving the news publishers of the money they would need to engage in expensive accountability journalism in the public interest. *Id.* Here, however, the ability to negotiate with the platforms as a cohesive group would doubtless enhance the bargaining position of the news organizations and publishers. See *supra* text accompanying note 401 (discussing news organizations’ attempts to obtain antitrust exemptions from Congress).

Other novel alternatives—such as the development of a journalism accreditation scheme pursuant to which accredited newspapers could reap the reputational benefits of being accredited—may be even more problematic. See Gonzales & Schultz, *supra*. But accreditation schemes are more attractive in the

reason to hope that the combination of the three-pronged recommendations made here could be helpful.

Admittedly, it is true that the activist right-wing mediasphere will still present challenges to the mainstream institutional press. But “fake news” can become the wedge to separate the traditional conservative press from the rising alt-right and alt-lite⁴³⁶ media. A united front against media disseminators of false information can emerge when mainstream conservative news outlets come to recognize that their professional norms give them much more in common with even liberal professional news media than with pseudo-populist Breitbart-like alt-right “news” outlets.⁴³⁷

CONCLUSION

The phenomenon of “fake news” has become the central rallying cry both of Trumpists who chide the mainstream press for their unsympathetic coverage of President Trump’s Administration and for liberals who worry that fabricated political content perhaps has, and definitely could, influence American elections. President Trump has used the charge of “fake news” to attempt to defang and delegitimize the mainstream media. There is a palpable fear that “fake news” in all its meanings is cheapening American democracy and political self-determination. This Article takes the position that even though “fake news” is socially, politically, and economically a highly disruptive development, it represents an occasion for collaborative commitments to truth on the part of information intermediaries, consumers, and a newly empowered press.

Recent studies suggest that there is little consensus on the question of whether there are likely to be solutions to the

abstract than in operation. *See* discussion, *supra* note 416. In any event, it would be difficult to convince courts holding a libertarian interpretation of the First Amendment (such as the current Supreme Court) that accreditation is not a close cousin to licensing, notwithstanding the recommendation that the accrediting agencies would nominally be private and not governmental entities. *Cf.* Jonathan Friendly, *National News Council Will Dissolve*, N.Y. TIMES (Mar. 23, 1984), <http://www.nytimes.com/1984/03/23/us/national-news-council-will-dissolve.html> (reporting that “[t]he National News Council, established in 1973 with the announced aim of increasing public trust in journalism by assessing complaints about the work of major news organizations, voted yesterday to dissolve itself. The group attributed its demise to ‘a general lack of news media acceptance of the concept of a news council.’”); Campbell, *supra* note 333, at 747 (on news councils).

⁴³⁶ *See, e.g.,* Bridges, *supra* note 50.

⁴³⁷ *See* Conor Friedersdorf, *Can Conservative Journalism Survive?*, THE ATLANTIC (Sept. 19, 2017), <https://www.theatlantic.com/politics/archive/2017/09/can-conservative-journalism-survive/539181/>.

“fake news” problem.⁴³⁸ Responses to the dissemination of fabricated news content have focused on regulation, platform self-regulation, and information literacy for the audience. But there are questions about how viable such responses are likely to be. As part of their claim that the First Amendment has gone over to the dark side, progressive critics argue that the difficulty of regulating “fake news” under current First Amendment doctrine demonstrates that the First Amendment is obsolete. While some types and degrees of platform self-regulation are likely to help reduce the amount of “fake news,” the platforms’ economic structure creates some counter-forces that lead to questions about self-regulatory effectiveness in the final analysis. And while information literacy initiatives are naturally attractive—and require nothing from either the government or the disseminators of “fake news”—the question of how to make them truly effective has not yet been answered. What we know is that people’s cognitive biases will often lead them to continue to hold on to their beliefs even after they have been shown to rest on falsity. What to do about that is still shrouded in mystery.

Still, as the adage goes, the perfect is the enemy of the good. Much headway is likely to be made by a combination of platform self-regulation and information literacy advocacy. Platform self-regulation is likely to continue if there is customer pressure, and it is likely to be somewhat effective so long as the platforms recognize the process as an iterative one that must evolve in response to sophisticated attempts to game the developing rules. When “fake news” begins to be seen as a problem that afflicts markets and commerce as well as the political world, then corporations can become partners with platforms in exploring ways to discipline the effects of disinformation. Commercial participants in the information marketplace are developing multiple technological ways to address “fake news.” Whether or not mandatory disclosure obligations applicable to political ads on the Internet would pass constitutional muster, such rules can be voluntarily adopted to enhance current technological “fixes” to “fake news.” Similarly, information literacy initiatives are likely to be increasingly effective the more they take account of the lessons taught by psychologists and political scientists. They just need to avoid the legitimacy trap themselves—by which they could

⁴³⁸ Anderson & Rainie, *supra* note 21. This report asserted that 51% of the experts it polled were pessimistic on the question, while 49% were more optimistic (although no one thought “fake news” could be eliminated rather than reduced). The attitudes apparently depended largely on whether the experts were optimistic about human nature and technology. *See id.*

be criticized for using manipulative techniques to combat manipulation.

Nevertheless, these sorts of developments, while laudable and likely to reduce the flow of “fake news,” are not sufficient to rebuild public trust in the press. They do not directly address the underlying threat to democracy posed by the consistent delegitimation of the press by the president, other governmental figures, and nakedly ideological segments of the so-called press itself. Authoritarianism and corruption can grow unchecked in contexts where an independent press is not there to watch, discover, and reveal. Periodic information dumps by leakers and shadowy entities like Wikileaks cannot make up for the loss of professional accountability journalism. Leaving the public sphere to mediation solely by Facebook, Google, and Twitter is a dangerous strategy. Therefore, the Article argues, we need to take the perhaps counter-intuitive step of empowering the press both doctrinally and with respect to its customs and practices. The first step is the reversal of the ground that has already been lost in terms of press protection, both formal and informal. The second step is a more sustained inquiry into expanding press protections, both legislatively and judicially. The last step is the changes that the press would have to undertake in order to regain public trust. None of this is an easy case, nor are the consequences of legally empowering the press likely to be unalloyed benefits. The principal reason to advocate for this, however, is that the alternative is likely to be far worse.

THE EPISTEMIC AND MORAL DIMENSIONS OF FAKE NEWS AND THE FIRST AMENDMENT

Ashley Messenger*

“Fake news”¹ is a concept that has garnered a lot of attention. It is faulted for creating a variety of social problems, contributing to political divisions in the U.S., and interfering with elections in the U.S. and abroad.² And as such, there have been calls for regulation.³

With respect to the legal aspects of fake news, there are two important points: (1) much of what is called fake news is probably constitutionally protected speech. First Amendment protection is not conditioned upon whether speech is helpful or good. The Founders had other priorities in mind. But by making a broad grant of freedom to the public, the Founders also expected the public to behave responsibly. That means, (2) the law must accommodate the broad conception of free speech and also limit liability for those who attempt to engage in good faith corrections of the record. In essence, the law must be consistent with the epistemic and moral positions in which the Founders placed government and citizens.

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¹“Fake news” is a term that has been applied to many different things, including satire and genuine news reports that turn out to be incorrect. *See, e.g.*, Mark Verstraete, Derek E. Bambauer, & Jane R. Bambauer, *Identifying and Countering Fake News* 5–7 (Ariz. Legal Studies Discussion Paper No. 17-15, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007971 (describing the various categories under which fake news may fall); Edson C. Tandoc Jr., Zheng Wei Lim, & Richard Ling, *Defining “Fake News”: A Typology of Scholarly Definitions*, 6 DIGITAL JOURNALISM 137, 141–47 (2017) (providing that fake news includes satire, parody, fabrication, photograph manipulation, and propaganda). However, for purposes of this article, I am using the term to refer to speech that purports to be a true journalistic news report but in fact is intentionally falsified and/or simply made up, and it is neither presented as nor intended to be taken as merely satirical. In other words, it is an intentional lie that deceives the public. The motive may be to make money, to support or oppose a political candidate or cause, or simply to fool people. For these purposes, the precise motive is irrelevant insofar as the purpose is not to promote the truth or attempt to inform the public.

² *See, e.g.*, Morgan Chalfant, *Denmark, Sweden Team up to Counter Russian ‘Fake News’*, THE HILL (Aug. 31, 2017, 11:03 AM), <http://thehill.com/policy/cybersecurity/348693-denmark-sweden-team-up-to-counter-russian-fake-news>.

³ *See, e.g.*, Daniel Chaitin, *Reporter: FTC Can Regulate What’s Real News, What’s ‘Fake News’*, WASH. EXAM’R (Jan. 30, 2017, 4:14 PM), <http://www.washingtonexaminer.com/reporter-ftc-can-regulate-whats-real-news-whats-fake-news/article/2613392>; Andrew Rettman & Aleksandra Eriksson, *Germany Calls for EU Laws on Hate Speech and Fake News*, EUOBSERVER (Apr. 6, 2017, 9:29 AM), <https://euobserver.com/foreign/137521>.

The purpose of this Essay is simply to acknowledge that the First Amendment is structured in such a way that leaves citizens responsible for upholding certain moral and epistemic duties. In short, it does no good to call for regulation of “fake news” because the Constitution makes the citizenry the regulators. Our system requires the good faith participation of citizens, and works only when they, in fact, participate in good faith. To the extent that we are suffering the consequences of fake news, we are suffering the consequences of the failure of citizens to uphold the duties imposed by our Founders.

I. THE FRAMEWORK ESTABLISHED BY THE FOUNDERS

America’s Founders included the freedoms of speech and press in the First Amendment because they wanted to ensure that the Government would not attempt to control what could be deemed “truth;” they feared the establishment of some political orthodoxy that allowed some views to be expressed while others were censored.⁴ The First Amendment, therefore, removes such power from the Government:

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.”⁵

Over time, as the Supreme Court has had opportunities to interpret the First Amendment, it has made clear that neither truth nor morality are prerequisites for protection under the law. Truth is certainly not required for protection: *United States v. Alvarez*⁶ explicitly provided First Amendment protection for lies (in the absence of some heightened form of harm), and *New*

⁴ See *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

⁵ *Id.* at 638; see also, Thomas Jefferson, 3rd U.S. President, First Inaugural Address (Mar. 4, 1801) (transcript available at http://avalon.law.yale.edu/19th_century/jefinau1.asp) (“Sometimes it is said that man cannot be trusted with the government of himself. Can he, then, be trusted with the government of others?”).

⁶ 567 U.S. 709 (2012).

*York Times Co. v. Sullivan*⁷ provided protection to false statements about public officials in libel cases (unless the plaintiff could prove a heightened standard of fault).⁸ The law also protects much speech that many consider morally problematic: hate speech,⁹ indecency,¹⁰ and violence.¹¹ In short, the First Amendment is epistemically and morally neutral. Fake news has flourished in this environment.

What's important to remember, though, is that even though the Founders wanted to limit the Government's power to control content or declare certain views to be "truth," they in no way intended for individual citizens to be epistemically or morally neutral. On the contrary, the purpose of the First Amendment is precisely to allow individuals to have access to a wide range of views so that they can determine what to believe, and the Founders assumed that citizens would strive to be moral, rational, and truth-seeking. In fact, the framers of the constitution explicitly stated that truth, science, morality, and the sharing of ideas for the purpose of forming a common understanding of the world and good government were primary goals of press freedom:

"The last right we shall mention, regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or

⁷ 376 U.S. 254 (1964).

⁸ *Alvarez*, 567 U.S. at 724 (plurality opinion); *Sullivan*, 376 U.S. at 279–80.

⁹ *Brandenburg v. Ohio*, 395 U.S. 444, 444–45 (1969) (providing constitutional protection to speech at a KKK rally); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 396 (1992) (providing constitutional protection to cross burning); *Snyder v. Phelps*, 562 U.S. 443, 448, 460 (2011) (providing constitutional protection to protesters with signs saying "God Hates Fags"); *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 867 (E.D. Mich. 1989) (holding that university regulations against hate speech were unconstitutionally vague).

¹⁰ *Miller v. California*, 413 U.S. 15, 36–37 (1973) (granting constitutional protection to sexual material that is not "obscenity" and establishing a high bar for determining what constitutes "obscenity"); *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (finding a constitutional right to possess obscenity in the privacy of one's own home).

¹¹ *United States v. Stevens*, 559 U.S. 460, 482 (2010) (striking down a law that prohibited the depiction of cruelty to animals); *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 805 (2011) (striking down law that banned the sale of violent video games to minors).

intimidated into more honourable and just modes of conducting affairs.”¹²

With respect to finding truth, the Founders believed in reason. Perhaps they were overly optimistic, but they assumed that people wanted to know the truth and would examine facts and ideas carefully. A free press was valued and privileged in large part because of the confidence they had in the ability of persons to discern the truth. They were familiar with *Aeropagitica*, a 1644 speech given by John Milton, arguing for the freedom of print materials without a license from the British government. He famously stated:

“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, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.”¹³

Such sentiments were echoed numerous times by the Founders¹⁴ and have influenced the Supreme Court’s reasoning in favor of a free press.¹⁵

¹² Continental Congress to the Inhabitants of Quebec (Oct. 26, 1774) in *JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789* 108 (Worthington C. Ford et al. eds. 1904).

¹³ JOHN MILTON, *AREOPAGITICA, WITH A COMMENTARY BY SIR RICHARD C. JEBB AND WITH SUPPLEMENTARY MATERIAL* 58 (1918).

¹⁴ See, e.g., *THE PAPERS OF THOMAS JEFFERSON, VOLUME 33: 17 FEBRUARY TO 40 APRIL 1801* 148–52 (Barbara B. Oberg, ed. 2006) (“[E]rror of opinion may be tolerated, where reason is left free to combat it”).

¹⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269–72 (1964) (“[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions, . . . and this opportunity is to be afforded for ‘vigorous advocacy’ no less than ‘abstract discussion’ . . . The First Amendment, said Judge Learned Hand, ‘presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection . . . Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials . . . Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker . . . The constitutional protection does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered’ . . . As Madison said, ‘Some degree of abuse

Moreover, the Founders expected citizens to *participate*, to engage with one another in good faith for the purpose of discerning truth and developing a civil society. As the Court has noted:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that, in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; *that public discussion is a political duty* and that this should be a fundamental principle of the American government.¹⁶

The Founders also believed strongly in the importance of personal virtue, noting that it was crucial to the functioning of the Republic. State constitutions acknowledged that the blessings of liberty were contingent on the good behavior of citizens and officials alike. For example, the Constitution of Virginia declared, “That no free government, nor the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue; and by frequent recurrence to fundamental principles.”¹⁷ And Pennsylvania’s constitution stated:

is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.’ . . . ‘In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.’ . . . ‘That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”) (citations omitted).

¹⁶ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (emphasis added).

¹⁷ VA. CONST. art. 1, § 15.

“That a frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty, and keep a government free: The people ought therefore to pay particular attention to these points in the choice of officers and representatives, and have a right to exact a due and constant regard to them, from their legislatures and magistrates, in the making and executing such laws as are necessary for the good government of the state.”¹⁸

Massachusetts had strikingly similar language in its state constitution.¹⁹

The Founders’ assumptions that citizens would strive to be thoughtful, rational, and moral may not have been explicitly emphasized in the U.S. Constitution—presumably because they were taken for granted—but those assumptions were nevertheless built in to the idea of granting freedoms to individuals. Although the Founders certainly anticipated instances of abuse,²⁰ they nevertheless chose a system where the Government may not establish legally enforceable standards with respect to speech and press. It is, instead, incumbent upon the rational agents in the community to consider the epistemic and moral dimensions of speech. In short, the Founders established a framework that imposes some obligations on citizens to live up to certain moral and epistemic obligations for the sake of good government and a good society.

To miss this is to misunderstand the fundamental faith the Founders had in human beings. They established a government by the people and for the people because they believed that the people, together, could aspire to something great. The Founders had a hopeful trust²¹ in citizens—a vision of a rational society that aspires to truth. The law therefore needn’t force any vision of the truth because the people themselves would aspire to it.

¹⁸ PA. CONST. § XIV (1776).

¹⁹ MASS. CONST. art. III.

²⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (“As Madison said, ‘Some degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press.’”).

²¹ For a discussion of the notion of hopeful trust, see generally Karen Frost-Arnold, *Social Media, Trust, and the Epistemology of Prejudice*, 30 SOCIAL EPISTEMOLOGY 513 (2016) (Hopeful trust is when a person holds out a vision to another of what he can be. It is motivating insofar as the audience aspires to act in accordance with the vision of the kind of person/society he/it can become).

Thus, the notion of government regulation of speech or press fundamentally repudiates the vision of the Founders. Any “regulation” is through the self-government of citizens who bear their responsibilities to speak truthfully, to examine the claims of others, and to correct falsehoods when required.

II. THE BURDENS OF THE SPEAKER

From a purely legal standpoint, speakers do not bear many burdens. As noted above, the First Amendment has been interpreted to protect a wide range of offensive, immoral speech, including outright lies.²² Speakers may be liable if their speech satisfies the elements for libel, true threats, fraud, or other crimes or torts, but the degree of protection given to speech is high. Thus, it is rare that speech will have legal repercussions.

But despite the protection from governmental consequences, the Founders nevertheless anticipated that citizens would strive to adhere to rational, epistemic,²³ and moral norms,²⁴ particularly the norm to tell the truth.²⁵ Fake

²² *Supra* notes 6–12 and accompanying text.

²³ Speakers have an obligation, as part of an epistemic community, to adhere to the “norms of assertion,” which requires that a person assert only what they know to be true. TIMOTHY WILLIAMSON, *KNOWLEDGE AND ITS LIMITS* 243 (Oxford Univ. Press 2000). This is to fulfill the epistemic goal of finding the truth. *Id.* Because much of our knowledge comes from what others tell us, it is important that people be truthful in their testimony.

²⁴ The moral dimensions of speech have been addressed by many of the world religions. The Ten Commandments, for example, contain at least two admonitions regarding speech or communication: to not take the Lord’s name in vain and to refrain from bearing false witness. *Exodus* 20:7, 16 (King James). There are arguably two additional admonitions as well: the prohibition on graven images, *id.* at 20:4, restricts expressive works, and the instruction to honor one’s parents, *id.* at 20:12, may imply a restriction on speaking in a manner that reflects poorly on them. The Quran instructs adherents of Islam to “speak justly.” *Noble Quran* 6:152. Buddhists adhere to an “eightfold path,” which outlines eight major principles for practitioners, one of which is “right speech,” a complicated ethics of speaking with wisdom and compassion. See BHIKKHU BODHI, *THE NOBLE EIGHTFOLD PATH* 45 (2006). Traditional Buddhist teachings, like the Abrahamic religions, prohibit profanity and lying, but they also caution against gossip, “idle speech,” and statements that are untimely or unwelcome by the audience. See *id.* at 49–56 (describing prohibited speech). Likewise, Hinduism requires “pure” speech, which entails truthfulness and kindness. LALA BAIJ NATH, *HINDUISM: ANCIENT AND MODERN, AS TAUGHT IN ORIGINAL SOURCES AND ILLUSTRATED IN PRACTICAL LIFE* (1905) 209 (2010). In short, most religions frown upon lying and abusive speech. While the First Amendment certainly stands for the proposition that the government cannot enforce the views of any religion, the Founders in no way required the population to be devoid of religion or amoral. On the contrary, as evidenced by the language of the state constitutions referenced *supra* notes 17–19, the Founders expected citizens to adhere to some moral system.

²⁵ Scholars have recognized that even apart from moral obligations, truth-telling is fundamental prerequisite to any functioning civil society; trust is integral to social coherence and prosperity, and our society breaks down if the system is compromised by persistent lies. See generally FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES*

news presents both epistemic and moral problems, for obvious reasons. If the stories purport to be true but are in fact false, then, from an epistemic standpoint, they do not contribute to either an individual's or society's body of knowledge—and worse, they actually hinder the ability of a person or group to determine what is true by creating doubt in the public's mind about which “facts” to believe. From a moral standpoint, it is not acceptable to make knowingly false statements and present them as true. And yet despite the epistemic and moral issues with fake news, some stories may be wholly protected by the First Amendment.

III. THE BURDENS OF THE AUDIENCE

Ideally, speakers will be honest in their speech, and many are. But the reality is that we cannot always rely on speakers to uphold their obligations, especially when there are no legal consequences for the failure to do so. This places a much greater burden on the *audience* to evaluate the truth of assertions and to uphold epistemic norms. With respect to fake news, the problem is not only one of the speaker lying, it is also a problem of the audience being willing to accept the assertions without subjecting them to adequate scrutiny.

What would constitute adequate scrutiny? There is a genuine debate in the philosophical community about whether or under what circumstances one should believe something simply because it was reported to them.²⁶ What is not debated is that there are some minimum standards that must be met before one should believe what is reported.

The kinds of factors an audience might evaluate to determine whether a speaker is credible may include: “how sincere and confident the speaker seemed in the assertion; how well-placed she was to have the knowledge in question[;]” what motives she may have had in speaking; whether the speaker has any motives for insincerity; what pressure the speaker feels to speak responsibly; whether the speaker looked the audience in the eyes or seemed nervous; and whether the assertion made sense or was supported by corroborating known facts.²⁷

AND THE CREATION OF PROSPERITY (1995); SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (2d ed. 1999).

²⁶ See generally C.A.J. Coady, *Testimony and Observation*, 10 AM. PHIL. Q. 149 (1973) (debating whether one should impose epistemic burdens upon those who hear the testimony of others), see also, e.g., Elizabeth Fricker & David E. Cooper, *The Epistemology of Testimony*, 61 PROC. ARISTOTELIAN SOC., SUPPLEMENTAL VOLUMES 57 (1987).

²⁷ Sanford C. Goldberg, *Anonymous Assertions*, 10 EPISTEME 135, 142 (2013).

IV. THE IMPACT OF ANONYMITY

Fake news is often perpetrated by anonymous (or pseudo-anonymous) individuals. While the First Amendment protects anonymous speech, that doesn't mean that anonymous speech is entitled to the same degree of epistemic respect as speech tied to a known person. If the norms of assertion include an expectation that a person speak truthfully and that one will be held accountable if one fails to do so, then naturally, a person will be aware that he or she may not be held accountable for lying if his or her identity is unknown.²⁸ A speaker whose identity is hidden is therefore inherently less credible than one who speaks openly. The belief-worthiness of anonymous assertions is inherently diminished.²⁹

This is not an argument against anonymity in all cases. Anonymous speech can serve an important purpose, particularly when the speaker is subject to potential threats.³⁰ There is a strong tradition of anonymous political speech in the U.S.³¹ But typically, credible, persuasive anonymous speech comes in the form of analysis or opinion, meaning it discusses a matter of policy or conscience; it is not trying to report or establish facts. The political brochures of the American Revolution were arguments in favor of freedom, not purported news reports. One can judge the merits of an opinion or argument without knowing the speaker. One cannot judge the credibility of a factual assertion without more information about the speakers: are they generally credible? What is their source? Are they in a position to know?³²

When a speaker is anonymous, the audience lacks the information required to capably assess these factors. Thus, "the assertions themselves no longer convey that the speaker has the sort of epistemic authority that would be needed to warrant outright belief."³³

²⁸ See *id.* at 136–37; see also Karen Frost-Arnold, *Trustworthiness and Truth: The Epistemic Pitfalls of Internet Accountability*, 11 *EPISTEME* 1, 63–81 (2014).

²⁹ See Goldberg, *supra* note 27, at 148.

³⁰ See Frost-Arnold, *supra* note 21, at 69–70.

³¹ See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342–43, 357 (1995) (upholding the right of a citizen to engage in anonymous political speech by distributing unsigned leaflets and discussing the history of anonymous speech, particularly in the context of political dissent).

³² See Goldberg, *supra* note 27, at 145.

³³ See *id.* at 149.

V. THE IMPORTANCE OF CREDIBILITY AND THE MODERATION OF BELIEF

It's important to remember that a speaker typically speaks with the aim of getting the audience to believe what one asserted.³⁴ If that's true, then the speaker should also want to engender credibility, have a good track record for truthfulness, be open about sources, and use one's real name as a form of accountability. This is what most legitimate news organizations do, and these practices are often declared in a statement of principles of journalistic ethics.³⁵

Because source credibility is of such great importance, news organizations are often reluctant to grant anonymity to sources, and when they do, the news organization is essentially vouching for the credibility of the source. They are in essence saying, *we have investigated the matter and believe the truth of the assertion; the source is in a position to know, and we are not using their identity to protect them, but we vouch for their credibility.*³⁶

One of the most vexing aspects of fake news is that some citizens opt to believe stories or outlets that lack any indicia of reliability, such as identification of verifiable sources, clear standards of journalistic ethics, or long-term enforcement of such ethical standards. The stories presented may align with the audience's personal opinions or political views, but otherwise fail to present the kind of substantiation that should be required before one invests belief in the matters asserted. Often, individuals will complain that supposed "legitimate" news outlets are biased or wrong, but even if one thinks the *New York Times* has not met the requisite epistemic standard for authority, one cannot rationally argue that an anonymous, untested site does. It would be more rational to believe no one and to suspend all judgment than to believe anonymous assertions without transparent sourcing.

If "knowledge" is "true, justified belief," then one who wishes to have knowledge must care about whether that belief is justified. Fake news can create belief, but it's not true. If the

³⁴ See *id.* at 139.

³⁵ See, e.g., *SPJ Code of Ethics*, SOC. OF PROF'L JOURNALISTS, <https://www.spj.org/ethicscode.asp> (last updated Sept. 6, 2014); see also Goldberg, *supra* note 27, at 143.

³⁶ See Goldberg, *supra* note 27, at 150. Goldberg calls this the "security wall model" of credible anonymous speech. *Id.* News organizations act as a filter, passing along only those assertions that are credible, substituting their own authoritativeness for the protected source. *Id.* This model preserves the belief-worthiness of the assertion even though the original source is unknown. Obviously, though, this model requires that the filter act sparingly and credibly, as it puts its own credibility on the line each time it vouches for another. And those who do not trust the filter (for whatever reason) will not trust the anonymous assertion.

audience doesn't realize the information isn't true or hasn't evaluated whether the belief is justified, then people may think they have knowledge, but they don't—and that undermines the quality of the decision making in our society.

When Milton talked about Truth grappling with Falsity, he assumed there would be a conclusion to the grappling. In the meantime, Falsity may have the upper hand, and that may cause harm.

Thus, if the audience can't be certain what's true, at least the audience can moderate belief. The audience must maintain a degree of epistemic humility when new information is received. It must be tested against other sources to determine whether believing the information is justified. The audience must account for the fact that some people make up facts. Therefore, belief should be attenuated if one cannot be sure the facts are true. This may mean that in the absence of corroboration or clear evidence, one should suspend judgment. We seem to believe that we must have an opinion about every topic, but from a moral and epistemic standpoint, it may be superior to refrain from forming firm beliefs and instead remain open to new information. As Truth grapples with Falsity, one needn't call the match too soon.

VI. THE OBLIGATION TO SPEAK UP AND PARTICIPATE

As a corollary to that principle, those who do have knowledge of the facts have an obligation to speak up and to correct the record when necessary to prevent others from believing false assertions. If in fact the Founders believed that public discussion is a political duty, then it is incumbent upon citizens with genuine knowledge to ensure that others are not fooled by lies. One prominent scholar has called this a "duty to object."³⁷ It may be a social or normative duty, but it is not a legal duty—nor could it be, because of First Amendment protections.³⁸ Nevertheless, the concept is consistent with the position in which citizens are placed; theirs is the duty to engage in good faith for the sake of civil society and good

³⁷ Jennifer Lackey, *The Duty to Object*, PHIL. AND PHENOMENOLOGICAL RES. (forthcoming 2018) (manuscript available at http://www.susannaschellenberg.org/REC/Program_2017_files/Lackey.pdf) ("If you report something that I know is false or unwarranted, or potentially harmful to others, I may be required to say as much."). In arguing for a "duty to object," Lackey notes that correcting false reports is an imperative with both epistemic and moral dimensions. *Id.* (manuscript at 3). She also notes a moral duty not to be rude or confrontational in doing so. *Id.* (manuscript at 22).

³⁸ The First Amendment protects the right not to speak as well as the right to speak. *See, e.g.,* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (protecting the right of a newspaper not to publish a column).

government, and that may mean correcting the record in response to fake news. Moreover, “those who know more about the situation have a greater obligation to weigh in than do those who are ignorant of the matter . . . and those who are regarded as an expert on an issue relevant to the case have a stronger duty than those who aren’t.”³⁹ I would add that not only must one speak up when one knows a statement is false, one must also speak up when one suspects that an assertion is based on flimsy evidence, is being promoted for short-sighted or self-serving motives, or otherwise may be epistemically flawed. It’s easy to deny responsibility when one can say that they don’t know for sure whether a statement is false, but allowing poorly grounded assertions to circulate without challenge is equally pernicious to the community as allowing false statements to circulate because, in both instances, we fail to uphold the interest in rigorously pursuing truth. Those who purport to be leaders—in journalism, politics, or otherwise—have an obligation to call out statements that are clearly false as well as to call into question statements that require further examination. It is particularly important for leaders to do so when the statement, left unchallenged, would seem to help them or their allies. Studies indicate that one of the greatest indicators of credibility is a correction from a source when the erroneous claim would have been in the source’s favor.⁴⁰

But even if a dutiful citizen were to object to false assertions, there is still an important, lingering question, which is whether other citizens are willing to listen and engage in the process of discerning what is true. We are all members of the moral and epistemic community,⁴¹ but that begs the question of what happens if some members refuse to participate. Our constitutional republic was founded on an ideal of citizen participation, and we place our country—and our freedoms—at great risk when we don’t take seriously the responsibilities that the Founders assumed we would uphold: civil, rational discourse in furtherance of our moral and epistemic obligations.

³⁹ Lackey, *supra* note 37.

⁴⁰ Neil Levy, *Nudges in a Post-Truth World*, 43 J. MED. ETHICS, 1, 3 (2017) (“Thus, corrections to myths about Obamacare that stem from Republican sources are effective for liberals and conservatives alike; the fact that the claim is contrary to the source’s interests is taken to be evidence in its favour.”); *see also* Lackey, *supra* note 38. Lackey also points out that one has a stronger duty to object to false assertions when that person will be deemed to have more credibility with the audience. *Id.* (manuscript at 30). In other words, Republicans who object to false assertions that other Republicans would otherwise be inclined to believe have a greater duty to speak up. The audience of “other Republicans” will be more likely to believe and respect the word of the “speaking Republican” than they will of Democrats who make the same point.

⁴¹ Lackey, *supra* note 38.

Finally, because the Founders have placed citizens, not government, in the role of discerning the truth, the First Amendment must fully protect efforts to fulfill our obligations.

VII. THE NEED FOR ADEQUATE CONSTITUTIONAL PROTECTIONS TO FULFILL OUR OBLIGATIONS

I have previously written about why the Supreme Court's jurisprudence on libel law is flawed: the law currently fails to account for situations in which one is advising the public of a potential falsehood, not to perpetuate the falsehood, but to advise the public on the controversy;⁴² and the Court's treatment of allegations of "lying" create potential problems for those who are trying to identify falsehoods or correct the record.⁴³ Both of these flaws are highlighted when one examines how journalists—or citizens—can discuss the problem of "fake news." Courts should account for the need to point out falsehoods (or likely falsehoods) and therefore should grant constitutional protection to speech that either reports on falsehoods or attempts to correct a falsehood.

The realm of fake news makes clear a point I have raised before: that libel law must account for the difference in motivations among speakers. The republication rule—which provides that ANY re-publisher is equally liable as the original publisher—simply does not make sense in the context of fake news. Those who originate or republish false statements for the purpose of persuading the public that they are true should be treated differently from those who republish the statements with the purpose of advising the public that they are or may likely be false.⁴⁴ Similarly, the courts should be reluctant to impose liability on a speaker who objects to the assertions of others. There are a slew of libel cases where plaintiffs allege that they are defamed as "liars," because another has deemed their assertions to be untrue.⁴⁵ The courts need to provide substantial protection to those who have legitimate motives to question

⁴² Ashley Messenger, *The Problem With New York Times Co. v. Sullivan: An Argument for Moving from A Falsity Model of Libel Law to A Speech Act Model*, 11 FIRST AMEND. L. REV. 172 (2012).

⁴³ Leonard Niehoff & Ashley Messenger, *Milkovich v. Lorain Journal Twenty-Five Years Later: The Slow, Quiet, and Troubled Demise of Liar Libel*, 49 U. MICH. J.L. REFORM 467, 468 (2016).

⁴⁴ See Messenger, *supra* note 42, at 470.

⁴⁵ See, e.g., *Costello v. Capital Cities Commc'ns, Inc.*, 125 Ill.2d 402 (1988); *McNamee v. Clemens*, 762 F.Supp. 2d 584 (E.D.N.Y. 2011); Daniel Jackson, *Sex-Assault Accusers Turn to Defamation Lawsuits in #MeToo Era*, COURTHOUSE NEWS SERV. (Jan. 25, 2018), <https://www.courthousenews.com/sex-assault-accusers-turn-to-defamation-lawsuits-in-metoo-era/>.

unfounded assertions, or who have personal knowledge of the events in question.⁴⁶

VIII. CONCLUSION

The Framers of the Constitution set up a system that gives citizens immense power in the realm of speech and press and requires them to adhere to moral and epistemic norms. That system collapses if people don't uphold their end of the deal. The problem of fake news should be a wake-up call—not for more government regulation, but for greater citizen participation in the moral and epistemic community.

⁴⁶ See Niehoff & Messenger, *supra* note 43, at 484; see also Clay Calvert, *Counterspeech, Cosby, and Libel Law: Some Lessons about Pure Opinion & Resuscitation of the Self-Defense Privilege*, 69 FLA. L. REV. 151, 171 (2017).

THE GOVERNMENT'S MANUFACTURE OF DOUBT

Helen Norton *

“The manufacture of doubt” refers to a speaker’s strategic efforts to undermine factual assertions that threaten its self-interest. This strategy was perhaps most famously employed by the tobacco industry in its longstanding campaign to contest the mounting medical evidence that linked cigarettes to serious health conditions.¹ At its best, the government’s speech can counter such efforts and protect the public interest, as exemplified by the Surgeon General’s groundbreaking 1964 report on the dangers of tobacco, a report that challenged the industry’s preferred narrative.² But the government’s speech is not always so heroic, and governments themselves sometimes seek to manufacture doubt and protect their own interest at the expense of the public’s.³

In this short Essay, I examine how the government as speaker sometimes seeks to manufacture doubt about factual assertions it perceives as inconsistent with its policy or partisan preferences. I start with some background on the history of government speech in the United States, a history that reveals the diversity and complexity of the government’s expressive choices. Drawing from historical and contemporary examples, I then identify at least three strategies through which the government sometimes seeks to manufacture doubt: through its lies and misrepresentations, through its attacks on individuals and institutions that challenge its preferred narrative, and

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¹ See NAOMI ORESKES AND ERIK M. CONWAY, *MERCHANTS OF DOUBT: HOW A HANDFUL OF SCIENTISTS OBSCURED THE TRUTH ON ISSUES FROM TOBACCO SMOKE TO GLOBAL WARMING* 33–34 (2010) (“[T]he tobacco industry knew the dangers of smoking as early as 1953 and conspired to suppress the knowledge. They conspired to fight the facts, and to merchandise doubt. . . . The industry defended its primary product—tobacco—by manufacturing something else: doubt about its harm.”).

² See generally, e.g., U.S. DEP’T OF HEALTH, EDUC., & WELFARE, No. 1103, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GEN. OF THE PUBLIC HEALTH SERV.* (1964) (describing the adverse health effects of smoking).

³ These strategies are neither new nor unique to American governments. See Amanda Taub, *‘Kompromat’ and the Danger of Doubts*, N.Y. TIMES, Jan. 16, 2017, at A3 (“[K]ompromat is more than an individual piece of damaging information: It is a broader attempt to manufacture public cynicism and confusion in ways that target not just one individual but an entire society. . . . By eroding the very idea of a shared reality, and by spreading apathy and confusion among a public that learns to distrust leaders and institutions alike, kompromat undermines a society’s ability to hold the powerful to account and ensure the proper functioning of government.”).

through its choices to bury or deny access to information that it finds inconvenient or dangerous. I close by briefly considering possible responses to these strategies.

I. SOME BACKGROUND ON THE GOVERNMENT'S EXPRESSIVE CHOICES

In this Part, I very briefly sketch the variety and complexity—as well as the pervasiveness—of the government's expressive choices. For example, when we discuss government speech, we often focus on presidential expression. But legislative and judicial branch speakers—as well as speakers from all levels of federal, state, and local governments—also deserve our attention and, at times, our concern. The government's audiences are similarly diverse: they include not only the American public but also our foreign allies, neutrals, and enemies. They include other government speakers as well; indeed, separation of powers and federalism principles in great part seek to force different government actors to talk with each other.⁴ The full range of the government's expressive choices is also broad, and includes not only its affirmative speech—such as the substance, tone, and delivery of its debates, dialogue, and counterspeech—but also its silences.⁵

Over time, governmental speakers have made very different decisions about how to deploy these expressive possibilities. With respect to presidential speech, for example, historian Jeffrey Tulis explains that “[t]he rhetorical presidency

⁴ See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 91 (1983) (“In Madisonian fashion, powerful communicators should be played off against one another, preventing any one group or elite from gaining ideological dominance. Governments should be pitted against one another in the wars of words and symbols, and government communications generally should be subject to the counterforce of communications emanating from a healthy, diverse, and pluralistic private sector.”).

⁵ Here I distinguish the government's “silences” from its “secrets.” Governmental secrets generally involve the government's decision not to disclose certain facts. See *infra* notes 81–85 and accompanying text. By governmental silences, in contrast, I mean the government's failure to speak on a contested public policy issue or crisis. For examples of such governmental silences, see NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE* 63 (1969) (“Eisenhower was later to state in his memoirs that the Supreme Court's judgment in the desegregation cases was unquestionably correct. During his years in office, however, the President failed to express publicly his approval either of the principle enunciated in the *Brown* decision or of the ruling itself. Since the racial question was the dominant domestic issue of the period, he made many comments on the subject. Yet not once did he endorse the desegregation decision or offer support to those struggling to implement its provisions. ‘I do not believe,’ the President reiterated, ‘it is the function or indeed it is desirable for a President to express his approval or disapproval of any Supreme Court decision.’”); GEOFFREY R. STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY* 259 (2017) (describing President Reagan's reluctance to engage AIDS as a public health crisis).

and the understanding of American politics that it signifies are twentieth-century inventions and discoveries. Our pre-twentieth-century polity proscribed the rhetorical presidency as ardently as we prescribe it.”⁶ Indeed, the Framers feared that charismatic speakers posed grave threats to a democratic state,⁷ and thus sought to limit such speakers’ power and influence through norms of discourse along with structural constraints.⁸ Starting with George Washington and continuing through most of the 19th century, for example, presidents expressed themselves primarily through written communications that offered greater formality and opportunity for reflection; along these lines, Jefferson began a tradition of sending his assessment of the State of the Union to Congress in writing, rather than through an oral address he felt more appropriate for a monarch.⁹ Similarly, Andrew Jackson “made his arguments to the people in the form of official statements such as his annual messages and the Nullification Proclamation, rather than by giving speeches. This formalized process allowed presidential positions on the Constitution to be fully vetted with advisors and crafted for widespread consumption.”¹⁰

Abraham Lincoln serves as the exemplar of thoughtful and restrained presidential rhetoric, largely preferring “to address the people through the press without the intervention of editors”¹¹ Lincoln’s successor, Andrew Johnson, provides the exception that demonstrates the rule, as Johnson routinely engaged in direct and informal appeals to the public that struck

⁶ JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 5–7 (1987).

⁷ See James W. Ceaser, *Demagoguery, Statesmanship, and Presidential Politics*, in *THE CONSTITUTIONAL PRESIDENCY* 251 (Joseph M. Bessette & Jeffrey K. Tulis eds., 2009) (“*The Federalist* is filled with grave warnings against flattery and against the ‘artful misrepresentations of interested men’ who encourage the people to indulge ‘the tyranny of their own passions.’”); TULIS, *supra* note 6, at 27 (“The founders worried especially about the danger that a powerful executive might pose to the system if power were derived from the role of popular leader. For most federalists, ‘demagogue’ and ‘popular leader’ were synonyms, and nearly all references to popular leaders in their writings are pejorative.”).

⁸ See Ceaser, *supra* note 7, at 252 (explaining that the Framers sought to channel presidential communication “away from informal popular orations and towards more deliberative forms of rhetoric”).

⁹ See TULIS, *supra* note 6, at 56.

¹⁰ HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 105 (2015).

¹¹ HAROLD HOLZER, *LINCOLN AND THE POWER OF THE PRESS: THE WAR FOR PUBLIC OPINION* 518 (2014); see also TULIS, *supra* note 6, at 80 (“Some have suggested that the rhetorical presidency might be a reflection of increased opportunity for popular leadership (development of wire services, mass communications, etc.), rather than a doctrinal change. Lincoln makes clear not only that he did not lack opportunity, but that such opportunities were the problem. Hastily formed statements might engender a course of policy that was unintended. Finally, Lincoln indicates that ‘silence’ will enhance the persuasive power of those speeches that he does deliver.”).

his contemporary observers as inappropriate.¹² Indeed, the House of Representatives' (ultimately unsuccessful) articles of impeachment show how deeply Johnson's expressive choices offended prevailing norms of presidential discourse, in that he was alleged to have made:

with a loud voice certain intemperate, inflammatory and scandalous harangues, and did therein utter loud threats and bitter menaces as well against Congress as the laws of the United States Which said utterances, declarations, threats, and harangues, highly censurable in any, are peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof Andrew Johnson has brought the high office of the President of the United States into contempt, ridicule, and disgrace, to the great scandal of all good citizens. . . .¹³

Presidents' expressive choices changed dramatically in the 20th century. Teddy Roosevelt started this shift with his strategic decision to advocate for his policies directly to the people rather than to Congress.¹⁴ Woodrow Wilson built on this move by resuscitating the long-dormant presidential tradition of delivering a State of the Union address to Congress in person and by offering important policy statements directly to the citizenry through public speeches.¹⁵ Newer communicative technologies further enabled and emboldened this turn, as Franklin D. Roosevelt "became the first master of the electronic media" with fireside chats broadcast directly to the public,¹⁶ and "Kennedy began the practice of live televised press conferences [because he] wanted to control the news."¹⁷ Professor Tulis summarizes this revolution in the norms of presidential discourse: "Today it is taken for granted that

¹² See TULIS, *supra* note 6, at 89 ("Nothing could be further from the founders' intentions than for presidential power to depend upon the interplay of orator and crowd. This interplay may or may not persuade the immediate audience, but the effect of such activity upon the president's office, upon his dignity, upon his future ability to persuade, and upon the deliberative process as a whole is likely to be deleterious.").

¹³ *Articles of Impeachment of Andrew Johnson*, TEACHINGAMERICANHISTORY.ORG, teachingamericanhistory.org/library/document/articles-of-impeachment-of-andrew-johnson (last visited Mar. 11, 2018).

¹⁴ TULIS, *supra* note 6, at 4 ("The core of [Roosevelt's] argument was that a change in authorized practices was necessary to fulfill the purposes of the underlying founding theory of governance.").

¹⁵ *Id.* at 133.

¹⁶ See BRUFF, *supra* note 10, at 231.

¹⁷ *Id.* at 294.

presidents have a *duty* constantly to defend themselves publicly, to promote policy initiatives nationwide, and to inspire the population. And for many, this presidential ‘function’ is not one duty among many, but rather the heart of the presidency—its essential task.”¹⁸

More recently, President Trump’s expressive choices provide novel departures from traditional norms in their substance, tone, and means of delivery. Trump himself celebrates his expressive innovations, innovations that some find resonant and others repellent: “Trump argued over the weekend that his outsized Twitter presence was part of a calculated redefinition of the presidency: ‘My use of social media is not Presidential—it’s MODERN DAY PRESIDENTIAL.’”¹⁹ As just one example, Trump is unusually combative and eager to engage conflict, rather than defuse it, with his speech—a choice that some attribute to his background in entertainment, media, and reality TV where the norms of discourse are very different from those of traditional politics.²⁰

But presidents are neither the only, nor necessarily the most important of, government speakers. Governmental agencies, for example, are now major expressive players—a development initially inspired in large part by the urgencies of war and implemented by the federal Committee on Public Information, which relied on press releases, movies and newsreels, posters, traveling exhibits, speeches, books, and pamphlets to mobilize public support for the nation’s World War I efforts.²¹ The growth of the administrative state fueled the continued expansion of agencies’ expression. New Deal agencies’ speech, for example, celebrated the work of the Civilian Conservation Corps and explained the terms of the newly enacted Social Security insurance program.²² Federal, state, and local government agencies’ speech is now ubiquitous, with examples that include not only the Surgeon General’s report on the dangers of tobacco, but also the Forest Service’s

¹⁸ TULIS, *supra* note 6, at 4.

¹⁹ Jill Colvin, *Twitter Battle with Press May Come with a Price*, AP NEWS (July 3, 2017) <https://apnews.com/f3838ea7b4c645fb85b61303740cad86>.

²⁰ See Daniel W. Drezner, *Why is Donald Trump so Bad at the Bully Pulpit?*, WASH. POST. (Aug. 14, 2017), http://wapo.st/2w4qic3?tid=ss_mail&utm_term=.2a1de22eb270.

²¹ See WALTER LIPPMANN, PUBLIC OPINION 46–47 (1922) (describing the Committee on Public Information as undertaking “the largest and most intensive effort to carry quickly a fairly uniform set of ideas to all the people of the nation”).

²² JAMES C. MCCAMY, GOVERNMENT PUBLICITY 23, 39 (1939); see also *id.* at 227 (“This expansion [in the administrative state] brought an attendant need for more explanation of the [government’s new] program and more attention to the possible public reaction to administrative practices. Likewise, as more of the public became involved in any way with the new program, more demands for information were created.”).

Smokey Bear wildfire prevention campaign; health alerts from the Center for Disease Control; disaster preparedness warnings from emergency management offices; and many more.

Legislatures also engage in a variety of expressive endeavors. Through resolutions, legislative bodies articulate their views on a particular topic. For instance, “in response to the outbreak of noose incidents in 2007, the entire United States federal legislature voiced its disapprobation. In December of that year, both the House and the Senate passed resolutions citing the history of lynching in America” and condemning the intimidating displays of nooses.²³ Committee reports and related oversight activities also communicate the legislature’s priorities and values.²⁴ As Josh Chafetz explains, “holding hearings and releasing information to the press and the public is an essential means by which houses and members make arguments in the public sphere and attempt to shape the public discourse.”²⁵

The judiciary speaks too. Not only does its power of the pen include the power to write opinions (including concurrences and dissents), but the judiciary also speaks in other settings to other governmental actors and to the public.²⁶ To be sure, the judiciary’s expressive norms vary from those of other government speakers in their greater tendency toward formality and deliberation; relatedly, judges (and government lawyers) are unlike other government speakers in that their speech is constrained by ethics codes that prohibit falsehoods,²⁷ ex parte communications,²⁸ certain commentary on pending matters,²⁹ and sometimes their campaign speech.³⁰ Indeed, judges’ politically expressive efforts met with outcry and opposition very early on: recall that Supreme Court Justice and Federalist party member Samuel Chase faced impeachment proceedings for his expressive use of grand jury charges to

²³ Charlotte H. Taylor, *Hate Speech and Government Speech*, 12 U. PA. J. CONST. L., 1115, 1146 (2010).

²⁴ See, e.g., Note, *Blacklisting Through the Official Publication of Congressional Reports*, 81 YALE L.J. 188 (1971) (discussing the expressive use of congressional reports to shame targeted individuals).

²⁵ JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 152 (2017); see also *id.* at 38 (“[C]ongressional committees can drive the national agenda by holding hearings that draw attention to certain issues, and ‘entrepreneurial’ individual members of Congress, using the platform afforded by their offices (and, if necessary the protection afforded by the Speech or Debate Clause . . .), can play key roles in shaping the national discussion.”).

²⁶ See generally RICHARD DAVIS, JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA (2011).

²⁷ MODEL CODE OF JUDICIAL CONDUCT r. 1.2 (AM. BAR ASS’N 2011).

²⁸ *Id.* at r. 2.9.

²⁹ *Id.* at r. 2.10.

³⁰ *Id.* at r. 4.1.

attack the Republican party and its policies.³¹ Over time, however, some judicial speakers have shown increasing willingness to engage in public policy debates. Recall, for example, Chief Justice Charles Evan Hughes' letter to the Senate Judiciary Committee refuting FDR's claims that the nine-Justice Court was struggling to handle its workload—a letter many considered to be key in cohering opposition to the president's Court-packing proposal.³² More recent illustrations include judges' growing efforts to educate the public about the judiciary as an institution, and to engage debates about competing approaches to constitutional interpretation.³³ Indeed, some judges now employ social media for these purposes.³⁴

In short, the history of government speech is as long as the history of governments; a history that reveals myriad changes and variations in the substance, tone, and delivery of the government's chosen messages. In contrast, the Supreme Court's government speech doctrine is relatively new. This doctrine permits the government to assert a privilege to control its own speech when defending Free Speech Clause challenges by private parties claiming a constitutional right to shut down the government's expression. As the Court explained:

When a government entity embarks on a course of action, it necessarily takes a particular viewpoint and rejects others. The Free Speech Clause does not require government to maintain viewpoint neutrality when its officers and employees speak about that venture. Here is a simple example. During the Second World War,

³¹ See Lynn H. Rambo, *When Should the First Amendment Protect Judges From Their Unethical Speech?* 5 (Tex. A&M Univ. Sch. of Law, Working Paper No. 17–56, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3027761 (“Chase’s impeachment (and near conviction) seems to have persuaded the judiciary that its grand jury charges, and other judicial appearances, should no longer include overtly political speeches.”).

³² See *Reorganization of the Federal Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong. 488–92 (1937) (statement of Senator Burton K. Wheeler) (reading from Chief Justice Hughes’s letter: “An increase in the number of justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the Court. It is believed that it would impair that efficiency so long as the Court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide. The present number of justices is thought to be large enough so far as the prompt, adequate, and efficient conduct of the work of the Court is concerned.”).

³³ See DAVIS, *supra* note 26, at 184–85.

³⁴ See generally Elizabeth G. Thornburg, *Twitter and the #So-Called Judge* (S. Methodist Univ. Sch. of Law, Working Paper No. 365, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3013241 (documenting some judges’ use of social media to respond to other speakers’ attacks on judicial legitimacy, to educate citizens about the legal system, and to address proposals for changes to the legal system).

the Federal Government produced and distributed millions of posters to promote the war effort. There were posters urging enlistment, the purchase of war bonds, and the conservation of scarce resources. These posters expressed a viewpoint, but the First Amendment did not demand that the Government balance the message of these posters by producing and distributing posters encouraging Americans to refrain from engaging in these activities.³⁵

The government speech doctrine thus explains why tobacco companies do not have a First Amendment right to force the Surgeon General to deliver their views on the benefits of cigarettes, and why the Administration's political critics do not have a First Amendment right to share the podium at the President's State of the Union address. Instead, the First Amendment protects those dissenting speakers' right to present their own views in their own reports and at their own press conferences.

The Court's government speech doctrine appropriately recognizes the value—and, indeed, the inevitability—of the government's expressive choices.³⁶ I believe, however, that its doctrine remains incomplete in at least two respects. First, the Court to date has failed to insist that the government affirmatively identify itself as the source of expression as a condition of claiming the government speech defense, even though meaningful political accountability requires such transparency.³⁷ Second, the Court has yet to grapple with the ways in which the government's speech sometimes affirmatively threatens specific constitutional values (apart from whether and when the government's religious speech violates the Establishment Clause). By failing to address these issues, the Court has missed opportunities to check the government's destructive expressive choices, including the government's expressive efforts to manufacture doubt.

To be sure, the government's expressive choices are neither inevitably good nor bad. Through its speech, the government can educate, shame, empower, challenge, distress, comfort, or distract. While this Essay focuses primarily on a

³⁵ *Matal v. Tam*, 137 S. Ct. 1744, 1757–58 (2017).

³⁶ *See id.* at 1758 (characterizing the Supreme Court's government speech doctrine as “important—indeed, essential”).

³⁷ *See* Helen Norton, *Government Speech and Political Courage*, 68 STAN. L. REV. ONLINE 61, 66 (2015).

dark side of the government's expression,³⁸ the government's speech can, and often does, serve important constitutional values. For example, presidents' expressive use of their bully pulpit to advocate for everything from tax reform to child nutrition can generate important public conversations and inform the public's political choices. Through its speech, the government can also assert moral and political leadership in the nation's ongoing struggle to achieve equality. Recall, for example, President Lyndon Johnson's nationally televised presidential exhortation that "We Shall Overcome" in the midst of the 1960s' civil rights battles,³⁹ President George W. Bush's repudiation of anti-Muslim bigotry in a speech at a mosque immediately after the 9/11 attacks,⁴⁰ and, more recently, New Orleans Mayor Mitch Landrieu's explanation of his city's expressive choice to remove its Confederate monuments from public property.⁴¹

But the government's speech sometimes excludes and divides in ways repugnant to equal protection values, as illustrated by the lies told by governmental officials to justify the World War II internment of thousands of Japanese-American citizens.⁴² As another example, in the aftermath of the Supreme Court's decision in *Brown v. Board of Education*, many Southern governors and members of Congress, along with other state and local officials, engaged in an expressive campaign of "massive resistance" to undermine the Court's credibility and legitimacy.⁴³ For instance, at his inauguration as

³⁸ See Seth Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 13 (1991) ("The landmarks by which we guide ourselves in constitutional law are usually not positive ideals but the dangers we have identified and seek to avoid.").

³⁹ President Lyndon B. Johnson, "We Shall Overcome" Speech to Congress, (Mar. 15, 1965) (transcript available at http://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202011-2012/Johnson_WeShallOvercome.pdf).

⁴⁰ President George W. Bush, Remarks by the President at Islamic Center of Washington, D.C. (Sept. 17, 2001) (transcript available at <https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010917-11.html>). For related examples, see Helen Norton, *Government Speech and the War on Terror*, 86 FORDHAM L. REV. 543, 545–46 (2017).

⁴¹ See Katherine Sayers, *Read Mayor Mitch Landrieu's Speech on Removing New Orleans's Confederate Monuments*, NOLA (May 22, 2017, 2:18 PM), http://www.nola.com/politics/index.ssf/2017/05/mayor_landrieu_speech_confeder.html ("Surely we are far enough removed from this dark time to acknowledge that the cause of the Confederacy was wrong.").

⁴² See *Korematsu v. United States*, 323 U.S. 214, 235–40 (1942) (Murphy, J., dissenting) (describing the government's many lies); *Korematsu v. United States*, 584 F. Supp. 1406, 1418–22 (N.D. Cal. 1984) (describing evidence of the government's lies in earlier proceedings). For additional examples, see Norton, *supra* note 40, at 547–52.

⁴³ See BARTLEY, *supra* note 5, at 117 (describing the objective of the Southern manifesto as to "confuse legal and moral issues and to undermine any sense of inevitability a Supreme Court decision normally commands").

governor of Alabama, George Wallace climbed the state capitol's steps to declare:

Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom-loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever.⁴⁴

(As an example of governmental counterspeech, contrast Jimmy Carter's inaugural address as Georgia's governor just eight years later: "The time for racial discrimination is over."⁴⁵) The government's expressive choices have undermined equality in other ways as well. At around the same time as the campaign for massive resistance, for example, a Senate subcommittee charged with investigating "The Employment of Homosexuals and Other Sex Perverts in Government" asserted that "[o]ne homosexual can pollute a Government office."⁴⁶ More recently, numerous state laws insist that public schools' sex education curricula include anti-gay expression; Alabama, for example, requires "[a]n emphasis, in a factual manner and from a public

⁴⁴ George Wallace, Former Governor of Alabama, Inaugural Address (1963) (Jan. 14, 1963) (transcript available at https://web.utk.edu/~mfitzge1/docs/374/wallace_seg63.pdf).

⁴⁵ Jimmy Carter, Former Governor of Georgia, Inaugural Address (Jan. 12, 1971) (transcript available at https://web.archive.org/web/20161201224225/https://www.jimmycarterlibrary.gov/documents/inaugural_address.pdf).

⁴⁶ S. REP. NO. 81-241, at 4 (1950); *see also id.* ("[I]t is generally believed that those who engage in overt acts of perversion lack the emotional stability of normal persons. In addition there is an abundance of evidence to sustain the conclusion that indulgence in acts of sex perversion weakens the moral fiber of an individual to a degree that he is not suitable for a position of responsibility. Most of the authorities agree and our investigation has shown that the presence of a sex pervert in a Government agency tends to have a corrosive influence upon his fellow employees. These perverts will frequently attempt to entice normal individuals to engage in perverted practices. . . .").

health perspective, that homosexuality is not a lifestyle acceptable to the general public.”⁴⁷

The government’s speech can frustrate other constitutional values too. In the next Part, I draw from both historical and contemporary examples to identify ways in which the government’s expressive choices may manufacture doubt and distort the truth.

II. THE GOVERNMENT’S CAPACITY TO MANUFACTURE DOUBT THROUGH ITS EXPRESSIVE CHOICES

The government is unusually well-positioned to manufacture doubt through its expressive choices because it generally enjoys advantages of power and information over its listeners.⁴⁸ Not only does the government exert coercive power over the public as sovereign, but it also speaks in a number of other roles in which it asserts power over its audience in various ways—for example, as employer, educator, property owner, and more. Indeed, the government sometimes holds its listeners “captive”—i.e., with limited possibilities for voice or exit⁴⁹—as is the case of those in government custody, young people in public schools, and patients in certain public health care settings.⁵⁰ The government’s often-privileged access to key information further empowers its ability to manufacture doubt about certain matters.⁵¹

⁴⁷ ALA. CODE § 16-40A-2(c)(8) (1975); see also Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1463 (2017) (describing a variety of state laws regulating public school teaching and curricula).

⁴⁸ The government’s observers and critics have long objected to its efforts to exploit these advantages to “weaponize” its speech. See, e.g., *News as a Weapon*, CHI. DAILY TRIB., Nov. 2, 1962, at 16 (criticizing the Kennedy Administration’s “admitted effort to convert news of government into a propaganda weapon”).

⁴⁹ See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (explaining that individuals can change organizational behavior through voice (i.e., counterspeech objecting to the group’s behavior) or exit (i.e., demonstrating their unhappiness by leaving the group altogether).

⁵⁰ See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 699 (1970) (expressing concern about the government’s speech addressed to a captive audience and other “government expression that monopolizes or otherwise distorts the system of freedom of expression”).

⁵¹ See LIPPMANN, *supra* note 21, at 247 (“The established leaders of any organization have great natural advantages. They are believed to have better sources of information. The books and papers are in their offices. They took part in the important conferences. They met the important people. They have responsibility. It is, therefore, easier for them to secure attention and to speak in a convincing tone. But also they have a very great deal of control over the access to the facts. Every official is in some degree a censor.”); David Pozen, *The Rhetorical Presidency Meets the Drone Presidency* (Columbia Pub. Law Research Paper No. 14-484, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id= (“The Obama administration’s speeches are admirably low on demagoguery. Yet like all governmental presentations in public venues, they have a tendency to obscure or

The government's ability to manufacture doubt through its expressive choices is greater still because its identity and substantial resources enable it, relatively easily, to attract the attention of a large audience.⁵² Newer expressive technologies enhance these opportunities by empowering the government to reach its listeners immediately and without intermediation from the press or other skeptical third parties. During the Obama Administration, for example, the White House's Office of Digital Services increasingly chose to break presidential news directly to the public through Obama's social media accounts rather than wait for traditional print media to do so.⁵³ That office also relied on analytics to "track what United States senators and the people who worked for them, and influenced them, were seeing online—and make sure that no potential negative comment passed without a tweet."⁵⁴ To be sure, the government's reliance on such technologies can facilitate democratic accountability, free expression, and related constitutional interests by expanding public access to government information and enabling citizens' participation in governmental processes.⁵⁵ On the other hand, some expressive technologies can also mask the government's authorship of,

omit significant facts, complications, and objections, a tendency that is exacerbated in the national security field by the ready-made excuse of protecting classified information.").

⁵² See Jenna Johnson, *This is What Happens When Donald Trump Attacks a Private Citizen on Twitter*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/politics/this-is-what-happens-when-donald-trump-attacks-a-private-citizen-on-twitter/2016/12/08/a1380ece-bd62-11e6-91ee-1adddfe36cbe_story.html?utm_term=.54f42bcc1b13 ("With one tweet, Trump can change headlines on cable news, move financial markets or cause world leaders to worry. With one tweet last week, Trump inflamed a conflict with China. With another tweet on Tuesday, Trump caused Boeing stock to plummet. With a third on Wednesday night, Trump prompted a series of threatening calls to the home of a union leader who had called him a liar."); see also Michael D. Shear, *Trump as Cyberbully in Chief? Twitter Attack on Union Boss Draws Fire*, N.Y. TIMES (Dec. 8, 2016), <https://www.nytimes.com/2016/12/08/us/politics/donald-trump-twitter-carrier-chuck-jones.html> ("David Axelrod, who was a senior adviser to President Obama, said he always advised the current occupant of the Oval Office to be mindful of the extra power that his words carried once they were amplified by the most powerful megaphone in the world. 'What you may think is a light tap is a howitzer,' Mr. Axelrod said. 'When you have the man in the most powerful office, for whom there is no target too small, that is a chilling prospect. He has the ability to destroy people in 140 characters.'").

⁵³ See Julie Hirschfeld Davis, *A Digital Team Is Helping Obama Find His Voice Online*, N.Y. TIMES (Nov. 8, 2015), <https://www.nytimes.com/2015/11/09/us/politics/a-digital-team-is-helping-obama-find-his-voice-online.html>.

⁵⁴ David Samuels, *The Storyteller and the President*, N.Y. TIMES MAG., May 8, 2016, at MM44.

⁵⁵ See *Davison v. Loudon Cty. Bd. Of Supervisors*, 227 F. Supp. 3d 605, 609 (E.D. Va. 2017) (holding that the plaintiff had adequately alleged that a public official's Facebook page was a limited public forum for First Amendment purposes).

and thus its political accountability for, various messages.⁵⁶ Moreover, the ever-increasing speed and reach of the government's communication can exacerbate the harms of its hateful or deceitful speech.⁵⁷ Indeed, changes in the means by which the government speaks can lead to changes in the substance of its speech as well. For example, Twitter requires brevity and rewards outrageousness; President Trump often excels at both.⁵⁸

The remainder of this Part explores three strategies through which government sometimes exploits these power and information advantages to manufacture doubt about factual assertions that it perceives to be inconsistent with its policy or partisan preferences: through its lies and misrepresentations, through its attacks on individuals and institutions that challenge its preferred narrative, and through its choices to bury or deny access to information that it finds inconvenient or dangerous. To be sure, this is not an exhaustive list, nor are these strategies mutually exclusive.

A. Lies and Misrepresentations

First, and perhaps most obviously, the government can manufacture doubt through its lies and factual misrepresentations.⁵⁹ As I have detailed elsewhere, the

⁵⁶ See Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899 (2010) (describing the government's transparent and opaque uses of newer expressive technologies).

⁵⁷ See YUDOF, *supra* note 4, at 11 ("The political significance of technology lies in the enhanced capacity of government officials to preserve their positions of power, to gain support for themselves and their policies, and to dominate discussion of public issues. Technology is ethically neutral, but unethical leaders seize upon it to advance their interests.").

⁵⁸ See Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 212 (2018) ("Trump is the first 'Twitter president,' not only in the volume of tweets that he sent out to his millions of followers but also in their incendiary nature. Trump was able to attract free (traditional) media attention through his social media program and communicate in ways that did not depend upon political parties, journalists, or other intermediaries to filter his message. And he was able to do so in short, angry bursts which would not be possible if directly addressing voters in a weekly radio address or a speech from the Oval Office. . . . Trump hurled insults and also used his Twitter account to spread false claims, for instance, that there was massive voter fraud in the 2016 election. He offered a variety of false, exaggerated, and incendiary claims many of which would not have been spread as widely and in an unmediated way before the era of cheap speech.") (footnotes omitted).

⁵⁹ See David Leonhardt, Ian Prasad Philbrick, & Stuart A. Thompson, *Trump's Lies v. Obama's*, N.Y. TIMES (Dec. 14, 2017), <https://www.nytimes.com/interactive/2017/12/14/opinion/sunday/trump-lies-obama-who-is-worse.html> ("We applied the same conservative standard to Obama and Trump, counting only demonstrably and substantially false statements. The result: Trump is unlike any other modern president. He seems virtually indifferent to reality, often saying whatever helps him make the case he's trying to make. . . . We have used the word 'lies' again here, as we did in our original piece. If anything, though, the word is unfair to Obama and Bush. When they became aware that they

government's lies can take many forms.⁶⁰ For example, the government's lies and misrepresentations include those that conceal itself as the source of a message to improve its reception in situations where the public might otherwise doubt the government's credibility.⁶¹ In terms of motive, the government's lies include those to avoid political accountability, silence dissent, and manipulate public policy, as well as those that seek to create skepticism and cynicism and distrust more generally.⁶² The government can also manufacture doubt through falsehoods that seek to divert and distract the public from efforts to discover the truth. For example, in response to growing concerns about his campaign's connections to Russia, President Trump claimed, without evidence, that President Obama had wiretapped him during the campaign;⁶³ the Department of Justice later acknowledged that no such evidence existed.⁶⁴

B. Expressive Attacks on Critics and Dissenters

Next, the government can manufacture doubt by seeking to silence or discredit those who speak about matters that threaten the government's perceived self-interest.⁶⁵ These tactics have a long pedigree. Queen Elizabeth forbade Parliament from discussing who might succeed her to the throne,⁶⁶ for example,

had been saying something untrue, they stopped doing it. . . . Trump is different. When he is caught lying, he will often try to discredit people telling the truth, be they judges, scientists, F.B.I. or C.I.A. officials, journalists or members of Congress.”).

⁶⁰ Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73 (2015).

⁶¹ See Helen Norton, *Government Lies and the Press Clause*, 89 U. COLO. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998909 (offering examples of the government's lies that conceal itself as the source of contested speech).

⁶² This strategy is far from new. See RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 100 (1967) (“[A]n essential part in the pseudo-conservative world view is that our recent Presidents [FDR, Truman, and Eisenhower], being men of wholly evil intent, have conspired against the public good. This does more than discredit them: it calls into question the validity of the political system that keeps putting such men into office.”).

⁶³ See David Shepardson, *Trump Claims Obama Wiretapped Him During Campaign; Obama Refutes It*, REUTERS (Mar. 4, 2017, 8:05AM), <https://www.reuters.com/article/us-usa-trump-obama/trump-claims-obama-wiretapped-him-during-campaign-obama-refutes-it-idUSKBN16B0CC>.

⁶⁴ See Deirdre Walsh, *Justice Department: No Evidence Trump Tower was Wiretapped*, CNN (Sept. 3, 2017, 5:50PM), <http://www.cnn.com/2017/09/02/politics/justice-department-trump-tower-wiretap/index.html>; Nina Burleigh, *Trump's Claim that Obama Wiretapped His Campaign is False: U.S. Department of Justice*, NEWSWEEK (Sept. 2, 2017 12:49 PM), <http://www.newsweek.com/trump-russia-investigation-wiretap-fbi-obama-658888>.

⁶⁵ See EMERSON, *supra* note 50, at 699 (expressing concern about “government expression used as a sanction against private expression”).

⁶⁶ See CHAFETZ, *supra* note 25, at 190, 245–46.

and the antebellum House of Representatives forbade the discussion of anti-slavery petitions on its floor.⁶⁷

More specifically, through its speech, the government can try to position itself as the authoritative source of information by attacking those who contest its preferred narrative.⁶⁸ The government's expressive attacks can be particularly effective when its targets are limited in their ability to engage in counterspeech—perhaps because they cannot attract the same media and public attention, or where they are politically or otherwise vulnerable.⁶⁹ The government's use of social media and related expressive technologies that encourage social and political polarization can additionally improve its ability to discredit and undermine those who challenge its preferred narrative.⁷⁰

The targets of the government's expressive attacks can include institutions, like the press, the judiciary, or intelligence agencies. Indeed, the government's lies are even more likely to succeed in deceiving the public if the government has already undercut truth-seeking institutions' ability to offer counter-narratives.⁷¹ The government's expressive targets can include individuals: examples include the FBI's defamatory falsehoods about the government's critics to friends, family members,

⁶⁷ See WILLIAM LEE MILLER, *ARGUING ABOUT SLAVERY: THE GREAT BATTLE IN THE UNITED STATES CONGRESS* (1996).

⁶⁸ See David Nakamura, John Wagner, & Aaron Gregg, *President Trump Locks Heads with News Media in a Social-Media First*, WASH. POST (July 2, 2017), https://www.washingtonpost.com/politics/president-trump-locks-heads-with-news-media-in-a-social-media-first/2017/07/02/313e1dd6-5f40-11e7-84a1-a26b75ad39fe_story.html (“Presidential historians suggested that Trump’s social media attacks are lowering the bar on what constitutes appropriate presidential conduct in fighting perceived media enemies.”); see also *id.* (quoting Trump: “The fake media is trying to silence us, but we will not let them. The people know the truth.”).

⁶⁹ See Susan Collins, *GOP Senator Susan Collins: Why I Cannot Support Trump*, WASH. POST (August 8, 2016), <http://wpo.st/MpAr1>. Recounting candidate Trump’s verbal attacks on those who disagreed with him, including a reporter with disability, the Gold Star parents of Muslim soldier, and a federal judge engaged in ongoing litigation, Republican Senator Susan Collins concluded, “[I]t was his attacks directed at people who could not respond on an equal footing—either because they do not share his power or stature or because professional responsibility precluded them from engaging at such a level—that revealed Mr. Trump as unworthy of being our president.” *Id.*

⁷⁰ See CASS R. SUNSTEIN, *#REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA* 90 (2017) (“In the 2016 campaign for the presidency, Donald Trump showed a keen working knowledge of social influences and group polarization, constantly emphasizing how popular he was, and pointing constantly to the polls as evidence.”).

⁷¹ See Ronnell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press* (Brigham Young Univ. Law Research Paper No. 17–23, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929708 (explaining that the government sometimes engages in “enemy construction” in which it seeks to instill or exacerbate public fear of certain individuals, communities, or institutions—like the press, immigrants, or racial and religious minorities).

employers, and the media during the 1950s and 1960s.⁷² The government's targets can include organizations: as Justice Black explained during the Cold War era, "In the present climate of public opinion it appears certain that the Attorney General's much publicized findings [that an organization should be designated to be 'subversive'], regardless of their truth or falsity are the practical equivalents of confiscation and death sentences for any blacklisted organization not possessing extraordinary financial, political, religious prestige and influence."⁷³ The government's targets can include its own employees: indeed, the Supreme Court's decision in *Garcetti v. Ceballos*⁷⁴ empowered the government to punish public employees who report the government's lies and other misconduct when it held that the First Amendment does not protect public employees' speech pursuant to their jobs.⁷⁵

Legislatures as well as executive branch speakers can manufacture doubt by attacking those who challenge the government's "truth."⁷⁶ Senator McCarthy, among others, demonstrated how to capture media attention and partisan gain through outrageous and often unfounded charges.⁷⁷ Seth

⁷² See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 490 (2004). The government sometimes urges private employers to punish governmental critics for their speech. See David Nakamura, *White House: ESPN's Jemele Hill Should Be Fired for Calling Trump a 'White Supremacist'*, WASH. POST. (Sept. 13, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/09/13/white-house-espn-jemele-hill-should-be-fired-for-calling-trump-a-white-supremacist/?utm_term=.90e752b39a80 (quoting White House press secretary Sarah Huckabee Sanders as saying that a sportscaster's Tweet describing Trump's election as "the direct result of white supremacy" was "certainly something that I think is a fireable offense by ESPN"); Ken Belson and Julie Hirschfeld Davis, *Trump Attacks Warriors' Curry. LeBron James's Retort: 'U Bum.'* N.Y. TIMES (Sept. 23, 2017), <https://nyti.ms/2ykBBKX> (quoting Trump as saying, "Wouldn't you love to see one of those N.F.L. owners, when somebody disrespects our flag, to say, 'Get that son of a bitch off the field right now, he's fired.'").

⁷³ *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 142 (1951) (Black, J., concurring).

⁷⁴ 547 U.S. 410 (2006).

⁷⁵ *Id.* at 421. Lower courts have since applied *Garcetti* to reject the First Amendment claims of numerous government workers who truthfully sought to expose governmental misconduct. See Helen Norton, *Constraining Public Employee Speech: Government's Efforts to Claim Its Workers Speech as Its Own*, 59 DUKE L.J. 1, 14-15 (2009) (listing examples).

⁷⁶ See EMERSON, *supra* note 50, at 250-51 ("The resulting exposure, in which the witness is cast in the role of a disloyal or even traitorous citizen, multiplies the effect and extends it over an indefinite period of time. The witness may lose his job, even his career; he may suffer other forms of economic reprisal, such as inability to obtain insurance or a mortgage; he is subject to great social pressures, which operate also against his entire family [The committee] conducted hearings in a manner that tended to stimulate hysteria. It issued reports, with or without prior hearings, that condemned certain conduct as disloyal. It functioned, in short, as a sort of modern Inquisition, attempting to stamp out heresy in the nation.").

⁷⁷ See JAMES RESTON, *DEADLINE: A MEMOIR* 220 (1991) ("Even with a superb staff, we were, I'm sorry to say, intimidated much of the time by the popularity of McCarthy's lies and his charges that his opponents were 'soft on communism.'"); see

Kreimer notes the power of the government's speech in this regard:

[T]he striking thing about the enterprise which Senator McCarthy embodied was that it achieved, strictly through the use of information, a substantial impact on citizens' lives, the discourse of the republic, and the exercise of the First Amendment rights of speech, belief, and association The sanctions at the command of Senator McCarthy, and his precursors and imitators, were primarily the ability to obtain and publish information The legacy of the McCarthy era was illuminated by the potential for private suppression manifest in the civil rights struggles of the 1950s and 1960s. The two combined to fix in the judicial consciousness the destructive power of exposure as a sanction. Courts have realized that words lead to sticks and stones; both physical and social sanctions form legal reality.⁷⁸

The consequences of government speakers' expressive attacks included targets' job loss, property destruction, physical violence, and even loss of life. Many of these stories are well-known, some less so. For example, shortly after Senators associated with McCarthy's efforts threatened to disclose that Wyoming Senator Lester Hunt's son had been arrested for soliciting a male police officer, Senator Hunt shot himself in his Capitol Hill office.⁷⁹ And the day after the Attorney General announced in 1966 that he would seek to require the W.E.B. DuBois Club to register as a communist front organization, the club's San Francisco office was bombed and its Brooklyn office attacked by a mob.⁸⁰

also id. at 216 ("His charges may not have made sense, but they made headlines and they sold a lot of papers. McCarthy knew how to take advantage of this 'cult of objectivity.' He made the front pages by announcing his discovery one day and embellishing it a few days later, and each time he still hit the front pages.").

⁷⁸ Kreimer, *supra* note 38, at 21, 28–29.

⁷⁹ See Drew Pearson, *Washington Merry-Go-Round*, MADERA DAILY NEWS-TRIB. (Cal.), June 23, 1954, at 9 (describing the incident as "one of the lowest types of political pressure this writer has seen in many years" and an example of "the new technique used by McCarthyites to pressure other senators").

⁸⁰ See Ted Finman & Stewart Macauley, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632, 633 (1966).

C. Information Control

The government can also manufacture doubt through its control of information. Here too its options are many and varied. A democratic government ideally makes expressive choices through which it shares information and encourages counterspeech.⁸¹ But the government sometimes instead manufactures doubt by depriving the public of access to key information.⁸² As Mark Yudof observed, “government expression and secrecy can sometimes” be the functional equivalent of censorship.⁸³ Secrecy, in turn, breeds further doubt.⁸⁴

The government can control information not only through secret-keeping and selective disclosures,⁸⁵ but also by abandoning efforts to collect or report factual information and by refusing to make its experts available for public discussion.⁸⁶ For instance, Robert Lopresti recounts that in 2004 the Bureau

⁸¹ See Jack M. Balkin, *The First Amendment is an Information Policy*, 41 HOFSTRA L. REV. 1, 4 (2012) (“Authoritarian information states are information gluttons, information misers, and information monopolists. They try to collect as much information as they can, but they do not share it with their people. They try to monopolize control over information in order to serve the interests of those in power. Democratic information states, by contrast, are information gourmets, information philanthropists, and information decentralizers.”).

⁸² See Heidi Kitrosser, *Classified Information Leaks and Free Speech*, 2008 U. ILL. L. REV. 881, 885 (2008) (describing the dangers of certain government secrets). Mary Graham recounts that governmental norms of secrecy, like those of affirmative discourse, have also changed with time and leadership. For example, George Washington tried to champion a culture of openness, while Woodrow Wilson sought “new levels of government secrecy.” MARY GRAHAM, *PRESIDENTS’ SECRETS: THE USE AND ABUSE OF HIDDEN POWER* 48–49, 78–79 (2017).

⁸³ YUDOF, *supra* note 4, at 158.

⁸⁴ See Richard G. Powers, *Introduction* to DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* 19 (1998) (“McCarthyism would probably have been impossible except for the claim that official secrecy was keeping the American people from the truth about Communists.”); see also *id.* at 58 (“What secrecy grants in the short run — public support for government policies — in the long run it takes away, as official secrecy gives rise to fantasies that corrode belief in the possibilities of democratic government.”).

⁸⁵ For example, the government can leak information strategically and selectively in ways that support its preferred narrative. See generally David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information*, 127 HARV. L. REV. 512 (2013). My thanks to Joseph Blocher for suggesting this connection.

⁸⁶ See Juliet Eilperin & Brady Dennis, *EPA Yanks Scientists’ Conference Presentation, Including on Climate Change*, WASH. POST (Oct. 22, 2017), https://www.washingtonpost.com/national/health-science/epa-yanks-scientists-presentations-at-conference-on-narragansett-bay/2017/10/22/7429e65c-b76a-11e7-a908-a3470754bbb9_story.html?utm_term=.9321d2d484df (reporting that the EPA “instructed two of its scientists and one contractor not to speak as planned at a scientific conference” on the climate change challenges affecting Narragansett Bay); but see Lisa Friedman, *Scott Pruitt, E.P.A. Chief, Says Agency Scientists Are Free to Discuss Their Work*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/climate/scott-pruitt-epa.html> (quoting EPA head Scott Pruitt as saying that “[p]rocedures have been put in place to prevent such an occurrence in the future”).

of Labor Statistics “became involved in a controversy related to what some interpreted as a deliberate attempt by George W. Bush’s administration to conceal information of which it disapproved. Specifically, the Bureau announced its plan to make major changes in the Current Employment Statistics (CES) survey” and to stop collecting separate data by sex in major industries.⁸⁷ Lopresti characterizes these decisions as contributing to the government’s longstanding underestimation of women’s role in the American workforce.⁸⁸ More recent illustrations include the Trump Administration’s decision to remove scientific information about climate change from federal agencies’ websites such that some estimate that it has cut available public data sets by 25 percent.⁸⁹ Legislatures can similarly choose to deprive the public of information that might threaten a preferred factual narrative; for example, “[a]t the request of the National Rifle Association, Congress forbade the Centers for Disease Control and Prevention from gathering statistics on gun violence.”⁹⁰

The government can also hide, and thus dilute the power of, counterspeech by burying it in other government speech. For example, Julie Cohen describes “infoglut” as a way in which the government (and other speakers) can create confusion and undermine certainty by overloading the public with speech:

The political and epistemological dilemmas of infoglut flow instead from abundance [rather than scarcity]. Techniques of critique and deconstruction increasingly become tools of the powerful, and sophisticated appeals to emotion and ingrained instinct readily overshadow reasoned argument. For example, “the rejoinder to critique is not the attempt to reassert a counter-narrative about, say, the scientific consensus around global warning, but to cast doubt on any

⁸⁷ ROBERT LOPRESTI, WHEN WOMEN DIDN’T COUNT: THE CHRONIC MISMEASURE AND MARGINALIZATION OF AMERICAN WOMEN IN FEDERAL STATISTICS 102 (2017).

⁸⁸ *Id.* at 252 (“This book contains multiple examples, over many decades, of government authors expressing astonishment that so many women were working for a living.”).

⁸⁹ See Juliet Eilperin, *Under Trump, Inconvenient Data is Being Sidelined*, WASH. POST (May 14, 2017), https://www.washingtonpost.com/politics/under-trump-inconvenient-data-is-being-sidelined/2017/05/14/3ae22c28-3106-11e7-8674-437ddb6e813e_story.html?utm_term=.56f9b71efcfa; see also Susan Nevelow Mart, *Disappearing Government Information and the Internet’s Public Domain*, 36 ADMIN. & REG. L. NEWS 5, 7 (2011) (describing the government’s removal of information from public websites and the concerns that arise when we don’t know what was removed as well as what is no longer being reported).

⁹⁰ LOPRESTI, *supra* note 87, at 3–4.

narrative's attempt to claim dominance: all so-called experts are biased, any account partial, all conclusions that result of an arbitrary and premature closure of the debate." Information abundance also enables new types of power asymmetries that revolve around differential access to data and to the ability to capture, store, and process it on a massive scale.⁹¹

Finally, the government can manufacture doubt by resisting oversight that might otherwise produce information that could challenge its preferred narrative—that is, by refusing to engage in dialogue with other government speakers.⁹² The government can achieve similar results by limiting access to the results of such oversight.⁹³

III. WHAT NEXT?

As the preceding Part explained, a variety of expressive strategies enable the government to manufacture doubt to protect its own interest at the expense of the public's. This problem is a tough nut indeed, and I do not pretend to crack it here.⁹⁴ Instead, I seek to invite additional thinking and discussion.

⁹¹ Julie E. Cohen, *The Regulatory State in the Information Age*, 17 THEORETICAL INQUIRIES L. 369, 384 (2016).

⁹² See Burgess Everett & Josh Dawsey, *White House Orders Agencies to Ignore Democrats' Oversight Requests; Trump's Aides are Trying to Shut Down the Release of Information that Could be Used to Attack the President*, POLITICO, (June 2, 2017, 5:11 AM), <http://www.politico.com/story/2017/06/02/federal-agencies-oversight-requests-democrats-white-house-239034> ("The idea, Republicans said, is to choke off the Democratic congressional minorities from gaining new information that could be used to attack the president.").

⁹³ See Mark Mazzetti & Matthew Rosenberg, *Trump Administration Returns Copies of C.I.A. Torture Report to Congress*, (June 2, 2017), <https://www.nytimes.com/2017/06/02/us/politics/cia-torture-report-trump.html> ("Congressional officials said on Friday that the administration had begun returning to Congress copies of a 6,700-page Senate report from 2014 about the C.I.A. program. The move raises the possibility that most of the copies could be locked in Senate vaults indefinitely or even destroyed—and increases the risk that future government officials, unable to read the report, will never learn its lessons. . . . The central conclusion of the report is that the spy agency's interrogation methods—including waterboarding, sleep deprivation and other kinds of torture—were far more brutal and less effective than the C.I.A. described to policy makers, Congress and the public.").

⁹⁴ See LIPPMANN, *supra* note 21, at 76 ("[T]he environment with which our public opinions deal is refracted in many ways, by censorship and privacy at the source, by physical and social barriers at the other end, by scanty attention, by the poverty of language, by distraction, by unconscious constellations of feeling, by wear and tear, violence, monotony. These limitations upon our access to that environment combine with the obscurity and complexity of the facts themselves to thwart clearness and

To start, we might draw from Lawrence Lessig's taxonomy of regulation and consider various responses that take the form of markets, architecture, law, and norms.⁹⁵ A number of thoughtful commentators have started to discuss how market-based approaches might encourage social media platforms to address related challenges.⁹⁶ And others have begun to suggest various architectural solutions, such as nudges to empower audiences' ability to evaluate and counter expressive pathologies both public and private.⁹⁷

In terms of law, elsewhere I have discussed possible doctrinal responses to the problems of government speech. For example, we can understand government lies as a violation of the Free Speech Clause when they are sufficiently coercive of their targets' beliefs or speech to constitute the functional equivalent of the government's direct regulation of that expressive activity.⁹⁸ Relatedly, the Court can adopt a more

justice of perception, to substitute misleading fictions for workable ideas, and to deprive us of adequate checks upon those who consciously strive to mislead.”).

⁹⁵ See Lawrence Lessig, *The New Chicago School*, 27 J. LEGAL STUD. 661, 662–64 (1998) (describing how law, social norms, markets, and architecture all can regulate human behavior in different ways). In other words, we need to think about law, but not only about law.

⁹⁶ See, e.g., Lili Levi, *Real “Fake News” and Fake “Fake News”*, 16 FIRST AMEND. L. REV. 285–290 (2018) (recommending self-regulation by information intermediaries to discourage the dissemination of fake news and to require disclosure of the source of such communications); Mark Verstraete, Derek E. Bambauer, & Jane R. Bambauer, *Identifying and Countering Fake News* (Ariz. Legal Stud. Discussion Paper No. 17–15, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007971 (suggesting possibilities that include “creating new platforms that do not rely on online advertising” and “encouraging existing platforms to experiment with technical solutions to identify and flag fake news”).

⁹⁷ See Levi, *supra* note 96 (urging greater investment in listeners' information literacy); see also JONATHAN HAIDT, *THE RIGHTeous MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 79–80 (2013) (“The main way that we change our minds on moral issues is by interacting with other people. We are terrible at seeking evidence that challenges our own beliefs, but other people do us this favor, just as we are quite good at finding errors in other people's beliefs. When discussions are hostile, the odds of change are slight. The elephant leans away from the opponent, and the rider works frantically to rebut the opponent's charges. But if there is affection, admiration, or a desire to please the other person, then the elephant leans toward the person and the rider tries to find the truth in the other person's arguments.”); *id.* at 105 (“[E]ach individual reasoner is really good at one thing: finding evidence to support the position he or she already holds, usually for intuitive reasons. We should not expect individuals to produce good, open-minded, truth-seeking reasoning, particularly when self-interest or reputational concerns are in play. But if you put individuals together in the right way, such that some individuals can use their reasoning powers to disconfirm the claims of others, and all individuals feel some common bond or shared fate that allows them to act civilly, you can create a group that ends up producing good reasoning as an emergent property of the social system.”).

⁹⁸ See Norton, *supra* note 60, at 100–07. Examples include the government's lies to or about its critics intended to deter or otherwise retaliate against them for their speech (through, for example, false threats about legal consequences or lies that inflict reputational or economic injury), or the government's lies to captive or otherwise vulnerable audiences intended to manipulate their expressive choices. *Id.*

muscular Press Clause doctrine to empower the press to check the government's destructive expressive choices.⁹⁹ Moreover, to enable greater transparency and accountability, the Court should refine its government speech doctrine to require that the government identify itself as the source of a message as a condition of claiming the government speech defense to Free Speech Clause challenges.¹⁰⁰ Legislatures can enact statutory responses to the government's expressive manufacture of doubt requiring the government to make certain affirmative disclosures and to otherwise constrain its lies and misrepresentations, and enforcement officials can more vigorously enforce existing laws that prohibit government agencies from engaging in covert propaganda or that require the government to make certain information public.¹⁰¹

But as Thomas Emerson observed, "[T]he judicial structure is not capable, by itself, of fully protecting in practice the theoretical rights guaranteed under our system of freedom of expression. Full realization of those rights must depend ultimately upon attitudes ingrained in the public mind and support extended by the body politic as a whole."¹⁰² This reality invites a turn to norms as an additional source of constraint on the government's destructive expressive choices.

Robert McAdams explains that "norms" refer "to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both."¹⁰³ Norms can effectively constrain behavior when those who violate them pay

⁹⁹ See Levi, *supra* note 96 (urging that the Court revitalize press freedoms); Norton, *supra* note 61 (proposing that we "understand the Press Clause to protect certain negative rights by prohibiting press-related lies by the government that undermine the press's watchdog and educator functions. For example, governmental lies of misappropriation—that is, its lies about being the press—can blur the line between the government and the press in the public's mind in ways that undermine public trust in the independence of the press and thus damage the effectiveness of its news-gathering functions. The government's lies of misattribution—i.e., its lies about not being the press—can similarly interfere with Press Clause functions by misleading the public about the source of press publications in ways that not only threaten to skew the public's decision-making, but also breach the public's trust in the press.").

¹⁰⁰ See Norton, *supra* note 37.

¹⁰¹ See Norton, *supra* note 40, at 560–61 (discussing possible statutory and enforcement responses); Norton, *supra* note 60, at 108–13 (discussing same); Norton, *supra* note 61 (discussing same).

¹⁰² Thomas Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 1007 (1968); see also *id.* ("There is no effective legal remedy for much of [the government's harassment of political dissenters through its own speech]. Statements of public officials or warnings of investigation, for instance, are not subject to judicial redress. Nor is it possible to obtain court review of most activities of legislative committees, apart from citations for contempt. . . ."); Norton, *supra* note 60, at 10–11 (describing limitations of legal responses to the government's constitutionally harmful speech).

¹⁰³ Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997).

a price for their choice. Counterspeech can thus shape norms through, for example, praise and criticism, and attendant reputational and political rewards and punishment.¹⁰⁴ To these ends, governmental and nongovernmental actors' counterspeech can enforce constructive norms of public discourse by challenging the government's lies and misrepresentations, its expressive attacks on truth-seeking individuals and institutions, and other destructive expressive choices.¹⁰⁵ Private and public counterspeakers' tools for enforcing norms of governmental discourse include not only voice but also exit—i.e., their noisy withdrawal.¹⁰⁶

Note that law can sometimes support and embolden counterspeakers' ability to enforce such norms.¹⁰⁷ For example, Josh Chafetz explains how the protections of the Speech or Debate Clause at times enabled crucial disclosures by members of Congress in the face of executive branch secrecy and lies. As an illustration, Senator Mike Gravel read portions of the

¹⁰⁴ See Cass R. Sunstein, *Unleashed* (Aug. 22, 2017) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3025749) ("Norm entrepreneurs draw attention to what they see as the stupidity, unnaturalness, or ugliness of current norms . . .").

¹⁰⁵ See Finman & Macaulay, *supra* note 80, at 696–97 (suggesting that government speakers "should behave in a manner calculated to promote rationality rather than error;" should exercise "more than ordinary care" to avoid misstatements; and should couple "criticism of dissent with a reminder that protest and dissent are a vital part of the American tradition."); see also Lawrence Summers, *After 75 Years of Progress, Was Last Week a Hinge in History?*, WASH. POST (June 4, 2017), https://www.washingtonpost.com/opinions/after-75-years-of-progress-was-last-week-a-hinge-in-history/2017/06/04/2085b91e-47cf-11e7-bcde-624ad94170ab_story.html?utm_term=.e2943d576b75 ("It is essential that leaders in U.S. society signal clearly their disapproval of the course the administration is taking. . . . The more that leading figures in U.S. society can signal their continuing commitment to reason, to common purpose with other nations, and to addressing global challenges, the more the damage can be contained."); Naureen Shah, *What U.S. Muslims fear from Trump*, WASH. POST. (Dec. 30, 2016), https://www.washingtonpost.com/opinions/gen-kelly-has-talked-about-human-rights-will-trump-listen/2016/12/30/ebabbcea-c928-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.1cd0bfaa41d2 ("Dialogue and decency: In today's hyper-polarized political climate, these are as rare as unicorns.").

¹⁰⁶ See Powers, *supra* note 84, at 3 (describing Senator Moynihan's resignation from the Senate Select Committee on Intelligence in response to then-CIA Director William Casey's lies about the mining of Nicaraguan harbors during the Iran-Contra affair; Moynihan returned to the Committee when Casey apologized); Jena McGregor, *Trump Fires Back After the CEO of Merck Resigned From His Manufacturing Council*, WASH. POST (Aug. 14, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/08/14/trump-fires-back-after-the-ceo-of-merck-resigned-from-his-manufacturing-council/> (quoting Merck CEO Kenneth C. Frazier's resignation from Trump's American Manufacturing Council "as a matter of personal conscience" because "America's leaders must honor our fundamental values by clearly rejecting expressions of hatred, bigotry, and group supremacy").

¹⁰⁷ See Richard A. Posner, *Social Norms, Social Meaning, and Economic Analysis of Law: A Comment*, 27 J. LEGAL STUD. 553, 564 (1998) ("[N]orms and laws are substitutes and complements, and sometimes norms are sources or even targets of law. . .").

Pentagon Papers on the Senate floor.¹⁰⁸ More recently, Senators Wyden and Udall “announced on the Senate floor that the Obama administration had adopted a secret, implausible interpretation” of federal domestic surveillance law; this disclosure, in turn, led to further investigations and further disclosures by public and private actors alike.¹⁰⁹ Indeed, federalism and separation of powers principles offer structural opportunities and incentives for counterspeech by some governmental actors.¹¹⁰

Finally, the government’s own workforce is another precious source of counterspeech challenging governmental efforts to manufacture doubt.¹¹¹ Sometimes this counterspeech takes the form of government workers’ public protests, sometimes their internal resistance, and sometimes their more innovative forms of counterspeech. For example, in response to the Trump Administration’s takedown of climate change data from government websites, some National Park Service employees created a new Twitter feed, @AltNatParkSer, to repost key information.¹¹²

As puny as these efforts to challenge the government’s manufacture of doubt may sometimes feel, the alternative—doing nothing—is doomed to failure. McCarthy—to name a particularly notorious government speaker—defied the norms of governmental discourse of his time, yet lasted nearly six years, at least in part due to the acquiescence of governmental and nongovernmental actors alike.¹¹³ As Kathleen Hall

¹⁰⁸ See CHAFETZ, *supra* note 25, at 216.

¹⁰⁹ *Id.* at 221.

¹¹⁰ See YUDOF, *supra* note 4, at 47 (“The greatest threat of government domination and distortion of majoritarian processes emanates from executive bodies and officers. The greatest hope of restraining that power lies with the legislative branches of government.”).

¹¹¹ See Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301 (2015) (explaining how public employees’ speech can offer unique insights into governmental workings).

¹¹² See Abby Ohlheiser, *A Running List of All the Possible Subtweets of President Trump from Government Twitter Accounts*, WASH. POST (Jan. 27, 2017), https://www.washingtonpost.com/news/the-intersect/wp/2017/01/25/a-running-list-of-all-the-possible-subsweets-of-president-trump-from-government-twitter-accounts/?utm_term=.9964bd35383c.

¹¹³ See RESTON, *supra* note 77, at 216–17 (“[M]ost news going to the papers and to the radio and television stations was comparatively free of analysis or even explanation. It was a sound enough theory and took into account everything but the arts of political deception. For example, putting quotation marks around McCarthy’s false charges did not relieve us of complicity in McCarthy’s campaign. Many newspapers condemned him on their editorial pages but gave him plenty of space on the front pages, which had more effect on public opinion. . . . [T]he trouble with [Eisenhower’s] technique of judicious leaving-alone was that McCarthy destroyed a lot of other people before Eisenhower finally had enough.”). Geof Stone recounts that “[d]uring a speech on the [Senate] floor, McCarthy piled hundreds of documents in front of himself, supposedly substantiating charges of Communist infiltration. He defiantly dared any senator to inspect them.” Geoffrey R. Stone, *Free Speech in the*

Jamieson recalls, “The demise of Joe McCarthy demonstrates that a sustained form of rebuttal is required to dispel an entrenched form of guilt by association.”¹¹⁴ In other words, we can find no substitute for persistent pushback, on all fronts, to the government’s efforts to manufacture doubt.¹¹⁵

IV. CONCLUSION

The government’s expressive choices can serve, or instead threaten, deliberative democracy. At its best, the government’s voice speaks truth to power both public and private, and supports or amplifies the voices of the powerless. But government is not always at its best. Our history and continuing experience reveal a variety of ways in which the government’s expressive choices can manufacture doubt, distort the truth, and frustrate key constitutional values. In this Essay, I’ve sought to identify some of these patterns, both longstanding and new, in hopes of helping to recognize and challenge their deployment.

Age of McCarthy: A Cautionary Tale, 93 CALIF. L. REV. 1387, 1398-99 (2005). When Senator Herbert Lehman “walked to McCarthy’s desk and held out his hand for the documents . . . [h]is fellow senators lowered their eyes or looked away. McCarthy snarled under his breath, ‘Go back to your seat, old man.’” Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387, 1398-99 (2005). *Id.*

¹¹⁴ See KATHLEEN HALL JAMIESON, *DIRTY POLITICS: DECEPTION, DISTRACTION AND DEMOCRACY* 71 (1992).

¹¹⁵ See Molly K. McKew, *The Gerasimov Doctrine*, POLITICO: MAGAZINE (Sept./Oct. 2017), <http://www.politico.com/magazine/story/2017/09/05/gerasimov-doctrine-russia-foreign-policy-215538> (predicting that foreign governments’ efforts to manufacture doubt “begin to fail when light is thrown onto how they work and what they aim to achieve. This requires leadership and clarity about the threat—which we saw briefly in France, when the government rallied to warn voters about Russian info ops in advance of the presidential election.”).

MINISTRY OF TRUTH: WHY LAW CAN'T STOP PREVARICATIONS, BULLSHIT, AND STRAIGHT-OUT LIES IN POLITICAL CAMPAIGNS

Catherine J. Ross*

The distinction between truth and falsehood in politics is much in the news these days. Candidates and office holders—from water district board members like Xavier Alvarez (of *United States v. Alvarez*¹) to President Donald Trump—are fact-checked, awarded Pinocchios, and sometimes indicted, for half-truths, untruths, and fantastical fabrications. Many observers fear there is an increasing disconnect between verifiable facts and political discourse, a lack of embarrassment about even complete fabrication, and a divide between voters who appear to be operating based on completely different sets of “facts.”

Lies in politics and political campaigns are nothing new. Neither are efforts to rein them in. Legislators and citizens insist “something must be done” to curtail the most egregious abuses. However, any government-directed effort to restrain deception in campaign speech by candidates or their supporters faces constitutional obstacles that appear to be insurmountable.

This Article analyzes lies during electoral campaigns,² legislative fixes that have been enacted, and the constitutional obstacles to such regulation. Part I provides a brief historical introduction to the problem. Part II proposes a taxonomy of the kinds of lies that arise during political campaigns. Part III reviews federal and state statutes that regulate campaign falsehoods. In Part IV, I demonstrate the First Amendment infirmities of campaign falsehood statutes. Part V presents a case study that reveals the difficulty of reaching agreement on what constitutes a verifiable lie. In concluding, Part VI briefly considers whether recent developments in technology, social media, and culture require modifications of First Amendment doctrine in order to ensure informed voting.

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¹ 567 U.S. 709, 713–14 (2012).

² The lies I am concerned with here include deceptive speech about candidates, their records and substantive issues on the ballot or pertinent to a candidacy. I have excluded lies designed to discourage or interfere with voting, such as lies about when and where to vote, which raise distinct issues. See, e.g., Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 72–73 (2013).

I. A BRIEF HISTORY OF ELECTION LIES

The election of 2016 was hardly the first time that observers lamented widespread falsehoods in campaigns and the risks that such falsehoods would not be adequately addressed in time to enable voters to make well-informed decisions. The problem manifested itself during the first contested presidential election in 1796.³ The country had quickly divided into two parties, with the Federalists supporting the John Adams/Thomas Pinckney ticket against the Democratic-Republicans' slate of Thomas Jefferson and Aaron Burr.

The 1796 election gave rise to the first documented outright lie—"a false statement of fact"—in Boston's *Independent Chronicle*.⁴ The paper alleged that presidential candidate John Adams had secretly conspired to remove Washington as the commanding general of the revolutionary forces, even though the conspirator had actually been his second cousin Sam Adams.⁵ Other "varieties of innuendo, distortion and falsehood," as one chronicler has dubbed them, in that first election included unfounded charges that Adams was variously pro-British or pro-French and, on the other side, that Jefferson was a drunkard, an illegitimate, interracial child, and, horrors, a "philosopher," as well as a supporter of the French Jacobins (the equivalent of being a card-carrying communist in the 1950s).⁶

The cross-charges continued when the candidates opposed each other again four years later in a campaign that has received more historical attention for its rancor, including allegations that Jefferson was so depraved (as an atheist who had spent time in libertine France) that his election would lead to "a national orgy of rape, incest, and adultery."⁷

The record of political lies in presidential races continued—and countless lies that were less well documented doubtless entered other electoral contests at every level of government—with what the leading account of political deception in politics has labelled "spectacularly dirty" races in "Jackson's first election, Lincoln's second, the Hayes-Tilden debacle, and Cleveland's first election" as well as the "Hoover-Smith clash of 1928" and Franklin Roosevelt's third and last

³ BRUCE L. FELKNOR, *DIRTY POLITICS* 18–19 (1966).

⁴ *Id.* at 18.

⁵ *Id.* at 19.

⁶ *Id.*; see also Jed Shugerman, *The Golden or Bronze Age of Judicial Selection?*, 100 IOWA L. REV. BULL. 69 (2015) (on the election of 1800).

⁷ FELKNOR, *supra* note 3, at 21.

campaign.⁸ But all of that was nothing, argued Bruce Felknor, the long-time executive director of the Fair Campaign Practices Committee, a non-partisan public interest group, and author of the leading account of deception in presidential campaigns, when compared to the “shrill and frenzied” attacks on presidential candidates and Presidents that took off beginning in the middle of the twentieth century.⁹

During each of the last few election cycles, commentators have lamented new lows (or heights) of deception. The apparent trend took off in 2004 with the swiftboating ad campaign a political action committee directed at John Kerry for which President George W. Bush could disclaim responsibility.¹⁰ Observers of the 2012 presidential contest accused Mitt Romney’s campaign of “a special level of shamelessness in its ads and attacks,” including taking President Obama’s quotes out of context “to portray the president as having said things he flatly didn’t say,” and running against things that never happened (like a purported elimination of the work requirement for welfare recipients).¹¹ By the 2016 election cycle, the Pulitzer Prize-winning website Politifact awarded its 2015 annual distinction “Lie of the Year” to the collective “campaign misstatements of Donald Trump,” based on “inaccurate statistics and dubious accounts of his own records and words” that “exhibited range, boldness and a blatant disregard for truth.”¹²

⁸ *Id.* at 40.

⁹ *Id.* at 41 (“Treason” would become a “constant campaign issue.”).

¹⁰ Elisabeth Bumiller, *The 2004 Campaign: Vietnam Record; Lawyer for Bush Quits Over Links to Kerry’s Foes*, N.Y. TIMES (Aug. 26, 2004), <http://www.nytimes.com/2004/08/26/us/2004-campaign-vietnam-record-lawyer-for-bush-quits-over-links-kerry-s-foes.html>. Benjamin Ginsberg, counsel to the Bush campaign resigned after disclosures that he had advised the veterans’ group that made “unsubstantiated attacks” on the war record of John Kerry who had been awarded “three Purple Hearts, a Silver Star and a Bronze Star” for his bravery in Vietnam). *Id.* The term “swiftboat” has entered popular discourse in the U.S. as meaning to “[t]arget (a politician or public figure) with a campaign of personal attacks.” *Swift-boat*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/us/swift-boat> (last visited Mar. 11, 2018). In addition, according to the Political Dictionary, the smear is “untrue or unfair.” *Swiftboating*, POLITICAL DICTIONARY, <http://politicaldictionary.com/words/swiftboating/> (last visited Mar. 11, 2018). For a more recent example of swiftboating, see Amy Chozick & Ashley Parker, *Donald Trump’s Gender-Based Attacks on Hillary Clinton Have Calculated Risk*, N.Y. TIMES (April 28, 2016) (noting that Donald Trump was swiftboating Hillary Clinton “by throwing shade on what should be a strength”).

¹¹ Robert Schlesinger, *Lies, Damned Lies, and Mitt Romney’s Ads: A New Level of Shamelessness in Campaigns*, U.S. NEWS (Aug. 8, 2012, 11:47 AM), <https://www.usnews.com/opinion/blogs/Robert-schlesinger/2012/08/08/lies-damned-lies-and-mitt-romneys-ads>.

¹² Lauren Carroll and Linda Qiu, *Looking Back at Lie of the Year*, POLITIFACT (Dec. 13, 2016, 5:28 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/13/looking-back-lie-year/> (noting that all of the contenders

II. A TAXONOMY OF CAMPAIGN FALSEHOOD

Most definitions of lying begin with the proposition that the speaker “says something she does not believe to be true.”¹³ Beyond that, the lying speaker wants the listener to accept the falsehood she proposes as truth.¹⁴

The variety of kinds and degrees of lies exacerbates the definitional and drafting problems that arise from any effort to regulate deception in political campaigns. This Part proposes a taxonomy of the varieties of lies, and establishes the definitional, volitional, and materiality issues they raise, showing that it is difficult if not impossible to address the permutations of campaign lies through statutory language or common law, even before adding constitutional considerations to the analysis. In this framework, the expression of those who support one side in a campaign is generally attributable to the candidate.

A. Straight-out lies: (A) self-referential and (B) oppositional

The first and simplest category is what the plurality in *United States v. Alvarez* labeled the “straight[-]out lie.”¹⁵ The straight-out lie states a verifiable fact that is easily confirmed or refuted. It is a knowing falsehood, resolving any issue of *mens rea*—“an intended, undoubted lie,” about which there is no room to argue about interpretation or shades of meaning.¹⁶

I start with the straight-out lie told by the candidate or his supporters about the candidate, not about his or her opponent. The straight-out lie about oneself (or the candidate the speaker supports), which I shall call the “self-referential straight-out lie,” concerns a simple fact that the candidate personally knows is either true or false. For example, in Xavier Alvarez’s case, the claim was that he received a Medal of Honor, but he was never actually awarded one.¹⁷ However,

for 2015 were Trump’s and he scored 76% Mostly False, False or Pants on Fire, more than any other politician). In the first 100 days, Trump as President averaged five lies a day. See Charles L. Blow, *In Defense of the Truth*, N.Y. TIMES (Sept. 4, 2017), <https://www.nytimes.com/2017/09/04/opinion/trump-truth-wiretapping-obama.html>. Trump received the dubious honor of winning PolitiFact’s Lie of the Year again, at the end of 2017, for his repeated assertions that Russian interference in the 2016 elections was a “made-up-story.” Angie Drobnic Holan, *2017 Lie of the Year: Russian Election Interference is a ‘Made-Up-Story’*, POLITIFACT (Dec. 12, 2017, 6:30 AM), <http://www.politifact.com/truth-o-meter/article/2017/dec/12/2017-lie-year-russian-election-interference-made-s/>.

¹³ SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 13 (2014); see also SISSELA BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* 13 (1989).

¹⁴ E.g., BOK, *supra* note 13, at 13.

¹⁵ *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion).

¹⁶ *Id.* at 715.

¹⁷ *Id.* at 709.

Alvarez's lie was not voiced during a campaign.¹⁸ Although Alvarez held a very minor public office—he had recently been elected a member of the local water district board when he falsely claimed to be a military hero—the Court noted that he did not lie until after the election and could not have hoped to garner votes from his deception.¹⁹ As discussed more fully in Part IV below, the Court held that the First Amendment extended to Alvarez's false claim.²⁰

Other easily verified facts about oneself include, "I am the incumbent," which, as discussed below, the state may or may not be able to regulate even if it is not strictly true depending on exactly how the claim is phrased.²¹

The bald-faced lie is often referred to in conversation as claiming, "up is down" or "black is white." I instead use the analogy "blue is yellow," a more accurate reference to opposite or complementary pigments on the color wheel which do not share any pigmentation.

A closely related but modestly distinguishable category involves the straight-out lie about an opponent, which I designate the "oppositional straight-out lie": "she is not the incumbent, though she calls herself 'Congresswoman';"²² "he is on the list of convicted sex offenders;" or "he is ineligible for the presidency because he was born in Kenya."²³ Again, each of these is easily verified or refuted with only a little bit of digging, either by the speaker or, in the age of online research, arguably by voters themselves. Citizens can determine who is the actual incumbent with a minimum of effort; check with the police to find the list of sex offenders; and, arguably, determine from news sources where the candidate was born, at least if the internet is not full of fake news or alternative facts.

¹⁸ *Id.* at 713–14 (explaining that the lie was told at his first board meeting as an already elected board member).

¹⁹ *Id.* at 714. ("The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.").

²⁰ *Id.* Alvarez made his untrue claim at the first public meeting of the Three Valley Water District Board he attended after being elected, apparently in "a pathetic attempt to gain respect that eluded him, not to obtain any benefit. *Id.* Presumably, winning the election might be construed as securing employment or other benefit. See *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015) (concluding that if a candidate made Alvarez's false claim "at a preelection debate," then Alvarez inoculates the candidate from criminal prosecution).

²¹ See, e.g., *Cook v. Corbett*, 446 P.2d 179, 182–83 (Or. 1968).

²² *Id.* at 183–85 (holding that a candidate who was not an incumbent violated the false campaign speech statute by urging voters to "re-elect" her).

²³ See Lily Rothman, *This Is How the Whole Birther Thing Actually Started*, TIME (Sept. 16, 2016), <http://time.com/4496792/birther-rumor-started/> (explaining the beginnings of the "birther" conspiracy theory about President Obama, which alleged that he was born in Kenya—not the United States).

B. Intentional Distortions

The second category of deceptions is composed of what I call “intentional distortions,” misleading but not strictly untrue statements about the record of either the candidate or the candidate’s opponent. Here, prevarication extends beyond biographical particulars to embrace disputes over policy issues, including ballot referenda.²⁴ These come in at least two classic forms. In the first, “false claims of credit,” the candidate who is speaking, say, running for re-election as governor, campaigns based on support for a popular measure he signed into law—although he opposed the measure when the legislature considered it, and it passed again with a veto-proof majority. In the second scenario, which I label “contextual distortion,” the distortion arises from the willful failure to disaggregate multiple issues that have been artificially compacted, as with omnibus legislation. For example, a candidate who opposes so-called “pork” might nonetheless vote to approve the annual budget, even though it is filled with lard, and then be accused of voting for pork barrel spending. An incumbent who has long been vociferous about her opposition to abortion may be accused of voting to support “taxpayer-funded abortion” because she voted for a broad health insurance bill that incidentally allowed funding for abortions.²⁵

C. Hyperbole

Beyond straight-out lies about the speaker and the opponent, and intentional distortions, a third category of campaign falsehood involves hyperbole. Hyperbole and similar rhetorical devices (including satire and parody, which I am rolling into the term hyperbole here) may not fit the definition of lying at all because the speaker does not offer the statement as truthful, much less verifiable, and does not expect any reasonable listener to believe it, or to rely on it.²⁶ Falsehoods

²⁴ See *281 Care Comm. v. Arneson*, 766 F.3d 774, 785, 788 (8th Cir. 2014) (holding that Minnesota’s Fair Campaign Practices Act, which made it a crime to knowingly or with reckless disregard for the truth make a false statement about a proposed ballot initiative, failed strict scrutiny as it was “simultaneously overbroad and underinclusive”).

²⁵ See *Susan B. Anthony List v. Driehaus*, 134 U.S. 2334 (2014) (holding that plaintiffs had standing to challenge Ohio’s false statement act under which the state’s Elections Commission found probable cause of a violation based on a proposed billboard that would have proclaimed “Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortion” without mentioning that the vote was for the Affordable Care Act); see also *Lucas*, 34 N.E.3d at 1256 (“Assertions regarding a candidate’s voting record on a particular issue may very well require an in-depth analysis of legislative history that will often be ill-suited to the compressed time frame of an election.”).

²⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 49 (1988) (explaining that even the most repugnant allegations are not actionable if they “could not reasonably have been interpreted as stating actual facts”); see also *RESTATEMENT (SECOND) OF TORTS* §

that hold out no pretense of being factual or truthful don't need to be unmasked. The marketplace they enter immediately discounts their contribution, at least as far as facts are concerned.²⁷

Hyperbole may include vigorous and hurtful epithets: liar, blackmailer, pimp, accomplice to murder.²⁸ If not capable of being seen as “reasonably implying false and defamatory facts,” hyperbole is not actionable in lawsuits for defamation, and presumably is beyond regulation as political deception for similar reasons.²⁹ Hyperbole may also embrace exaggeration of the speaker's successes, like a record of “bests.”³⁰

581A (AM. LAW INST. 1977) (providing a clear example in the law of defamation where two extremes provide defenses—one complete defense to a suit for defamation being truth).

²⁷ Catherine J. Ross, *Incredible Lies*, 89 U. of Colorado L. Rev. 101 (forthcoming 2018) (discussing hyperbole and other statements not offered for their truth in the context of defamation and fortune-telling).

²⁸ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 2 (1990) (holding that simply stating “Jones is a liar—in terms of opinion—‘In my opinion Jones is a liar’—does not dispel the factual implications contained in the statement”); *Greenbelt Coop. Publ'g Ass'n v. Bressler*, 398 U.S. 6, 14 (1970) (stating that “blackmail” referred to a tough negotiation stance, not a crime); *Kniesel v. ESPN*, 393 F.3d 1068, 1079 (9th Cir. 2005) (holding that a “reasonable person would not construe caption under photo on website as charging celebrity with being pimp or that wife was prostitute, as required to establish defamation”); *Horsley v. Rivera*, 292 F.3d 695, 696, 702 (11th Cir. 2002) (holding that talk show host comments that an “anti-abortion activist was ‘an accomplice to murder’” was “non-literal rhetorical hyperbole”); *Troy Group, Inc. v. Tilson*, 364 F. Supp. 2d 1149, 1156 (C.D. Cal. 2005) (discussing hypotheticals and holding “crook,” in context, to be “colloquial, exaggerated, and non-literal”). Absent a showing of malice, the “rhetorical hyperbole often present in vehement debate” and the “misstatements and misrepresentations ordinarily associated with the political milieu” are “rhetorical hyperbole” and not actionable as defamation. *Herbert v. Okla. Christian Coal.*, 992 P.2d 322, 332 (Okla. 1999) (citing *Greenbelt Coop. Publ'g Ass'n*, 398 U.S. at 10–11). But an accusation of criminal activity may constitute defamation if stated as fact during a political campaign. See *Newman v. Delahunty*, 681 A.2d 671, 680, 683 (N.J. 1994) (holding that a news story headlined “Newman's thugs attack senior citizen” and complaining about taxes and corruption was defamatory statement of fact, actionable if actual malice was shown, and distinguishable from cartoons making similar points because cartoons are “ordinarily understood” to “be rhetorical, exaggerated means of expressing opinions.”); see also *Celebrezze v. Dayton Newspapers, Inc.*, 535 N.E.2d 755, 758 (Ohio 1988) (holding that a cartoon during a reelection campaign that depicted a judge as a murderer was clearly “exaggeration, hyperbole,” comparable to a cartoon depicting the city “council as a prostitute willing to sell her favors”).

²⁹ See *Milkovich*, 497 U.S. at 2 (holding that “statements that cannot reasonably be interpreted as stating actual facts about an individual are protected”).

³⁰ Lauren Carroll, *The 10 Biggest Falsehoods From the Year of Trump*, POLITIFACT (June 16, 2016, 8:43 AM), <http://www.politifact.com/truth-o-meter/article/2016/jun/16/10-biggest-falsehoods-year-trump/> (Trump “oversold his personal successes,” citing misleading references to the “largest” winery “on the East Coast,” “the best-selling business book of all time,” and the claim the Trump University received an A grade from the Better Business Bureau” six months before he paid \$25 million to settle a lawsuit by defrauded students); see also *Judge Approves \$25 Million Settlement Of Trump University Lawsuit*, NPR (Mar. 31, 2017, 1:51 PM), <http://www.npr.org/sections/thetwo-way/2017/03/31/522199535/judge-approves-25-million-settlement-of-trump-university-lawsuit> (Trump paid \$25 million to settle a lawsuit by defrauded students).

But liars often claim after the fact and without justification that their statements were intended as “jokes,”³¹ hyperbole, or parody. This category of speech is not a get out of jail free card. The humor or exaggeration must be readily apparent for the hyperbole defense to be sustainable.³²

If the speaker has no concern about the truth or falsehood of what she is saying, as philosopher Harry Frankfurt has pointed out, she may just be “bullshitting,” a different form of speech than hyperbole, but sharing the attribute that no lie is intended.³³ “Lack of . . . concern with truth —[an] indifference to how things really are,” Frankfurt tells us, is “of the essence of bullshit.”³⁴ Both hyperbole and bullshit, if recognizable as such, fall within the domain of expression I have argued elsewhere the law protects precisely because it is so out of bounds that no reasonable person would believe it.³⁵ Its absurdity renders it harmless to the recipient and materially worthless to the speaker.³⁶

D. Indirect Prevarication

The fourth variety of campaign lies in many ways poses the most difficult definitional dilemma: it is neither an outright fabrication, nor a matter of omitting context that helps to explain what happened and why, but rather a situation in which key facts and outcomes can be read in different ways and easily exploited by the sly speaker. Let’s return to the color circle. Imagine that observers, asked to label each pigment as a primary color, are told to assign labels to purple. They might choose red or blue—both choices would be arguably correct or incorrect. This category is not intended to embrace conclusions about which reasonable minds may differ, but rather is designed to incorporate the sleight of tongue, which I call “indirect prevarication,”—falsehoods the speaker can disingenuously deny.

³¹ Chris Cillizza, *Donald Trump Likes to ‘Joke’ About a Lot of Things That Aren’t Funny*, CNN: THE POINT (Aug. 1, 2017, 4:25 PM), www.cnn.com/2017/08/01/politics/trump-joking-police/index.html (White House says the President was “just joking” when he urged police officers to rough up suspects, urged supporters to “knock the hell” out of protesters at rallies, and called on Russia to hack more of the Clinton campaign’s emails.).

³² *In re O’Callaghan*, 796 S.E.2d 604, 625–26 (W. Va. 2017) (rejecting a judicial candidate’s claim that his misleading campaign flyer was a parody or alternatively rhetorical hyperbole).

³³ HARRY G. FRANKFURT, ON BULLSHIT 61 (2005).

³⁴ *Id.* at 33–34.

³⁵ Ross, *supra* note 27.

³⁶ *Id.*

Push polling questions provide a perfect example of deniable indirect prevarication.³⁷ During the 2000 South Carolina Republican primary, for example, push pollers working for the Bush campaign suggested that John McCain had “fathered an illegitimate black child.”³⁸ Recurring forms of questions whose verifiability can be denied include, “Did you know . . . ?” and “Would it change your opinion if you knew . . . ?”³⁹

The subtlest of distinctions may prove dispositive in an assessment of whether claims are true or false. In two cases decided one year apart, the highest court in Oregon held first that the ubiquitous campaign slogan “Re-elect” used in a primary by a challenger to the actual incumbent constituted a deliberate material falsehood, “intended to create the belief in the reader” that the candidate, referred to as “Senator Corbett,” was the incumbent, even though her term in office had expired the previous year.⁴⁰

The very next year, the same court held that a candidate for county commissioner did not make false claims to incumbency by using the slogan “Return a proven leader,” despite the possible inference that the candidate currently held a public office, possibly even the one up for grabs in the pending election.⁴¹ The court reasoned that the candidate had once served as sheriff, and could claim to be “a veteran in government.”⁴² An intentionally ambiguous statement, susceptible to a truthful interpretation, may be treated as truthful no matter how many voters it misleads.⁴³ Or perhaps not, in the hands of a different court or with a slight twist on the facts. And whether a candidate is regarded as “a proven leader”

³⁷ Push polls purport to be neutral opinion polls but are in fact acting on behalf of a campaign. See *N.H. Att’y Gen. v. Bass Victory Comm.*, 104 A.3d 181, 184 (N.H. 2014). The questions commonly include inferences and misinformation. See *id.* at 184 (noting that the statute under review defined push polling as “[a]sking questions related to opposing candidates for public office which state, imply, or convey information about the candidates [sic] character, status, or political stance or record.”).

³⁸ News Shrink, *McCain’s Revenge*, DAILY BEAST (Nov. 5, 2008, 7:16 AM), <http://www.thedailybeast.com/mccains-revenge?source=dictionary>.

³⁹ Frederick F. Schauer, *Language, Truth and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263, 297 (1978) (explaining that statements that can be tested are “susceptible to verification and thus may be characterized as true or false with some degree of certainty”).

⁴⁰ See *Cook v. Corbett*, 446 P.2d 179, 179 (Or. 1968). See also *United States v. Alvarez*, 567 U.S. 709, 738 (2012) (Breyer, J., concurring) (upholding, against a First Amendment challenge, a statute prohibiting campaign materials falsely claiming that the candidate is an incumbent).

⁴¹ *Mosee v. Clark*, 453 P.2d 176, 177 (Or. 1969).

⁴² *Id.* at 178.

⁴³ *Id.* (“Ambiguity may be just cause for criticism in political debate, but it is not a statutory ground for forfeiting an election.”).

was a matter of opinion, immune to regulation.⁴⁴ Perhaps it also matters whether the indirect prevarication is contained in an off-the-cuff remark, voiced in casual conversation, or a meticulously crafted evasion read from a script or incorporated into myriad campaign materials.

1. Opinion distinguished.

Indirect prevarication can be difficult to distinguish from opinion, which does not implicate verifiable facts.⁴⁵ Opinions voiced during a campaign do not amount to misleading statements for the same reason opinions do not constitute defamation: they are not susceptible to proof or disproof.

A 2017 fundraising email from then-Senator Al Franken provided an apt explanation:

Minnesota hotdish is one of the most delicious foods. Betsy DeVos is the most unqualified cabinet nominee ever. Washington is one of the most dysfunctional places in the country. These are all opinions. I think they're correct, but I'm biased because these are my opinions. These are not facts.⁴⁶

The email continues with what Franken correctly labels verifiable "facts": "The FEC [fundraising] deadline is in 6 days, and my campaign has not yet met its goal."⁴⁷

Another example involves disputes over whether a proposed tax is "fair."⁴⁸ As one appellate panel explained, whether a vote for a ballot measure that would impose a new tax on a particular industry would make it pay its "fair share" is

not subject to objective verifiability. You can get a Ph.D. in political science studying what 'fair shares' are and still not come to any firm conclusion. The subject has occupied political philosophers since at least Aristotle It is one

⁴⁴ *Id.* at 177.

⁴⁵ SCHAUER, *supra* note 39, at 279 (highlighting the difficulty of distinguishing between facts and opinions, stating that "[i]n between these extremes lie statements reflecting varying degrees of inference, synthesis, and value judgment, the presence of each making the process and possibility of verification somewhat less certain").

⁴⁶ Email from Al Franken, Senator from Minn., to author (Sept. 24, 2017) (on file with author) (Re: "Opinions vs [sic] Facts").

⁴⁷ *Id.*

⁴⁸ *Huntington Beach City Council v. Superior Court*, 94 Cal. App. 4th 1417, 1436 (Cal. App. 2002).

of those topics that is particularly suited for the marketplace of ideas.⁴⁹

It is, in short, “mere opinion.”⁵⁰ On the other hand, a speaker cannot count on escaping liability for defamation by labeling a scurrilous charge that implies knowledge of facts as “just my opinion.”⁵¹

Do the allegations that “my opponent’s plan is likely to destroy the budget,” or “leave hundreds homeless,” suggest underlying facts?⁵² The answer may depend on whether a factual statement appears to be embedded in hyperbole or ambiguity that insulates it from prosecution, or whether the speech may be construed to imply “an assertion of objective fact.”⁵³

Many statements present a mix of facts and opinion that can be difficult for candidates, judges, and, presumably, voters to disaggregate. For example, a candidate seeking reelection to the Oregon state senate in a contested primary sued his opponent for claiming that he had “voted against the Farm Use Deferral.”⁵⁴ On closer inquiry, it appeared that the bill the incumbent candidate had voted against would have deprived some current Farm Use Deferral recipients of continued eligibility for the benefit, and thus the candidate construed his vote “against” as a vote “for” Farm Use Deferral because of the effect he expected his vote to have.⁵⁵ An appellate court held that “characterization of the meaning of the [candidate’s] vote” was not a statement of fact but “in reality . . . a nonactionable expression of opinion” under a state law regulating campaign falsehood.⁵⁶

Other courts agree that it is simply too difficult to sort out convoluted legislative histories and the motives of individual legislators so that statements about a candidate’s voting record “fall within the ambit of reasonable comment on

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 1 (1990) (holding that a “separate constitutional privilege for ‘opinion’ was not required in addition to established safeguards regarding defamation to ensure freedom of expression guaranteed by [the] First Amendment”).

⁵² *Sumner v. Bennett*, 608 P.2d 566, 566 (Or. Ct. App. 1980) (holding after the election that characterization of a candidate’s voting record was opinion, “not actionable as false statements within [the] meaning of [Oregon’s] Corrupt Practices Act”).

⁵³ *Neumann v. Liles*, 369 P.3d 1117, 1119 (Or. 2016).

⁵⁴ *Yes on 24-367 Comm. v. Deaton*, 367 P.3d 937, 942 (Or. App. 2016).

⁵⁵ *Id.*

⁵⁶ *Id.* at 355.

official conduct.”⁵⁷ The problem is exacerbated by the increasing use of omnibus bills to which controversial measures are attached as amendments.⁵⁸

These are just examples of what concerned the highest court in Massachusetts when it advised: “it is much easier to recognize the significance of the distinction between statements of opinion and statements of fact than it is to make the distinction in a particular case.”⁵⁹

In another twist, the candidate (or a person or group speaking on the candidate’s behalf) might repeat a rumor with the caveat that the speaker has no idea whether the rumor is true, as many people do in conversation. Consider these hypotheticals:⁶⁰ “someone told me that my opponent runs a child sex ring from a pizza shop”;⁶¹ “some people say my opponent was arrested for pedophilia”; “I saw a picture, I don’t know if it was photo-shopped or not, indicating that my opponent’s father was present when President Kennedy was assassinated.”⁶²

2. Just bullshitting.

Unlike the straight-out lie, in the examples set out immediately above, the speaker makes no pretense of knowing whether the allegation is true or false. If the speaker doesn’t care about the truth of the matter, perhaps the statement is just bullshit. But in an electoral context, we might expect the campaign to have an obligation to perform due diligence before repeating a rumor, because the stakes are high: “In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker).”⁶³ Does it matter whether the rumor is already in circulation, or whether the campaign itself originated the

⁵⁷ *Herbert v. Okla. Christian Coal.*, 992 P.2d 322, 331 (Okla. 1999) (summarizing cases from other jurisdictions and the Kansas Supreme Court in stating, “[A]lthough the whole truth was not stated, it seldom is in political campaigns” (citing *Hein v. Lacy*, 616 P.2d 277, 286 (Kan. 1980))).

⁵⁸ *E.g.*, *id.* at 326 n.2 (describing a vote for a “massive bill that would have recodified [the state’s] Criminal Code,” characterized by opponents as a vote to decriminalize sodomy and legalize marijuana).

⁵⁹ *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1255 (Mass. 2015) (quoting *King v. Globe Newspaper Co.*, 512 N.E.2d 241, 244 (Mass. 1987)).

⁶⁰ See generally H. Taylor Buckner, *A Theory of Rumor Transmission*, 29 PUB. OPINION Q. 54 (1965).

⁶¹ See BBC Trending, *The Saga of ‘Pizzagate’: The Fake Story that Shows How Conspiracy Theories Spread*, BBC (Dec. 2, 2016), <http://www.bbc.com/news/blogs-trending-38156985>.

⁶² Robert Farley, *Fact Check: Trump Defends Claim on Oswald and Cruz’s Father*, USA TODAY (July 23, 2016, 12:31 PM), <https://www.usatoday.com/story/news/politics/elections/2016/07/23/fact-check-trump-lee-harvey-oswald-rafael-cruz/87475714/>.

⁶³ *United States v. Alvarez*, 567 U.S. 709, 738 (2012) (Breyer, J., concurring).

rumor? In the latter instance, does that bring the statement into the straight-out lie category? How about the candidate who says: “I was just joking” but has nonetheless introduced a rumor into the marketplace of ideas, where the falsehood may have staying power.⁶⁴

The taxonomy⁶⁵ of deceptive campaign speech I have proposed here includes (from simplest to most complex): (i) straight-out lies, self-referential (where the speaker knows the truth as well as anyone) or oppositional; (ii) intentional distortions, including both false claims of credit and contextual distortion of an opponent’s words or acts; (iii) hyperbole; and (iv) indirect prevarication.⁶⁶ Each of these categories—and the list is not exhaustive—raises distinct issues concerning: the speaker’s intent to mislead; how we define the statements subsumed under the label; the harms and degree of harm the falsehoods may cause; and whether, how, and with what ease the statements may be verified.

The reader should keep these variations on campaign deceptions in mind while reading Part III, which reviews statutes that purport to contain falsehood in elections. Consider whether the statutory language is likely to reach the vast majority of straight-out lies, of indirect prevarications, or of the gradations of falsehood between those two extremes.

II. REMEDIAL STATUTES

Each category in the taxonomy I have just proposed may contain expression that under other circumstances would be considered libelous, but actions for defamation are unlikely to bring relief in the face of campaign lies.⁶⁷ To begin with,

⁶⁴ See Maria Konnikova, *Trump’s Lies vs. Your Brain*, POLITICO: MAGAZINE (Jan./Feb. 2017), <http://www.politico.com/magazine/story/2017/01/donald-trump-lies-liar-effect-brain-214658>.

⁶⁵ Other commentators have proposed different taxonomies focused on other aspects of lies. See Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1443–54 (2015) (proposing a different sort of taxonomy for lies, one that divides falsehoods based on their social value and assigns different levels of protection to different categories of lies). Helen Norton has proposed a number of insightful taxonomies of lies, including one addressed specifically to election lies. She suggests (and I agree) that the various taxonomies of election lies, and presumably of other lies, are “by no means mutually exclusive.” Helen Norton, *(At Least) Thirteen Ways of Looking at Election Lies*, 71 OKLA. L. REV. (forthcoming 2018) (offering a taxonomy with numerous dimensions including the speaker’s identity, (candidate, robot, corporation), motive (to be elected or undermine truth), the subject matter of the lie, and the timing of the lie in relation to election day, and arguing that the distinctions may bear on the nature and scope of the harm election lies cause).

⁶⁶ See Chen & Marceau, *supra* note 65, at 1443–54.

⁶⁷ See Brooks Jackson, *Suing Over False Political Advertising*, FACTCHECK.ORG (Feb. 7, 2008), <http://www.factcheck.org/2008/02/suing-over-false-political-advertising/> (“Supreme Court decisions make it extremely difficult for a public figure—especially

neither civil nor criminal defamation actions are likely to be resolved before the election is in a distant rearview mirror.⁶⁸ More to the point for my purposes, candidates in every election—local to national, party primary to the presidential ballot—are public figures under defamation jurisprudence.⁶⁹

The defamation rules crafted for public figures in *New York Times v. Sullivan*⁷⁰ apply, making it extremely difficult for a plaintiff to prevail.⁷¹ Libel laws, numerous courts have held, will not provide a remedy for political candidates absent a showing of actual malice or reckless disregard for truth.⁷² To the contrary, the Supreme Court expressly explained that the “clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel.”⁷³ “[I]t is by no means easy,” the Court warned, “to see what statement about a candidate might be altogether without relevance to his fitness for the office he seeks.”⁷⁴ Relevance to the candidate’s fitness for office appears to inoculate even the false statement from liability.

This gap has led legislators at every level of government to enact statutes purporting to penalize campaign lies. Efforts may have started during the progressive era,⁷⁵ well before the Supreme Court incorporated the First Amendment through the Fourteenth to govern state and local regulations on speech,⁷⁶ and before the Court even began to interpret the meaning of the

anyone running for public office—to win a libel case even if what is said about them is false.”).

⁶⁸ *Id.* (“[I]t can take years for a libel case to come to trial, and so there would be no hope of getting a court to rule until the election in question was long over.”).

⁶⁹ *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272–74 (1971); *Harte-Hanks Commc’ns., Inc. v. Connaughton*, 491 U.S. 657, 686–88 (1989).

⁷⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁷¹ *See id.* at 279–280 (holding that a public figure must show that the speaker acted “with ‘actual malice,’ that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”).

⁷² Richard L. Hasen, *supra* note 2, at 63.

⁷³ *Monitor Patriot Co.*, 401 U.S. at 275.

⁷⁴ *Id.* at 274–75 (reserving without deciding the question of “whether there remains some exiguous area of defamation against which a candidate [might] have . . . recourse” and reversing and remanding where the jury was instructed to consider whether the allegation that a candidate for office had been a “small-time bootlegger” decades earlier was relevant to his “fitness for office” and therefore within the *New York Times* standard).

⁷⁵ *See* Jason Zenor, *A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 46 (2016) (citing *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1273–79 nn. 39, 49 (1975)). The earliest campaign falsehood statute appears to be the precursor of the Minnesota law overturned in *Care Committee v. Arneson*, 766 F.3d 774 (2014), originally enacted in 1893. Five other states appear to have enacted campaign falsehood statutes during the Progressive era: West Virginia (1908), Oregon (1909), North Dakota (1911) (limited to prohibiting payment to a newspaper to support or oppose a candidate for public office), Montana (1912), and North Carolina (1913).

⁷⁶ *See* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (containing dicta that extends First Amendment freedom of speech guarantee to the states).

Speech Clause.⁷⁷ Watergate and the associated revelations about events during the 1972 presidential election brought renewed popular and legislative focus to deceptive speech in campaigns and renewed efforts to regulate such expression lest it undermine informed voting and democracy.⁷⁸

A. Federal Responses

The scandal that unfolded after the break-in at the Democratic National Committee's headquarters in the Watergate complex eventually revealed that President Nixon's reelection team engaged in a myriad of "dirty tricks"⁷⁹ beyond the crimes of breaking and entering, stealing records, and covering up the initial burglary. Pressure mounted on Congress to do something, "but do what?"⁸⁰ Asked to advise congressional leaders, distinguished constitutional scholars and commentators warned that any "comprehensive" response that attempted to "regulate 'smears,' however desirable it may seem" would "necessarily raise First Amendment questions," which they did not lay out.⁸¹

Ignoring that caveat, Congress acted.

Democratic Senator Birch Bayh, who sponsored the section of a campaign finance bill containing language designed to rein in campaign lies which Congress adopted in 1974, expressly recognized "the difficult problems that a broader criminal libel statute presents in terms of [F]irst [A]mendment guarantees."⁸² He hoped to circumvent those barriers in a narrower provision aimed at "dirty tricks."⁸³ The tricks, he

⁷⁷ See CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 13–16 (2015).

⁷⁸ SENATE SELECT COMMITTEE ON PRESIDENTIAL CAMPAIGN ACTIVITIES, HEARINGS ON WATERGATE AND RELATED ACTIVITIES, 93RD CONG., 1ST SESS., ch. 5, (1973).

⁷⁹ These "tricks" were of course conduct, not speech that could even arguably be protected as a matter of constitutional law. They included the earlier burglary of the office of the Pentagon Paper's leaker Daniel Ellsberg's psychiatrist by a group that overlapped with those who conducted the Watergate break-in, including G. Gordon Liddy, the general counsel of the Finance Committee of the Committee to Re-Elect the President ("CREP"). RALPH K. WINTER, JR. WATERGATE AND THE LAW: POLITICAL CAMPAIGNS AND PRESIDENTIAL POWER AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH 14–15 (1974). For "dirty tricks," the report recommended restricting any legislative fix to "political espionage . . . requiring proof of specific intent," but noted that "the most serious activities" are already illegal under existing law and that "there are abundant pitfalls in undertaking" an "expansion," including differentiating tricks from mere humorous "pranks." *Id.* at 50.

⁸⁰ *Id.*

⁸¹ *Id.* at 51 (discussing only the protections for anonymity extending to campaign literature and the risk of selective prosecution). The group included Ralph Winter, Alexander Bickel and Harry Wellington, all of Yale Law School, as well as Paul Bator, Aaron Wildavsky and James Q. Wilson. *Id.*

⁸² 120 CONG. REC. 10814 (daily ed. Apr. 11, 1974) (statement of Sen. Birch Bayh).

⁸³ *Id.*

reminded his colleagues on the Senate floor, included a 1972 incident in which the Committee to Re-Elect the President forged a letter on the stationery of Democratic Senator Edward Muskie that “accused Senators HUMPHREY and JACKSON,” against whom he was competing in the Democratic presidential primary, “of the most bizarre type of personal conduct.”⁸⁴ Specifically, the unsigned letter, sent through U.S. mail to thousands of voters, falsely alleged that Senator Humphrey had a call girl in his car with him when he was arrested in 1967 for drunk driving, and that Senator Jackson had been arrested twice for homosexuality.⁸⁵ Neither Senator had been arrested, and no evidence existed that Senator Humphrey had ever been seen with a call girl.

Bayh’s language enacted into federal law prohibitions on falsely attributed statements in campaigns for federal office “on a matter which is damaging to [an opposing] candidate or political party.”⁸⁶ Violations constituted felony fraud, and penalties included imprisonment.⁸⁷ The language on

⁸⁴ *Id.* (capitalization in original).

⁸⁵ Martin Waldron, *Segretti Indicted in Mailing of Bogus Muskie Letter*, N.Y. TIMES (May 5, 1973), http://www.nytimes.com/1973/05/05/archives/segretti-indicted-in-mailing-of-bogus-muskie-letter-linked-to-plot.html?_r=0. Donald Segretti, an attorney, was convicted and served four-and-a half-month sentence. John M. Crewdson, *Out of Prison a Month, Segretti Tries to Pick Up the Pieces of His Old Carefree Life*, N.Y. TIMES (Apr. 22, 1974), <http://www.nytimes.com/1974/04/22/archives/out-of-prison-a-month-segretti-tries-to-pick-up-the-pieces-of-his.html>. The federal statute under which Segretti was charged reached campaign falsehoods transmitted through the United States Postal Service or in interstate commerce. 18 U.S.C. § 371 (1988) (amended 1994); 18 U.S.C. § 612 (1970) (repealed 1976). Section 617, enacted in 1974, reached speech in any format, whether or not it was transmitted by U.S. mail or entered interstate commerce. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

The false allegations Republicans hurled at Humphrey were being lived by Wilbur Mills, the Democratic Chair of the House Ways and Means Committee, with whom District of Columbia police engaged in a car chase until a drunk Mills drove his car into the Tidal Basin where he was found with his frequent companion, burlesque performer Fanne Fox. Stephen Green & Margot Hornblower, *Mills Admits Being Present During Tidal Basin Scuffle*, WASH. POST (Oct. 11, 1974), <http://www.washingtonpost.com/wp-srv/local/longterm/tours/scandal/tidalbas.htm>. The revelations that followed ended his career. Dennis Hevesi, *Wilbur Mills, Long a Power in Congress, is Dead at 82*, N.Y. TIMES (May 3, 1992), <http://nytimes.com/1992/05/03/us/wilbur-mills-long-a-power-in-congress-is-dead-at-82.html?pagewanted=print>. Because the facts were verifiable, political opponents remained free to exploit them even after the Federal Election Campaign Act Amendment of 1974.

⁸⁶ 18 U.S.C. § 617 (Supp. 1975).

⁸⁷ *Id.* The statute remains in place today in modified form. 52 U.S.C. § 30124(a) (2012); 52 U.S.C. § 30109 (2012). There do not appear to be any reported cases involving enforcement of the campaign falsehood section of the federal election laws. Timothy J. Moran, *Format Restrictions on Televised Political Advertising: Elevating Political Debate Without Suppressing Free Speech*, 67 IND. L. J. 663, 674 n.63 (1992) (there are “no reported decisions” under 2 U.S.C. § 441(h) (1988), which prohibits fraudulent misrepresentation by a member of a political party). The only reported case since then, my research revealed, involved the same section. See *FEC v.*

“damaging” to an opponent is common in state statutes aimed at deception in politics analyzed in Part IV below.

Congress declined to adopt a competing campaign finance statute that contained an alternative restriction on deceptive campaign speech that would have reached more political expression. Referred to as Section 20, the provision would have criminalized “dirty tricks,” engaged in “with the specific intent [to] mislead[] voters or disrupt[] a campaign” coupled with a likelihood of success.⁸⁸ It enumerated illegal “acts,” many of which were in fact speech, making it a crime to: (i) “convey false instructions to a campaign worker”; (ii) “place misleading advertisements”; (iii) or “utter a false oral or written statement concerning any material fact about a candidate.”⁸⁹

Section 20, which resembled many of the state statutes discussed below in Part III B, was rife with First Amendment perils, though nothing in the written record suggests they were explored at the time.⁹⁰ What, for example, constitutes a “misleading” advertisement?⁹¹ What facts about a candidate are “material” or, for that matter, “false”?⁹² Must the falsehood be about an opposing candidate, or could it be a falsehood that puts the candidate who is speaking or whose supporters speak in a better light than the truth would sustain?⁹³ All of these issues arise in state campaign truth statutes that remain on the books today, as Part IV demonstrates.

B. State Responses

At least sixteen states currently have laws that regulate or criminalize false campaign speech.⁹⁴ Taking all of the

Novacek, 739 F. Supp.2d 957, 959–60 (N.D. Tex. 2010) (fraudulent implication that a telemarketer was raising funds for the Republican party).

⁸⁸ 120 CONG. REC. 8663 (1974) (statements of Sen. John Tower); *Developments in the Law: Elections*, 88 HARV. L. REV. 1111, 1296, 1296 n.354 (1975) (questioning not the constitutionality but “rather the wisdom of a comprehensive approach encompassing all types of deceptive practices”).

⁸⁹ 120 CONG. REC. 8663 (1974).

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ ALASKA STAT. § 15.13.095 (2012); COLO. REV. STAT. § 1-13-109 (2015); FLA. STAT. § 104.271 (2015); 10 ILL. COMP. STAT. 5/29-4 (2014); LA. STAT. ANN. § 18:1463 (2008); MASS. GEN. LAWS ch. 56, § 42 (2014); MINN. STAT. § 211B.06 (2014); MISS. CODE ANN. § 23-15-875 (2015); N.C. GEN. STAT. § 163-274(a)(7)–(8) (2015); N.D. CENT. CODE § 16.1- 10-04 (2015); OHIO REV. CODE ANN. § 3517.21–.22 (LexisNexis 2013); OR. REV. STAT. § 260.532 (2013); S.D. CODIFIED LAWS § 12-13-16 (2004); TENN. CODE ANN. § 2-19-142 (2014); UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2010); VA. CODE ANN. § 24.2- 1005.1(A) (2011); WASH. REV. CODE § 42.17A.335 (2014); W. VA. CODE § 3-8-11 (2013); WIS. STAT. § 12.05 (2011). These statutes were last checked by the author in October, 2017. The Federal Election Campaign Act does not preempt the states from regulating fraud in political advertising or, it seems,

provisions together, they would arguably reach all of the categories of deceptive campaign speech set out in the taxonomy described in Part II,⁹⁵ but each state leaves some substantial categories of campaign falsehood unregulated.

Broadly, the state statutes take a number of common approaches.

First, some statutes target false speech about an opponent.⁹⁶ Modifiers may restrict the statute's reach to falsehoods aimed at defeating the candidate.⁹⁷ The language in these statements, including clauses like "any statement about an opposing candidate which is false,"⁹⁸ reaches far beyond oppositional straight-out lies.

Recognizing potential First Amendment issues, a number of states have tried to bring their regulations within the doctrine governing defamation of public figures in civil actions by including requirements that the speaker proceeded with "actual malice"⁹⁹ or in "reckless disregard" of knowledge that

other campaign falsehoods in elections for national office. *See* *State v. Jude*, 554 N.W.2d 750, 752 (Minn. Ct. App. 1996).

⁹⁵ *See supra* Part II.

⁹⁶ For statutes criminalizing false speech about opponents, see COLO. REV. STAT. § 1-13-109 (2015); LA. STAT. ANN. § 18:1463 (2008); MASS. GEN. LAWS ch. 56, § 42 (2014); OHIO REV. CODE ANN. § 3517.21 (LexisNexis 2013); UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2010); W. VA. CODE § 3-8-11(c) (2013); WIS. STAT. § 12.05 (2004). Similarly, for statutes criminalizing false speech about opponents or the other side regarding substantive issues submitted to voters, see ALASKA STAT. § 15.13.095(a) (2012); COLO. REV. STAT. § 1-13-109(2)(a) (2015); LA. STAT. ANN. § 18:1463(c) (2008); MINN. STAT. § 211B.06 (2014); N.C. GEN. STAT. § 163-274(a)(7)–(8) (2015); N.D. CENT. CODE § 16.1-10-04(2015); OHIO REV. CODE ANN. § 3517.21 (LexisNexis 2013), *held unconstitutional by* *Magda v. Ohio Elections Comm'n*, 58 N.E.3d 1188 (Ohio Ct. App. 2016); OR. REV. STAT. § 260.532 (2013).

⁹⁷ *E.g.*, MASS. GEN. LAWS ch. 56, § 42 (2014).

⁹⁸ FLA. STAT. § 104.271(2) (2015).

⁹⁹ *E.g.*, FLA. STAT. § 104.271(2) (2015). Statutes aimed at false campaign advertisements may incorporate the language of defamation law governing public figures, requiring actual malice or reckless disregard, which are notoriously hard to prove. *Lee Goldman, False Campaign Advertising and the "Actual Malice" Standard*, 82 TUL. L. REV. 889 *passim* (2008) (arguing that the standard should be relaxed). Some statutes that allowed liability on a standard of less than actual malice have been struck down or amended to include an actual malice standard. *See, e.g.*, *Weaver v. Bonner*, 309 F.3d 1312, 1319 (11th Cir. 2002) (addressing the constitutionality of Canons of the Georgia Code of Judicial Conduct and JQC rule regulating statements by judicial candidates); *Ancheta v. Watada*, 135 F. Supp. 2d 1114, 1122–23 (D. Haw. 2001) (examining provisions of the statutory Code of Fair Campaign Practices); *Butler v. Alabama Judicial Inquiry Comm'n*, 802 So. 2d 207, 218–19 (Ala. 2001) (examining the Federal Constitution of Alabama Canon of Judicial Ethics); *In re Chmura*, 608 N.W.2d at 43–44 (addressing the constitutionality of Canon 7(B)(1)(d) of the Code of Judicial Conduct); *State v. Jude*, 554 N.W.2d 750, 753–54 (Minn. Ct. App. 1996); *Smith v. Russell*, 456 So. 2d 462, 464 (Fla. 1984) ("[T]he applicable New York Times standard allows public figures or public officials to recover for injury to reputation only upon clear and convincing proof of actual malice."); *see also* MASS. GEN. LAWS ch. 56, § 42 (2014); MISS. CODE ANN. § 23-15-875 (2015); S.D. CODIFIED LAWS § 12-13-16 (2004); TENN. CODE ANN. § 2-19-142 (2014); UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2010); W. VA. CODE § 3-8-11(c) (2013); WIS. STAT. § 12.05 (2011).

the statement was false.¹⁰⁰ Those statutes do not appear to impose an affirmative obligation to ascertain the facts before speaking.¹⁰¹

Statutes also frequently reach any false statement about either side that “is intended or tends to affect any voting at any primary, convention, or election.”¹⁰² These provisions reach beyond allegations about candidates to referenda and other substantive ballot issues, including, as Florida’s legislature puts it, “any false statement designed to affect the vote on any issue submitted to the electors.”¹⁰³ There are generally no guardrails around these provisions analogous to the actual malice or reckless disregard requirements for defamatory falsehoods about candidates.

A smaller number of jurisdictions also prohibit deceptive speech tending to benefit the speaker or the candidate with whom the speaker is associated, what I have called the self-referential straight-out lie and the intentional distortion falsely claiming credit.¹⁰⁴ These provisions do not impose any particular standard of care because the candidate knows better than anyone whether misleading biographical information is true or false.¹⁰⁵ The statements at issue range from misleading

¹⁰⁰ See, e.g., *Green v. N. Publ’g Co.*, 655 P.2d 736, 741 (Alaska 1982), *cert. denied*, 463 U.S. 1208 (1983). But see *In re Judicial Disciplinary Proceedings Against Gableman*, 784 N.W.2d 631, 639 (Wis. 2010) (Prosser, J.) (proceeding with an evenly divided court, leaving proceedings below in place) (discussing whether defamation law, developed in a civil context where no government regulation applies, is inapplicable to regulation of campaign speech).

¹⁰¹ *Sharkey v. Fla. Elections Comm’n*, 90 So.3d 937, 939 (Fla. Dist. Ct. App. 2d 2012) (holding that a failure to investigate whether a falsehood was true before speaking does not satisfy the actual malice standard in Florida’s statute barring false statements about opposing candidates).

¹⁰² UTAH CODE ANN. § 20A-11-1103 (LexisNexis 2017) (“A person may not knowingly make or publish, or cause to be made or published, any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting at any primary, convention, or election.”).

¹⁰³ FLA. STAT. § 104.271 (2017).

¹⁰⁴ COLO. REV. STAT. § 1-13-109 (2016) (“any false statement designed to affect the vote”); LA. STAT. ANN. § 42:1130.5 (2016) (false claim to have an endorsement, and “any false statement”); MASS. GEN. LAWS ch. 56, § 7 (2017) (falsehood designed or tending to “aid” election); MINN. STAT. §211B (2017) (tends to elect or promote ballot issue); N.D. CENT. CODE § 16.1-10-04 (2016) (false statements “on behalf of”); OHIO REV. CODE ANN. § 3517.22 (“false statement . . . designed to promote the adoption . . . of any ballot proposition or issue”); OR. REV. STAT. § 260.532 (2015) (false statements of “material fact relating to any candidate, political committee or measure”); UTAH CODE ANN. §20A-11-1103 (LexisNexis 2017) (“any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting . . .”).

¹⁰⁵ The Washington statute expressly notes that a candidate “cannot defame himself or herself,” making false statements by the candidate or the candidate’s supporters exempt from the portion of the statute regulating defamation with actual malice. WASH. REV. CODE § 42.17A.335(3) (2017); see also *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 352 n.16 (1995).

claims of current incumbency (discussed *supra* Part II.B) to false claims about having received endorsements, to deceptive biographical details such as having attended or graduated from a prestigious college, having served honorably in the military, or having received a military honor.

None of those statutes appear to limit the antics of the rare candidate who assumes a new identity in an effort to win votes. Issues surrounding name changes by two candidates in Arizona's 7th Congressional district arose during the 2014 election season in the midst of a crowded Democratic primary to replace a retiring Congressman. In a district where more than fifty percent of the voters were Hispanic, a Hispanic surname was thought to be highly advantageous.

Scott Fistler, who had previously sought office as a Republican and began the primary season with his Republican registration intact, legally changed his name to Cesar Chavez, piggybacking on the renown of the widely respected labor organizer and civil rights activist whose reputation would presumably resonate with many of the district's voters. Fistler, who does not appear to have any Hispanic ancestors, also changed his party registration midway through the primary season so that he could get on the ballot. The grandson of the renowned Cesar Chavez sued to enjoin the name change, but the suit was promptly dismissed.¹⁰⁶ No statute stood in Fistler-Chavez's way. As in most or all states, Arizona law permits name changes unless made with "intent to defraud," whether or not the change is registered with the state.¹⁰⁷

At about the same time, a lawsuit was filed against a Hispanic leader in the state's House of Representatives, also running in the Democratic congressional primary, who had changed his name from Ruben Marinelarena to Ruben Marinelarena Gallego. The suit was filed by supporters of yet another primary candidate of Hispanic origin, Mary Rose Wilcox, who sometimes included her birth name, Garrido, on campaign materials, and who posited, "We the people have a right to know who is running to represent us in Congress."¹⁰⁸ Gallego retorted that he had changed his name from the family

¹⁰⁶ Meghan Kenneally, *Arizona Congressional Candidate Changes His Name to Cesar Chavez in Order to Appeal to Hispanic Voters*, DAILY MAIL, <http://www.dailymail.co.uk/news/article-2647456/Arizona-congressional-candidate-changes-Cesar-Chavez-order-appeal-Hispanic-voters.html> (last updated June 3, 2014, 5:18 PM); Jaime Fuller, *This Arizona Candidate Changed His Name. His Opponent Wasn't Happy About It.*, WASH. POST (June 12, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/06/12/this-arizona-candidate-changed-his-name-his-opponent-wasnt-happy-about-it/?utm_term=.eb182c67190e.

¹⁰⁷ 4 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 483 (15th ed. 2017).

¹⁰⁸ Fuller, *supra* note 104.

name of his father who had abandoned him in infancy to that of his mother who had raised him as a single parent and whose father was “a father figure” to him.¹⁰⁹ Apparently voters did not agree with Wilcox that Gallego was trying to mislead them; Gallego won handily and still represents the district.

The two name-change stories are manifestly distinguishable. One appeared to be nothing but a stunt intended to mislead the uninformed, the other (predating the primary by four years) reflected biographical realities that regularly lead people to change their names. It is hard to imagine a statute that could bar the first while permitting the second, unless the name change was required to have preceded the election by a certain number of years.¹¹⁰

A handful of states outlaw falsehoods in specific settings, including political advertisements,¹¹¹ during telephone polling,¹¹² and at polling places (where many states outlaw all electioneering).¹¹³ One state expressly targets charges about the “honesty, integrity, or moral character of any candidate, so far as his or her private life is concerned, unless the charge shall be in fact true and actually capable of proof.”¹¹⁴ The statute further provides that any statements that “clearly and unmistakably imply” such attacks on personal integrity shall be treated as a direct charge (reaching what I have labelled indirect prevarications as well as straight-out oppositional lies and intentional distortions).¹¹⁵

Misleading campaign speech and complaints alleging falsehood by the other side often enter the marketplace very shortly before the balloting occurs. The short time frame until election day makes it much more difficult for the candidate who was besmirched or the party against whom a meritless complaint for violating a campaign falsehood statute is filed to respond effectively.¹¹⁶

¹⁰⁹ *Id.*

¹¹⁰ If I ran for office, my opponent could accuse me of changing my name from Rosovsky to Ross, because my father “Americanized” our family name when I was a toddler.

¹¹¹ MINN. STAT. § 211B.06 (2014); N.D. CENT. CODE § 16.1-10-04 (2015); OR. REV. STAT. § 260.532(1) (2013); TENN. CODE ANN. § 2-19-142 (2014).

¹¹² ALASKA STAT. § 15.13.095 (2016).

¹¹³ MINN. STAT. § 211B.11 (2014); 10 ILL. COMP. STAT. 5/7-41(c) (2007); *see also* *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding narrowly drawn statute barring electioneering at polling places).

¹¹⁴ MISS. CODE ANN. § 23-15-875 (2015).

¹¹⁵ *Id.*

¹¹⁶ For example, in *List*, even though the allegedly false campaign materials appeared as early as August 9, Congressman Driehaus did not file his complaint with the Ohio Elections Commission until “[j]ust before the election,” and proceedings were ongoing on election day. *List v. Driehaus*, 779 F.3d 628, 631 (6th Cir. 2015). Until 2017, Mississippi barred any accusations that a candidate had violated the campaign deception statute within five days of an election, or on election day. That provision

Outside the context of ballot initiatives, referenda and the like, no statute appears to expressly limit campaign deception of any variety respecting substantive issues.¹¹⁷ To the extent that statutes are modelled on defamation law, they are inapplicable to ballot issues and substantive debate.¹¹⁸

III. FIRST AMENDMENT BARRIERS TO REGULATING CAMPAIGN FALSEHOODS

Now we reach the constitutional day of reckoning: can the federal and state statutes regulating deception in political campaigns survive First Amendment scrutiny? Or, do they raise the specter of “Oceana’s Ministry of Truth,” which the *Alvarez* plurality reminded us has no place in “[o]ur constitutional tradition”?¹¹⁹

A. First Principles, Content-Based Regulations, and the Ministry of Truth

The Ministry of Truth wielded enormous power in the Oceana of George Orwell’s *1984*. Like other ministries in Oceana, it did the opposite of what its name suggested. The Ministry of Truth dealt with lies. That is, it falsified the past and the present, ensuring no other sources of information were available for public consumption, so that whatever the rulers

was repealed in 2017. MISS. CODE ANN. § 23-15-875, Amendment Notes (2017). The former language acknowledged the difficulty of responding to last minute accusations, including accusations that one had violated a law that prohibits allegations “with respect to integrity” of the opposing candidate. Recent developments, including heavy reliance on social media both to spread falsehood and to respond it and voting that is spread over several weeks, may affect the calculations about the window of opportunity for deception and response. Oregon’s statute anticipates the urgency of resolving campaign deception disputes by requiring that all complaints under its law be filed within 30 days of the election during which the violation allegedly occurred, and that courts expedite hearings on such claims, so that final judgments relating to primary elections be rendered no later than 30 days before the general election, and final judgments respecting complaints arising during a general election be resolved “before the term of that office begins.” OR. REV. STAT. § 260.532 (9) (2017).

¹¹⁷ Greg Mellen, *Huntington Beach Prepared to Go to Court to Keep At-Large Elections*, ORANGE CTY. REGISTER (May 25, 2017, 5:11 PM), <https://www.ocregister.com/2017/05/25/huntington-beach-prepared-to-go-to-court-to-keep-at-large-elections/> (interpreting and applying a statute governing deception in the language of ballot propositions and the accompanying explanatory material). See *supra* note 102 (listing statutes that seem broad enough to reach campaign deception respecting substantive positions of individual candidates). Language targeting false statements “intended” or “tending to” affect the outcome of an election may reach misrepresentation of substantive positions, but I have not found any cases interpreting that language as reaching substantive claims that were not understood as disparaging the other side.

¹¹⁸ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 352 n.16 (1995) (quoting *People v. White*, 506 N.E.2d 1284, 1288 (Ill. 1987) (“A public question clearly cannot be the victim of character assassination.”)).

¹¹⁹ *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality opinion).

declared as truth became “truth.” It is the perfect propaganda machinery for the state because it methodically eliminates all sources of conflicting ideas and messages, even as it scales back language itself.¹²⁰

In contrast to such dystopias and authoritarian regimes, the Speech Clause forbids any “broad censorial power” vested in government.¹²¹ To avoid even the risk of chilling expression, “as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”¹²² Any effort to proscribe speech as false—whether as a straight-out lie or an indirect prevarication, or anything in between—necessarily rests on its content. Such content-based regulations are presumptively unconstitutional, unless they aim at the narrow categories of speech that fall outside the First Amendment’s protection such as defamation, fraud, or obscenity.

Before the Supreme Court’s 2012 decision in *United States v. Alvarez*, legislatures could arguably be forgiven if they were under the impression that falsehoods might fall outside the First Amendment’s protections altogether or, at a minimum, receive less zealous protection than other forms of speech.¹²³ More than 100 federal statutes regulated falsehoods.¹²⁴ And there was a Circuit split over whether the Speech Clause protected falsehood when the Court considered *Alvarez*.¹²⁵

Justice Kennedy’s plurality opinion in *Alvarez*, however, forcefully repudiated the government’s assertion that it had the power to control deception. The cases do not establish, Justice Kennedy insisted, the “principle” the government urged in *Alvarez*, “that all proscriptions of false statements are exempt

¹²⁰ GEORGE ORWELL, *Appendix: The Principles of Newspeak*, in *ANIMAL FARM*: 1984 379 (Houghton Mifflin Harcourt 2003) (1949) (heretical thought becomes literally “unthinkable” through the elimination of words which “simply ceased to exist”).

¹²¹ *Alvarez*, 567 U.S. at 723 (plurality opinion).

¹²² *Id.* at 716 (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

¹²³ Brief of Petitioner at 18–36, *United States v. Alvarez*, 567 U.S. 709 (2012) No. 11-210; *Alvarez*, 567 U.S. at 732–33 (Breyer, J., concurring) (conceding that the “Court has frequently said or implied that false factual statements enjoy little First Amendment protection”); *Alvarez*, 567 U.S. at 746 (Alito, J., dissenting) (citing cases recognizing that “false factual statements possess no intrinsic First Amendment value”).

¹²⁴ *See Alvarez*, 567 U.S. at 747–48 (Alito, J., dissenting) (noting that “many kinds of false factual statements have long been proscribed without ‘raising any Constitutional problem,’” including “[l]aws prohibiting fraud, perjury, and defamation,” and that “more than 100 federal criminal statutes” punish “false statements” related to the work of federal agencies).

¹²⁵ *United States v. Strandlof*, 667 F.3d 1146, 1160 (10th Cir. 2012) (upholding the Stolen Valor Act and a conviction under it using “breathing space” analysis, not strict scrutiny, and reviewing the rulings of “most circuit courts” that false statements of fact receive “limited First Amendment protection”), *vacated*, 684 F.3d 962 (10th Cir. 2012).

from exacting First Amendment scrutiny.”¹²⁶ They do not support the “broader proposition that false statements are unprotected when made to any person, at any time, in any context.”¹²⁷ Most starkly, a law that “targets falsity and nothing more” violates the First Amendment.¹²⁸ There would be, Kennedy wrote, “no limiting principle” if the government had “authority to compile a list of subjects about which false statements are punishable” regardless of “whether shouted from the rooftops or made in a barely audible whisper.”¹²⁹

The Court held that the First Amendment protected Alvarez’s straight-out self-referential lie, a form of puffery, and overturned the federal Stolen Valor Act under which he was convicted. Even a “straight-out lie,” the Court underscored, could not be criminalized based on its indisputable falsity without more: harm to others or unwarranted advantage to the speaker.¹³⁰

The dissenters in *Alvarez*, who would have upheld both the Stolen Valor Act and Alvarez’s conviction under it, acknowledged that “it is perilous to permit the state to be the arbiter of truth.”¹³¹ Even if we could ignore the state action required to ban deception in campaign speech, how would such statutes be administered and enforced absent a government role in discerning what is true or false?

Broadly speaking, the statutes rely on two courses of action. The candidate or concerned citizens may complain by going directly to court, or by asking a state agency or prosecutor to determine whether a *prima facie* case has been made that a campaign engaged in the type of deceptive speech the statute bars, in which case a court would then conduct hearings. In either instance, the state (whether through the

¹²⁶ *Alvarez*, 567 U.S. at 720 (plurality opinion).

¹²⁷ *Id.*

¹²⁸ *Id.* at 719.

¹²⁹ *Id.* at 723.

¹³⁰ *Id.* at 727. Kennedy cabined the Court’s earlier statements about falsehoods that the state could punish within several narrow categories. These included falsehoods voiced “to effect a fraud or secure moneys or other valuable considerations,” several types of material falsehoods made to government officials, and perjured testimony, made under oath, which “undermines the function . . . of the law,” forms the basis of government action and “affects the rights and liberties of others.” *Id.* at 720–21. The rights and liberties of others include the victims of defamation, long protected under common law. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11–12 (“Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person’s reputation by the publication of false and defamatory statements” thereby “allowing an individual to vindicate his good name” and obtain “redress for harm caused by such statements”). This is why many of the statutory frameworks discussed in Part III are modeled on laws regulating fraud or libel. See *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1246–50 (Mass. 2015) (rejecting the State’s arguments that the campaign speech statute aims at unprotected fraudulent and defamatory expression).

¹³¹ *Alvarez*, 567 U.S. at 752 (2012) (Alito, J., dissenting).

executive branch, an independent agency, or ultimately the judiciary) becomes the arbiter of truth. As the Supreme Court explained in *New York Times v. Sullivan*, the precise form the government uses to impose truthfulness is irrelevant: “Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials”¹³² For the time being, I’ll ask that you set aside that particular obstacle to regulation, because the enforcement mechanism may be the least of the First Amendment barriers to constraining deceptive campaign speech, as I argue in the next part.

B. Legal Standards

The Supreme Court has never considered whether lies in campaign speech can be regulated without violating the expressive rights of speakers.¹³³ *Alvarez* and earlier Supreme Court decisions set out a framework, but do not expressly resolve a number of threshold issues including: whether lies in political campaigns and other political speech have greater or lesser constitutional protection than autobiographical lies of the sort at issue in the case;¹³⁴ and what standard of review applies to inhibitions on protected but deceptive expression.¹³⁵ *Alvarez* is the starting point for any contemporary discussion of laws governing falsehood; it informs but does not determine the outcome of recent cases in which litigants have challenged the constitutionality of campaign deception statutes.

Like other types of expression, even political speech is not immune from prosecution if it fits within a category of speech that falls outside the First Amendment. Where the restrictions on election falsehood aim at defamatory communications, there is no need to choose a standard of review if the court determines that the speech is defamatory

¹³² *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

¹³³ The decision in *Susan B. Anthony List v. Driehaus* focused on justiciability issues: standing and mootness. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341–47 (2014). The Court did not reach the merits.

¹³⁴ *E.g.*, *Alvarez*, 567 U.S. at 732–33 (Breyer, J., concurring); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 472 (6th Cir. 2016); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2235–36 (2015); 281 *Care Comm. v. Arneson*, 766 F.3d 774, 784 (8th Cir. 2014).

¹³⁵ There was no majority on the issue of what standard of review should apply in *Alvarez*. The plurality used the terms “exacting” and “most exacting” instead of strict scrutiny, presumably because Justice Breyer’s concurring opinion proposed using “proportionality” or intermediate scrutiny which would only require the state to demonstrate a “legitimate” objective rather than a compelling interest. *Alvarez*, 567 U.S. at 724 (plurality opinion); *id.* at 730 (Breyer, J., concurring).

under *New York Times v. Sullivan*.¹³⁶ *New York Times* sets a high bar for recovery where public figures, a group that includes all candidates for public office, allege that they have been defamed. It requires clear and convincing evidence that the statement was false and that the defendant acted with actual malice or reckless disregard of the truth.¹³⁷

This is a hard standard to satisfy under the best of circumstances, and “recovery by a candidate is highly unusual.”¹³⁸ That matters because, as discussed above, so many state statutes attempt to squeeze regulation of campaign communications within the framework of defamation.¹³⁹

1. Political speech under *Alvarez*

It has long been undisputed that political speech is at the apex of First Amendment freedoms.¹⁴⁰ We have, the Supreme Court reminds us again and again, “a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.”¹⁴¹ Even before *Alvarez*, the Court warned that the “breathing space” the First Amendment requires for such robust debate carries the risk of falsehoods and broken promises.¹⁴²

Speech related to political campaigns may be even more sacrosanct, at least according to longstanding dicta. The foundational principle that inhibitions on expression based on content are presumptively invalid has, the Supreme Court has stated, the “‘fullest and most urgent application’ to speech uttered during a campaign for political office.”¹⁴³ The reasons

¹³⁶ *Rickert v. Pub. Disclosure Comm’n*, 168 P.3d 826, 859 (Wash. 2007) (en banc) (Madsen, J., dissenting) (“[I]f the actual malice standard is met[,] the speech . . . is not constitutionally protected” and the statute does not have to be analyzed under strict scrutiny.); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280 (1964).

¹³⁷ *Sullivan*, 376 U.S. at 279–80.

¹³⁸ *Reed v. Gallagher*, 204 Cal. Rptr. 3d 178, 196 (Cal. Ct. App. 3d 2016) (quoting *Beilenson v. Superior Court*, 52 Cal. Rptr. 2d 357, 365 (1996)).

¹³⁹ See *supra* notes 94–96 and accompanying text.

¹⁴⁰ See *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs,” including “candidates” and “all such matters relating to political processes.”); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989); see also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

¹⁴¹ *Sullivan*, 376 U.S. at 270.

¹⁴² *Id.* at 271–72 (“[E]rroneous statement is inevitable in free debate”); *Brown v. Hartlage*, 456 U.S. 45, 55 (1982) (“[P]romises” are “indispensable to decisionmaking in a democracy,” but here candidate’s promise to take a reduced salary was barred by statute, and quickly retracted.).

¹⁴³ *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011) (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)); see also *Brown*, 456 U.S. at 53 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271–72 (1971)). In the more recent decisions, much of the “speech” at issue is actually the expenditure of money.

are manifold. As James Madison explained in 1800, electing public officials is “the essence of a free and responsible government. The value and efficacy of this right depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits”¹⁴⁴ In more modern parlance, although false statements during elections may have profound consequences if they mislead voters,¹⁴⁵ a state may not “enhance[] the ability of its citizenry to make wise decisions by restricting the flow of information to them.”¹⁴⁶ Cutting off the flow of information to voters not only diminishes the campaign’s expressive rights, it also implicates the voter’s right to receive information.

Therefore, it is a bit startling that the various opinions in *Alvarez* seem to signal a step back from full protection for campaign speech.¹⁴⁷ Recall that the splintered opinions provided no majority resolution of what standard of scrutiny applies to falsehood. If intermediate scrutiny were to apply to all false speech, then *Alvarez* would not mean what six justices agreed the case stands for: falsehood is not categorically removed from First Amendment protections, at least without the government showing some more specific harm. If that is the case, then it suggests that the hierarchy of First Amendment values which, if anything, privilege political and campaign speech, should remain in place until “something more” (such as defamation within the context of political speech) is proven that removes the particular statement from constitutional protection. The Eighth Circuit, considering a sister statute to the statute at issue in *List*, distinguished *Alvarez* as a case that did not involve political speech, but rather involved a statute that proscribed falsehood outside the political context.¹⁴⁸ It held that strict scrutiny applies when the state attempts to regulate political speech at the core of First Amendment protections and that, “*Alvarez* does not alter the landscape on this issue.”¹⁴⁹

A closer look at the plurality and concurring opinions in *Alvarez* provides some insight. Concurring, Justice Breyer distinguished “false statements about verifiable facts” of the sort

¹⁴⁴ *Harte-Hanks Commc’ns., Inc. v. Connaughton*, 491 U.S. 657, 687–688 (1989) (quoting James Madison (citing THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE FEDERAL CONSTITUTION 575 (Jonathan Elliot ed., 4th ed. 1861))).

¹⁴⁵ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 349 (1995).

¹⁴⁶ *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228 (1989) (The state’s claim must “be viewed with some skepticism.”).

¹⁴⁷ E.g., 281 *Care Comm. v. Arneson*, 766 F.3d 774, 797 (8th Cir. 2014) (reversing a district court’s conclusion that *Alvarez* mandated intermediate scrutiny in a case involving campaign speech).

¹⁴⁸ *Id.* at 782–85.

¹⁴⁹ *Id.* at 784.

at issue in *Alvarez* from the potentially broader reach of the Stolen Valor Act.¹⁵⁰ He would impose a clear *mens rea* requirement even in the context of verifiability.¹⁵¹

More importantly, he worried that the Stolen Valor Act could reach “political contexts, where such lies are more likely to cause harm,” presumably by misleading voters. And, he continued, the regulations may inadvertently distort political discourse because of the risk of selective prosecution of falsehoods.¹⁵² It is easy to imagine an administrative body with authority over campaign falsehood whose members were appointed by an incumbent governor who is running for reelection selectively choosing which deceptions merit investigation and which statements meet the definition of falsehood. Much less would be needed to find selective prosecution.

Breyer analogizes the risks of consumer confusion in trademark law to certain kinds of lies the government might have a compelling interest in restricting. He reminds us that trademark plaintiffs must usually show that confusion is likely before they can claim a risk of dilution. Couldn’t candidates unfairly tarred by deceptive speech make similar claims: “voters are likely to be confused” or “my reputation will be diminished.” But could the candidates back those claims up with statistically reliable evidence?

And Justice Breyer anticipated chill in both public and private contexts (“barstool braggadocio” as well as “family, social or other private contexts”).¹⁵³ Justice Kennedy, writing for the plurality, sounded similar alarms about the statute’s potential reach into: “personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings.”¹⁵⁴ Some state statutes aimed at campaign deception share the same infirmity.¹⁵⁵ But nothing in the *Alvarez* plurality

¹⁵⁰ *United States v. Alvarez*, 567 U.S. 709, 732 (2012) (Breyer, J., concurring). *But cf.* *id.* at 710 (plurality opinion).

¹⁵¹ *Id.* at 732 (Breyer, J., concurring).

¹⁵² *Id.* at 736.

¹⁵³ *Id.* at 736–37.

¹⁵⁴ *Id.* at 722–23 (plurality opinion).

¹⁵⁵ COLO. REV. STAT. § 1-13-109 (2016) (any “person” who makes “any false statement designed to affect the vote”); LA STAT. ANN. § 18:1463(2)(C) (2016) (reaching false statements by any person who “knows or should reasonably be expected to know” that it is false, about a candidate or a proposition submitted to voters); MASS. GEN. LAWS ch. 56, § 7 (2017) (falsehood designed or tending to “aid” election); MINN. STAT. § 211B.06(B) (2017) (reaching letters to the editor that are “false” and tend to elect or promote ballot issue); UTAH CODE ANN. § 20A-11-1103 (reaching any “person” who “knowingly” makes “any false statement in relation to any candidate, proposed constitutional amendment, or other measure, that is intended or tends to affect any voting . . .”). *See also* MASS. GEN. LAWS ch. 56 § 42, *overturned by* *Commonwealth v. Lucas*, 34 N.E. 3d 1242 (Mass. 2015)

opinion, or in Justice Breyer's concurrence, indicates whether or to what extent the Court's prior statements about diminished protection for "calculated falsehood" in political campaigns remains good law after *Alvarez*.

C. Scrutinizing Regulation of Campaign Lies

Before *Alvarez*, a number of scholars compared the regulation of campaign falsehoods to the regulation of campaign finance in that both seek to mitigate potential distortions; but all or most of them wrote before the Supreme Court upended the government's capacity to control campaign spending.¹⁵⁶ Commentators before and after *Alvarez* have disagreed about whether any effort to restrain deception during political campaigns could withstand First Amendment challenge.¹⁵⁷ Some authorities who support regulation of falsehood during campaigns have relied on the defamation model many states have used, including the "actual malice" standard, or have argued that the standard need not be so high because of the unique dangers inherent in false manipulation of voters.¹⁵⁸ And still others, like Diogenes seeking the honest person, are on a quest to craft a statute that would strike the right balance between freedom of expression and electoral integrity.¹⁵⁹

Outside the defamation framework,¹⁶⁰ most state courts and lower federal courts considering restrictions on campaign

(applicable to ballot issues, applied as soon as the issue was announced and could be enforced against exchanges "between two friends engaged in a spirited political discussion in a local pub.").

¹⁵⁶ William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 300–22 (2004); see also *Citizens United v. FEC*, 558 U.S. 310, 319 (2010); *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014); *McConnell v. FEC*, 540 U.S. 93, 171–73 (2003).

¹⁵⁷ Many scholars argue that campaign falsehood statutes are unlikely to survive constitutional review. See, e.g., Jack Windsbro, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 863–65 (1987) (pre-*Alvarez*) (emphasizing that the cure is more and better speech); Lance Conn, *Mississippi Mudslinging: The Search for Truth in Political Advertising*, 63 MISS. L.J. 507, 514 n.40 (1994) (restrictions on electoral lies chill speech and are ineffective); Richard L. Hasen, *supra* note 2.

¹⁵⁸ E.g., Michelle Roberts, *Ask Me No Questions and I'll Tell You No Lies: The First Amendment in Ballot Question Campaigns*, 33 LOY. L.A. ENT. L. REV. 37, *passim* (2013) (arguing that falsehood with actual malice is outside the First Amendment); Jason Zenor, *A Reckless Disregard for Truth? The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 63–71 (2016) (arguing for an intermediate standard of review akin to commercial speech doctrine); Goldman, *supra* note 99, at 892–97 (discussing false negative ads as "serious First Amendment concerns," but advocating for a negligence standard immediately prior to balloting).

¹⁵⁹ E.g., Staci Lieffring, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 MINN. L. REV. 1047, 1076–78 (2013).

¹⁶⁰ *List v. Driehaus*, 779 F.3d 628, 633 (6th Cir. 2015) (affirming summary judgment to SBA List on grounds that the elements of defamation were not established because

speech since *Alvarez* have applied strict scrutiny, reasoning that it is the standard for all content-based regulations.¹⁶¹ If there had been any doubt, several courts have noted, *Reed v. Gilbert* resolved the issue.¹⁶²

Strict scrutiny provides that content-based laws “are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”¹⁶³ Applying strict scrutiny to campaign deception regimes reveals a cornucopia of First Amendment flaws in each of the statutes that have reached the courts.

2. Compelling interest.

The lower courts have generally had little difficulty acknowledging the compelling nature of the government interest in regulating campaign lies: to preserve the integrity of the electoral process; to protect “voters from confusion and undue influence,” sometimes described as distortion; and to “ensur[e] that an individual’s right to vote is not undermined by fraud in the election process.”¹⁶⁴ However, states overstep when they offer what the Massachusetts Supreme Judicial Court terms “the rather remarkable argument that the election context gives the government broader authority to restrict speech”

the facts were “subject to differing interpretations”); *see also* *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1246 (Mass. 2015) (rejecting the state’s efforts to “shoehorn” its campaign deception law into the categorical exceptions of fraud or defamation).

¹⁶¹ *Driehaus*, 814 F.3d at 472 (noting that strict scrutiny applies to restrictions on “core speech” and indeed to all content-based regulations, whether under “old . . . or more recent First Amendment law”) (citing, *inter alia*, *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (reiterating that strict scrutiny applies to all content-based prohibitions on expression)); *Winter v. Woinitzek*, 834 F.3d 681, 693 (6th Cir. 2016) (holding that strict scrutiny applies to the false statements and misleading statements clauses of Kentucky’s ban on speech during judicial elections); *281 Care Comm. v. Arneson*, 766 F.3d 774, 779 n.9 (8th Cir. 2014) (standard hotly contested below in light of splintered decision in *Alvarez*, strict scrutiny applies to regulations on falsity in the “context of political campaigns on a ballot issue”); *Lucas*, 34 N.E.3d at 1250–52 (discussing *Alvarez* in light of *Gilbert* and applying strict scrutiny as required for a content-based regulation and as directed by the Massachusetts Declaration of Rights).

¹⁶² *Driehaus*, 814 F.3d at 473 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015) (clarifying that strict scrutiny applies to all content-based regulations, even if the regulation does not distinguish based on viewpoint)).

¹⁶³ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

¹⁶⁴ *E.g.*, *Burson v. Freeman*, 504 U.S. 191, 199 (1992); *281 Care Comm.*, 766 F.3d at 785–86 (assuming, for purposes of analysis, that the compelling interest had been established and noting that the State “indisputably has a compelling interest in preserving the integrity of its election process”); *Lucas*, 34 N.E.3d at 1252 (“[A]s a general matter,” the State has a compelling interest in “free and fair elections.”); *Rickert v. State Pub. Disclosure Comm’n*, 168 P.3d 826, 858–80 (Wash. 2007) (en banc) (Madsen, J., dissenting); *Pub. Disclosure Comm’n v. 119 Vote No! Comm.*, 957 P.2d 691, 699–700 (Wa. 1998) (Madsen, J., concurring). *But see Rickert*, 168 P.3d at 830 (rejecting the claim that the legislature has a compelling interest in “protecting political candidates (including themselves)”).

presumably to help citizens discern reliable campaign statements.¹⁶⁵ To the contrary, a long line of cases make clear that, “The opposite is true.”¹⁶⁶

The countervailing interests in protecting political speech might weigh heavily against even acknowledging that the state’s interest is compelling, because of the constitutional imperative of protecting free speech during campaigns for political office.¹⁶⁷ The claim that the state may “prohibit false statements of fact in political advertisements” or in a broader swath of expression “presupposes that the State possesses an independent right to determine truth and falsity in political debate . . . Rather, the First Amendment operates to insure the public decides what is true and false with respect to governance.”¹⁶⁸

Even before *Alvarez*, the Supreme Court of Washington held that the state lacked a compelling interest in regulating speech published with actual malice in political advertisements that contained a false statement of material fact—at least if the lies did not defame an actual person.¹⁶⁹ The court expressly rejected the state’s reliance on defamation law because the statute at issue reached (and the controversy in the case before it involved) a referendum; the absence of an individual whose private rights could be harmed or vindicated rendered defamation inapposite.¹⁷⁰ Where an initiative measure is involved, the court held, “there is no competing interest sufficient to override our precious freedom to vigorously debate

¹⁶⁵ *Lucas*, 34 N.E.3d at 1253.

¹⁶⁶ *Id.*; *Rickert*, 168 P.3d at 827; 281 Care Comm. v. Arneson, 766 F.3d 774, 793 (8th Cir. 2014). In 2009, the legislature of the State of Washington explained the purpose of post-*Rickert* legislation barring defamatory statements made with actual malice as part of campaign materials: such statements “damage the integrity of elections by distorting the electoral process. Democracy is premised on an informed electorate. To the extent such defamatory statements misinform the voters, they interfere with the process upon which democracy is based, . . . lower the quality of campaign discourse and debate, and lead or add to voter alienation by fostering voter cynicism and distrust of the political process.” S. Comm. on Gov’t Operations & Elections, B. 5211, 61st Leg., Reg. Sess. (Wash. 2009), amending Rev. Code Wash. 42.17.530.

¹⁶⁷ See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *119 Vote No! Comm.*, 957 P.2d at 698 (rejecting the State’s asserted compelling interest in shielding the public from falsehood during campaigns as “patronizing and paternalistic”).

¹⁶⁸ *119 Vote No!*, 957 P.2d at 695 (citing *Meyer v. Grant*, 486 U.S. 414, 419–20 (1963)); *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 791 (1988).

¹⁶⁹ *119 Vote No! Comm.*, 957 P.2d at 691.

¹⁷⁰ *Id.* at 697 (citing Charles Fried, *Speech in the Welfare State: The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992)). The state legislature subsequently adopted a statute limited to political advertisements that with actual malice contained a false statement of material fact about a candidate for public office. 1999 WASH. SESS. LAWS 1290 § 2(1)(a)(1999). That law, too, was found unconstitutional on its face. *Rickert*, 168 P.3d at 845.

the wisdom of enacting a measure, even if that debate contains falsehoods as well as truths.”¹⁷¹

In light of *Alvarez*, another way of thinking about the state’s compelling interest would be to ask whether the state was targeting the kinds of harms—the “something more” than even a straight-out lie—that the plurality said was required before silencing protected speech: harm to others or unwarranted advantage to the speaker. This inquiry turns out not to be simple either.

Presumably, winning an election might be construed as securing employment or other benefit of the sort the *Alvarez* plurality had in mind. One might think that if *Alvarez* had falsely claimed to be a war hero during his election campaign, and that claim garnered votes for him, he would have obtained a concrete benefit, subjecting his lie to regulation. The Massachusetts Supreme Judicial Court considered that very hypothetical. It concluded that *Alvarez* inoculates from criminal prosecution a candidate who might make *Alvarez*’s false claim “at a preelection debate.”¹⁷² No court appears to have addressed the question whether misleading the public constitutes the sort of harm to others the *Alvarez* plurality had in mind, which itself suggests the answer is no. Consistent with the precedents the plurality discussed, that harm likely requires an individual who is defrauded, defamed, or otherwise suffers directly as a result of speech that the First Amendment is already understood not to protect.

3. Narrow tailoring

Establishing a compelling interest is just the beginning of the analysis. The state must next show that its regulations have a relationship to the danger it seeks to forestall,¹⁷³ that the remedy is narrowly crafted, and that it is neither underinclusive nor overbroad. Outside of the judicial election context, discussed in Part V below, none of the state campaign deception statutes that have reached the courts since *Alvarez* have survived the next stages of strict scrutiny.¹⁷⁴

¹⁷¹ *119 Vote No! Comm.*, 957 P.2d at 700.

¹⁷² *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015).

¹⁷³ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995); *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799–803 (2011).

¹⁷⁴ Before *Alvarez*, some courts had sustained regulations on deceptive campaign speech. *Goldman*, *supra* note 99. Afterwards, courts held that *Alvarez* required them to reject those precedents. *E.g.*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 470-71 (6th Cir. 2016) (expressly rejecting reliance on *Pestak v. Ohio Elections Comm’n*, 926 F.2d 573 (6th Cir. 1992), because *Alvarez* “clearly abrogates *Pestak*’s reasoning” that false speech is unprotected).

a. Is the inhibition of speech necessary to address the problem?

A tight “fit” or nexus is required between the compelling interest a regulation on speech is designed to serve and the specific inhibition on expression. The restriction must be “actually necessary” to achieve the state’s goals,¹⁷⁵ and the state must demonstrate “a direct causal link between the restriction imposed and the injury to be prevented.”¹⁷⁶

Government lawyers defending deceptive campaign speech statutes have asked courts to rely on common sense and “conjecture” about the likely impact of campaign lies.¹⁷⁷ A reasonable inference is not a sufficient substitute for empirical evidence showing a close link between the harm to be prevented and the impact of suppressing protected speech.¹⁷⁸ Granted, the secret ballot makes it very difficult to ascertain whether and to what extent voters were deceived by campaign falsehoods and whether they changed their votes as a result. The very proposition is undermined in cases where the victorious candidate was the target of the deceptive speech.¹⁷⁹ None of the reported cases contain evidence of the alleged harm and, failing that, the state cannot show how regulating campaign speech would ameliorate the purported (though common-sensical) harms.

b. Overbreadth

Defamatory statements are beyond the First Amendment’s protection whether the statement is uttered in the context of a business transaction or an election. However, statutes that purport to apply the legal standard for defamation to bar campaign falsehoods are overbroad if they reach falsehoods that are not defamatory.¹⁸⁰

Beyond that threshold problem, even if it were possible to draft a deceptive campaign speech statute narrowly enough that it could survive strict scrutiny on its face, matters of timing

¹⁷⁵ *Brown*, 564 U.S. at 799.

¹⁷⁶ *United States v. Alvarez*, 567 U.S. 709, 710 (2012) (plurality opinion).

¹⁷⁷ 281 Care Comm. v. Arneson, 766 F.3d 774, 790 (8th Cir. 2014).

¹⁷⁸ *Id.* at 790 (Minnesota failed to present evidence of harm or efficacy of regulating campaign speech.); see also Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 501–21 (2000) (The government must show that the harm is real, not conjectural, and that the regulation will “alleviate the harm ‘in a direct and material way.’”).

¹⁷⁹ *E.g.*, *Rickert v. State Pub. Disclosure Comm’n*, 168 P.3d 826, 828 (Wash. 2007) (en banc) (The target of falsehood, who complained to the administrative body charged with enforcing the campaign deception act, was re-elected with 79% of the vote.); *Zollman v. Dawson*, 611 P.2d 1175, 1177 (Or. Ct. App. 1980) (finding no evidence that violations of the law were “capable of affecting the result of the election”).

¹⁸⁰ *Rickert*, 168 P.3d at 828 (holding that non-defamatory false statements about candidates may not be prohibited).

threaten to make fair application extremely vexing. As I have noted, many of the false campaign statements and advertisements that reach the courts appear very shortly before election day, when there is little time for the target to respond effectively. The last-minute lie, however, is not treated differently under the First Amendment.¹⁸¹ The lie is out there, and given the notorious persistence of misinformation,¹⁸² might be very difficult to dislodge under the best of circumstances: unlimited time and budget to spread the repetition of the truth.

But elections have a deadline. The lie is in play. This is the very evil the regulations are intended to redress. However, an unintended but easily predictable consequence flows from the regulatory scheme. The target of the alleged lie may weaponize the regulatory apparatus if (as is often the case) the enforcement mechanism allows the target, his or her supporters, or “any citizen” to file a complaint that initiates a formal inquiry. That inquiry, in turn, is reported in the press, tarnishing the original speaker, who may not have been lying at all. Alternatively, the purported deceptive statement may fit within one of the many definitional loopholes for deception that will result in the allegations that the statute has been violated amounting to naught—many months after the election is over.

The overbreadth potential of campaign deception statutes is both built in and easily manipulated to reach speech that will not be found to meet the definitions of lies contained in a narrowly crafted regulatory scheme. This is, as many courts have found, exceedingly likely to chill campaign speech.

c. Underinclusiveness

In order for the government’s regulation of campaign deception to survive strict scrutiny, the regulatory scheme would need to address all of the intentional deceit that was likely to cause the harms to the integrity of elections the state had identified. These would, at minimum, include all of the categories of lies I have set out: straight-out lies, both oppositional and self-referential; intentional distortions that can be disproven; hyperbole that is not so obvious a rhetorical device that voters are likely to believe it; and indirect

¹⁸¹ “[A]n eleventh-hour anonymous smear campaign” is insufficient to justify a restriction on speech.” *People v. White*, 506 N.E.2d 1284, 1288 (Ill. 1987); see also *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 352–53 (1995).

¹⁸² Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 *POL. BEHAV.* 303 (2010); R. Kelly Garrett & Brian E. Weeks, *The Promise and Peril of Real-Time Corrections to Political Misperceptions* (Feb. 23–27, 2013) (on file with the Proceedings of the 2013 Conference on Computer Supported Cooperative Work) (noting that even real-time corrections can be ineffective with citizens who have already formed views while processing misinformation).

prevarication—at least if it is shown to be knowing and intentional.

To the extent that campaign deception statutes only target straight-out lies about opponents, they are underinclusive. An exception that allows candidates to lie about themselves is not calculated to serve the state’s asserted compelling interest in promoting the integrity of the electoral process.¹⁸³

Most, perhaps even all, of the existing campaign deception statutes, are also underinclusive because they fail to address many kinds of campaign deceptions that may be at least as harmful to the electoral process as the ones that are targeted.¹⁸⁴ For example, no statute appears to forbid lies about substance, such as the candidate’s platform, or the platform’s likely costs and impact. So-called alternative facts appear to be beyond any efforts at regulation.

IV. CAN WE IDENTIFY CAMPAIGN LIES WHEN WE SEE THEM?

Even if courts were to find that the state has a compelling interest in regulating deceptive speech in political campaigns, and a specific statute and regulatory scheme survived strict scrutiny, it might prove nearly impossible for regulators and judges to agree about what constitutes a lie. The problem does not entirely rest in post-modernist approaches to reality. Courts have long taken the position that a statement is not false if any reasonable inference can be drawn from it that is either a fact or a matter of opinion that is immune from being labelled untrue.¹⁸⁵

In the context of alleged defamation of a public figure, courts have drawn fine lines in discussing how “far removed from the truth” a statement must be in order to “permit an inference of actual malice, even assuming *arguendo* [a statement] was false.”¹⁸⁶ If the “gist or sting” of the defamatory statement “is not so very different from the ‘truth,’” the “campaign rhetoric” is protected.¹⁸⁷ More broadly, under

¹⁸³ *Rickert*, 168 P.3d at 831; *ACLU of Nev. v. Heller*, 378 F.3d 979, 996–97 (9th Cir. 2004) (holding that a statute providing exceptions to the ban on anonymous campaign speech for political parties and candidates still fails narrow tailoring).

¹⁸⁴ *Id.* at 831 (The “statute is underinclusive because it does not apply to many statements that pose an equal threat to the State’s alleged interest in protecting elections. Specifically, the statute exempts all statements made by a candidate” or by the candidate’s supporters about the candidate him- or herself).

¹⁸⁵ *Mosee v. Clark*, 453 P.2d 176, 177 (Or. 1969).

¹⁸⁶ *Reed v. Gallagher*, 204 Cal. Rptr. 3d 178, 194 (Cal. Ct. App. 3d 2016).

¹⁸⁷ *Id.* at 194–96 (holding that calling the losing candidate a “crook” and “unscrupulous” attorney was not so far from the truth as to permit a finding of actual malice).

the “substantial truth doctrine” courts are called upon to give the benefit of the doubt to the speaker accused of deception: If the statement “is ‘substantially’ true in overall effect, minor inaccuracies or falsities will not create falsity.”¹⁸⁸ Liability will only be found where “‘the substance, the gist, the sting’ of the communication taken as a whole, is patently false.”¹⁸⁹

Judicial elections provide a sort of petri dish for testing the feasibility of identifying intentional and material falsehood. A subset of cases suggests that the state may have a compelling interest in regulating materially misleading statements by candidates for judicial office and that such regulations may survive strict scrutiny even when regulations imposed on candidates for other offices would not.¹⁹⁰ States argue that the integrity of the judicial system—the third branch of government—itsself is at stake. The regulations may be contained in the state’s code of judicial conduct, which itself inhibits the robust response that would be entailed in the traditional admonition to drown out lies with truth, or more and better speech.¹⁹¹

Judicial elections have not been immune to the scorched earth tactics exemplified by the Willie Horton ads pro-Republican PAC aired during the 1988 presidential campaign, which falsely accused the Democratic candidate of being responsible for a program of weekend passes under which a convicted African American felon committed additional violent crimes. Taking a page from that approach to campaigning, Michael Gableman, running for a seat on the highest court in Wisconsin in 2008, approved a television ad that accused his opponent of using a legal “loophole” to get the rapist of an 11-year-old girl out of prison, allowing him to molest another

¹⁸⁸ *In re O’Callaghan*, 796 S.E.2d 604, 627 (W. Va. 2017) (quoting *Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 115 (Tex. 2000)).

¹⁸⁹ *Id.*

¹⁹⁰ *Callaghan*, 796 S.E.2d at 623 (noting that regulations on materially false statements by judges during elections aim at preserving respect for the judicial system and have been uniformly upheld); *see also* *Winter v. Woinitzek*, 834 F.3d 681, 693 (6th Cir. 2016); *Myers v. Thompson*, 192 F. Supp. 3d 1129, 1139 (D. Mont. 2016). *But see In re Judicial Campaign Complaint against O’Toole*, 24 N.E.3d 1114, 1121 (Ohio 2014) (overturning the portion of the judicial code that barred speech “conveying true information about the candidate or her opponent” that, though true, “nonetheless would deceive or mislead a reasonable person”).

¹⁹¹ *Callaghan*, 796 S.E.2d at 624 (noting that if the code were not upheld, a judicial candidate would be left with a “Hobson’s choice of leaving false attacks unrequited or following his or her opponent into the ethical minefield of judicial counter-speech”).

child.¹⁹² Gableman was elected and was sworn in as a justice of the Wisconsin Supreme Court.¹⁹³

The state's Judicial Commission charged Gableman with violating the state's Supreme Court rules¹⁹⁴ by knowingly mispresenting a fact concerning an opponent.¹⁹⁵ A judicial conduct panel granted summary judgment to Gableman, and the matter reached the Wisconsin Supreme Court for review in 2010. The Court's six justices unanimously rejected Gableman's argument that the state's framework regulating knowing or reckless falsehoods during judicial campaigns violated the First Amendment.¹⁹⁶

The panel was bitterly divided, however, over whether Gableman's advertisement constituted a misrepresentation of fact. The justices were so divided over a matter involving their colleague on the bench that the justices who signed Justice Prosser's opinion declined to publish their views under the same citation as the one attached to Chief Justice Abramson's opinion, which proposed remanding for a jury trial as to the meaning of Gableman's ad.¹⁹⁷

The transcript of the television ad read in full:

Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman. It's not true!

Judge, District Attorney, Michael Gableman has committed his life to locking up criminals to keep families safe—putting child molesters behind bars for over 100 years.

Louis Butler worked to put criminals on the street.

Like Reuben Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child.

¹⁹² *In re Judicial Disciplinary Proceedings Against Gableman*, 784 N.W.2d 605, 633–34 (Wis. 2010).

¹⁹³ Both candidates were incumbent judges sitting on the state's lower courts. Any criticisms they directed toward each other might well have been considered speech directed at public officials, at the pinnacle of First Amendment protections.

¹⁹⁴ WIS. SUP. CT. R. 60.06(03)(c); *see also* WIS. STAT. § 757.87(3) et seq. (providing procedures for enforcement and review).

¹⁹⁵ *Gableman*, 784 N.W.2d at 630.

¹⁹⁶ *Id.* at 617, 646–47.

¹⁹⁷ *Id.* at 605.

Can Wisconsin families feel safe with Louis
Butler on the Supreme Court?

Justice Prosser's opinion, dispositive because there was no majority and the opinion below granting summary judgment to Gableman remained undisturbed, concluded that each sentence taken in isolation was "objectively true" and immune to penalty.¹⁹⁸ The Prosser opinion treats the disputed text as if it were a series of tweets spun out over days or weeks that had no contextual connection to each other. Each sentence, Prosser concluded, contained facts.

Chief Justice Abramson, in contrast, took the position that one could not, as the Commission and Justice Prosser did, "read each of the sentences . . . in isolation, as if the other sentences did not exist."¹⁹⁹ A myopic focus on literal truth, she asserted, denudes each sentence of "context or meaning."²⁰⁰ The message communicated that "Butler's actions in finding a 'loophole' led to Mitchell's release and his commission of another crime." No other reasonable interpretation of the advertisement has been suggested . . . This message is objectively false."²⁰¹

What did Louis Butler actually do? In the early 1990s, Butler worked as a public defender and, in that capacity, was appointed to represent Mitchell. During the appeal of Mitchell's criminal conviction, Butler successfully argued that the state had violated the rape shield law during the trial.²⁰² The Wisconsin Supreme Court subsequently declared the evidentiary error harmless, and Mitchell remained in prison until he was released on parole in the normal course of events.²⁰³ The oral narration to Gableman's advertisement was accompanied by written information, including citations to opinions in Mitchell's case, which pointedly omitted any citation to the Wisconsin Supreme Court opinion.²⁰⁴ Mitchell committed a new offense after his parole. The Judicial Conduct Panel concluded that: "Nothing that Justice Butler did in the course of his representation of Mitchell caused, facilitated, or enabled Mitchell's release from prison in 1992."²⁰⁵ Nor did any aspect of Butler's representation of Mitchell have "any

¹⁹⁸ *Id.* at 641–44 (defining truth objectively will limit prior restraint, reduce uncertainty and chill, and will not put the speaker "at the mercy of the hearer's understanding").

¹⁹⁹ *Id.* at 613.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 615.

²⁰² *Id.* at 612.

²⁰³ *Id.*

²⁰⁴ *Id.* at 616.

²⁰⁵ *Id.* at 612.

connection to Mitchell's commission of a second sexual assault of a child."²⁰⁶

In the absence of a majority opinion, the summary judgement below vindicating Gableman remained in place. The Supreme Court had no occasion to consider the appropriate penalty for knowing misrepresentations, or to ask whether removal from office could be an appropriate remedy. As this Article goes to press, Gableman remains on the Wisconsin Supreme Court; in June of 2017, he announced that he would not seek reelection in 2018.²⁰⁷

The Gableman story contains a number of cautionary tales.

First, the liar may be an incumbent, with connections to decision makers. Imagine how uncomfortable the six justices on the Wisconsin Supreme Court must have been sitting in judgment on a colleague with whom they had to work (and possibly share lunch and coffee with) every day.

Second, the facts were pretty straightforward. The advertisement wasn't an impromptu misstatement. Gableman had the opportunity to consider the text, and he used it. Moreover, he "virtually conceded" through counsel at the Judicial Conduct Panel that the advertisement was "misleading."²⁰⁸ Even in what seems like a very straightforward case, it is difficult to obtain consensus on how to distinguish truth from falsehood. The judges could not even agree about what methodology to apply.

Third, a regulatory structure designed to sustain the integrity of the judicial system allowed a misleading advertisement for a person seeking the highest judicial office to materially undermine public understanding of the adversary system by asking voters to hold a lawyer personally responsible for the later actions of a client he was appointed to zealously represent.

Chief Justice Abramson concluded that the court's deadlock in *Gableman*—a refusal to even remand the matter for a jury trial to ascertain whether the advertisement violated the statute—amounted to an invitation to "future judicial candidates to push and distort the content of advertising in judicial campaigns as far past truthful communication as the creative use of language may allow."²⁰⁹ If the advertisement, taken as a whole, did not amount to a straight-out oppositional

²⁰⁶ *Id.* (quoting Judicial Conduct Panel Findings of Fact # 17).

²⁰⁷ *Michael Gableman*, BALLOTPEdia, https://ballotpedia.org/Michael_Gableman (last visited Mar. 15, 2018).

²⁰⁸ *Gableman*, 784 N.W.2d at 616 n.34 (quoting Judicial Conduct Panel, slip op. at 17 (Deining, J., concurring)).

²⁰⁹ *Id.* at 614.

lie, it surely was an intentional distortion, or, at a minimum, an indirect prevarication resting on contextual distortion that was intended to deceive voters.

The Gableman saga indicates that even if the First Amendment posed no obstacle to regulating campaign falsehood, and even if a regulatory scheme survived strict scrutiny, it might be nigh on impossible for regulators to agree about where the boundaries lie. If regulation of campaign lies were constitutionally permissible, which I have argued it is not, such a statutory or regulatory scheme would hold little promise of offering a panacea. If straight-out defamatory statements about opponents in judicial elections are amenable to regulation, as several decisions suggest, then the normative message to partisans seems to be: use innuendo with abandon.

V. FACTS AND FICTIONS

I have argued that the First Amendment poses a virtually insurmountable obstacle to government regulation of deceptive campaign speech. Above all, freedom of expression means that the state cannot become the arbiter of truth, even where misleading statements are nothing more than straight-out lies. The same holds true no matter where the deception falls within the taxonomy of campaign lies I have set out. And even if we assumed for purposes of argument that the government could punish campaign deception, *Gableman* demonstrates the difficulty that would confront government officials asked to define and identify misleading expression. Instead, it is incumbent on journalists to ferret out and expose the facts—an essential aspect of the fourth estate's contribution to democracy.

Confronted with cases involving campaign deceptions, the courts have, almost without exception, reiterated that the classic First Amendment response to “falsehood and fallacies” enunciated by Justice Brandeis in 1927 remains an effective remedy to contemporary lies: “the remedy to be applied is more speech, not enforced silence.”²¹⁰ The *Alvarez* plurality underscored that the facts in that case demonstrated the power of “the dynamics of free speech, of counterspeech, of refutation [to] overcome the lie.”²¹¹ Xavier Alvarez was “ridiculed online,” exposed in the press, and called on to resign, even

²¹⁰ *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *quoted in inter alia*, *United States v. Alvarez* 617 F.3d 1198, 1216–17 (9th Cir. 2010), *aff'd*, 567 U.S. 709 (2012); *List v. Ohio Elections Comm’n*, 45 F. Supp. 3d 765, 778 (S.D. Ohio 2014), *aff'd*, 814 F.3d 466 (6th Cir. 2016).

²¹¹ *United States v. Alvarez*, 567 U.S. 709, 726 (2012) (plurality opinion).

before the FBI began to investigate his false claims.²¹² Channeling Justice Brandeis, the plurality offered succinct guidance: “The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight[-]out lie, the simple truth.”²¹³

This response seems particularly appropriate in the context of an election where, as the Supreme Court explained in 1982, “a candidate’s factual blunder is unlikely to escape the notice of, and correction by, the erring candidate’s political opponent. The preferred First Amendment remedy of ‘more speech, not enforced silence,’ thus has special force.”²¹⁴ The opponent’s accurate correction is expected to prevail in the marketplace of ideas, at least in theory. State courts also point to more and better speech as the constitutional remedy to election falsehoods.²¹⁵

Granted, none of the election falsehood cases I have relied on have been decided in the short time since new information emerged about the scope of disinformation spread by third parties during the 2016 election cycle.²¹⁶ In closing, I’d like to place my analysis of the constitutional limitations on

²¹² *Id.* at 727. Once he was known as a liar, Alvarez was investigated for misappropriating public funds. He was charged, convicted and sentenced to a five-year prison term. *People v. Alvarez*, No. B220044, 2010 WL 3964595, at *1 (Cal. Ct. App. Oct. 12, 2010) (unpublished).

²¹³ *Alvarez*, 567 U.S. at 727 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)); *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015) (overturning campaign falsehood statute) (“*Alvarez* teaches that the criminalization of such falsehoods is unnecessary because a remedy already exists: ‘the simple truth.’” (quoting *United States v. Alvarez*, 567 U.S. 709, 727 (2012))).

²¹⁴ *Brown v. Hartlage*, 456 U.S. 45, 61 (1982) (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

²¹⁵ See, e.g., *Commonwealth v. Lucas*, 34 N.E.3d 1242, 1253 (Mass. 2015); *Rickert v. Pub. Disclosure Comm’n*, 168 P.3d 826, 832 (Wash. 2007) (en banc); 281 *Care Comm. v. Arneson*, 766 F.3d 774, 793 (8th Cir. 2014) (“[E]specially as to political speech, counterspeech is the tried and true buffer and elixir.”). Narrow exceptions are found in cases involving judicial elections, where some opinions have concluded that counterspeech, concededly the usual remedy for falsehood, is inadequate to restore confidence in the integrity of the courts once deceptive campaign by candidates for judicial office undermines it. *In re O’Callaghan*, 796 S.E.2d 604, 624 (W. Va. 2017); *Myers v. Thompson*, 192 F. Supp.3d 1129, 1140 (D. Mont. 2016).

²¹⁶ See Samuel C. Woolley & Douglas R. Guilbeault, *Computational Propaganda in the United States of America: Manufacturing Consensus Online* 18–22 (Univ. of Oxford Computational Propaganda Research Project, Working Paper No. 2017.5, 2017) (discussing the role of bots during the 2016 election cycle to manipulate public opinion in the U.S., based on ethnographic research and a study of 17 million tweets); Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html> (noting that Russian agents reached an estimated 126 million users on Facebook, published 131,000 messages on Twitter and posted more than 1,000 YouTube videos to influence voters during the 2016 election, in addition to paid advertising by the Russian Internet Research Agency, which the companies characterized as a “minuscule” portion of overall traffic).

efforts to regulate deceptive campaign speech more directly in the context of the fake news that is this Symposium's focus.

Campaign deception—at least in its most blatant forms (straight-out lies)—may fit within PEN America's excellent, narrow definition of fraudulent news: “demonstrably false information that is being presented as a factual news report with the intention to deceive the public,”²¹⁷ except that the campaign, not the journalist, puts out false information intending to deceive.

In the face of Russian trolling and bots on social media sites, the seemingly widespread collapse of confidence in traditional sources of information, and allegations of fake news (all discussed elsewhere in this Symposium issue), some readers may justifiably wonder whether misleading speech by candidates and their supporters matters very much in the scheme of things. Amidst the breakdown of long-held norms, perhaps analyzing run-of-the-mill campaign deceptions and the obstacles to regulating them is purely quixotic, a rendering from a simpler time, about problems that, to draw from a different context, “Don't amount to a hill of beans in this crazy world.”²¹⁸

As other authors have demonstrated, the universe of information today and the way in which consumers of information assess it, has undergone a paradigm shift since the First Amendment was adopted and since Brandeis formulated his classic statement about the remedy to be applied to falsehood and fallacy. Recent events and survey data may seem to challenge the notion that truth will expose fiction, or that once voters hear verifiable facts they will weigh those facts in ways commentators consider appropriate. For example, a 2017 Fox News survey revealed that more respondents (45%) trusted the Trump administration to “tell the public the truth” than trusted the reporters who cover the administration (42%). Another 10% did not trust either. In 1996, 52% of those polled trusted the media more than the administration, while another 25% trusted both to tell them the truth. Only 9% trusted “politicians” to tell the truth in 1996; the 2017 survey did not

²¹⁷ *Faking News: Fraudulent News and the Fight for Truth*, PEN AM. 1, 4 (2017), <https://pen.org/wp-content/uploads/2017/11/2017-Faking-News-11.2.pdf>.

²¹⁸ *Casablanca*, IMDB, <http://www.imdb.com/title/tt0034583/quotes> (last visited Dec. 16, 2017) (quoting Rick, the hero, commenting on the insignificance of his personal happiness compared to the stakes of fighting fascism during World War II); see also *My Cousin Vinny* (1992) *Movie Script*, SPRINGFIELD! SPRINGFIELD!, http://www.springfieldspringfield.co.uk/movie_script.php?movie=my-cousin-vinny (last visited Mar. 15, 2018).

ask whether the President is by definition a politician because he won the office.²¹⁹

Whether we are actually confronting an epistemic crisis about the meaning of truth, whether we have lost shared sources and facts upon which to base debates, and what to do about shifting cultural norms—such questions are all beyond the scope of this Article. But while I have argued that the First Amendment limits the government’s role in responding to deceptive speech in campaigns (and more broadly to fake news and the like,) it does not stand in the way of private responses and solutions, including some of those proposed in these pages.

Real news matters, and truth continues to matter—all the participants in this Symposium take both of those statements as foundational principles. Lies campaigns tell about themselves and about their opponents matter beyond the immediate electoral context in large part because they undermine trust in politics and in civic institutions.

It primarily falls to overworked and underfunded journalists and fact-checkers to expose campaign deceptions. In the present climate, it is essential for journalists to call out lies as lies, to present facts that undermine fictions in the same story, and to reject gestures toward evenhandedness that amount to false equivalency.

Ultimately, any solution rests in cultural norms that go far beyond the parameters of this Article. The main burden, as always, falls on the voter who consumes information. The efficacy of faith in “more speech” relies on rational educated citizens. To that end, there are no constitutional barriers to better education, more transparency about the sources of information, assertive exposure of lies by private organizations, and other actions by private individuals and groups aimed at inoculating citizens and society from the most nefarious consequences of deception in public discourse. Most important, as public discussion of how our society should respond to this perceived crisis intensifies, we should not succumb to the temptation to undermine foundational First Amendment principles that constrain what government itself can do.

²¹⁹ *Fox News Poll 2/17/17*, FOX NEWS, <http://www.foxnews.com/politics/interactive/2017/02/17/fox-news-poll-21717.html> (last visited Mar. 15, 2018) (referring to page 7, Question 43).

JUST THE (ALTERNATIVE) FACTS, MA'AM: THE STATUS OF FAKE NEWS UNDER THE FIRST AMENDMENT

Jessica Stone-Erdman*

*“The First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.”*¹

INTRODUCTION

In the 2016 U.S. presidential election, Republican nominee Donald Trump won the popular vote by a landslide.² More groundbreaking was the unprecedented political endorsement he received from Pope Francis.³ Then, shortly before leaving office, President Obama, per executive order, enacted a nationwide ban on reciting the Pledge of Allegiance in schools.⁴ And according to Vice President Mike Pence, “Michelle Obama is the most vulgar first lady we’ve ever had.”⁵

Faster than content could be read and facts could be checked, these news articles were liked and shared hundreds of thousands of times on social media giant Facebook, with some stories having well over one million views.⁶ Characterized by sensational titles and highly charged discussions of political figures, these news stories share one undeniable trait: they are all fake.

Although Mike Pence disagreed with Michelle Obama’s criticism of his GOP running mate, he never called her vulgar

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¹ United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

² Hannah Roberts, *This is What Fake News Actually Looks Like—We Ranked 11 Election Stories That Went Viral on Facebook*, BUS. INSIDER (Nov. 17, 2016, 11:10 AM), <http://www.businessinsider.com/fake-presidential-election-news-viral-facebook-trump-clinton-2016-11>.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* The story about President Obama, for example, was seen over two million times. *Id.* A recent study found that “59 percent of links shared on social media have never actually been clicked: In other words, most people appear to retweet news without ever reading it.” Caitlin Dewey, *6 in 10 of You Will Share This Link Without Reading It, A New, Depressing Study Says*, WASH. POST (June 16, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/06/16/six-in-10-of-you-will-share-this-link-without-reading-it-according-to-a-new-and-depressing-study/?utm_term=.bcfa87d8e65e.

and in fact stated that he has “a lot of respect for the first lady.”⁷ President Obama’s elimination of the Pledge of Allegiance was nothing more than a “recycled hoax promulgated by a malware-spreading fake news site.”⁸ Donald Trump was never endorsed by Pope Francis,⁹ who actually expressed strong disagreement with some of the candidate’s political stances.¹⁰ And in the 2016 presidential election, the landslide popular vote victory went to Democratic nominee Hillary Clinton, who won it by nearly three million votes.¹¹

Election years in the United States are marked by several things: voter registration drives, pamphlets arguing for or against proposed legislation, and, perhaps the biggest hallmark, an abundance of political advertisements. Beginning several months before that critical Tuesday in November, television viewers can expect to be bombarded with political segments come every commercial break. By either highlighting one’s accomplishments or emphasizing another’s questionable behavior, these ads attempt to persuade viewers to vote for a particular candidate or, in the very least, to abstain from voting for their opponent.

In 2016, however, political “advertising” seemed to take on an entirely new meaning, particularly in the realm of the Internet and social media. Unlike traditional advertisements, which are arguably based in some measure of truth, this emerging phenomenon known as “fake news” seemed to come entirely from the imaginative minds of faceless strangers—individuals hiding behind both the anonymity of the Internet and the appearance of a seemingly legitimate news outlet. These stories, having no factual basis, made outlandish claims about presidential candidates and were shared repeatedly across

⁷ Reena Flores, *Mike Pence: “I Don’t Understand” Michelle Obama’s Critique of Trump*, CBS NEWS (Oct. 14, 2016, 8:11 AM), <http://www.cbsnews.com/news/mike-pence-i-dont-understand-michelle-obamas-critique-of-trump/>. Pence’s debunked comment was portrayed as a response to the first lady’s voiced concern over a presidential candidate bragging about sexually assaulting women. *Id.* In the actual interview from which this comment allegedly came, the word “vulgar” is never mentioned at all. *Id.* In fact, despite appearing in the headline, the quote is found nowhere in the fake news article itself. Arturo Garcia, *A “Vulgar” Lie*, SNOPE (Oct. 15, 2016), <http://www.snopes.com/mike-pence-calls-michelle-obama-vulgar/#>.

⁸ *Executive Disorder*, SNOPE (Aug. 16, 2016), <http://www.snopes.com/pledge-of-allegiance-ban/>.

⁹ Sydney Schaedel, *Did the Pope Endorse Trump?*, FACTCHECK.ORG (Oct. 24, 2016), <http://www.factcheck.org/2016/10/did-the-pope-endorse-trump/>.

¹⁰ Roberts, *supra* note 2.

¹¹ Sarah Begley, *Hillary Clinton Leads by 2.8 Million in Final Popular Vote Count*, TIME (Dec. 20, 2016), <http://time.com/4608555/hillary-clinton-popular-vote-final/>; *Presidential Results*, CNN, <http://www.cnn.com/election/results/president> (last visited Jan. 28, 2018).

a multitude of social media platforms, most notably Facebook.¹²

While fake news has existed in some form or another for decades,¹³ it recently became a hot topic following the 2016 presidential election.¹⁴ The phenomenon garnered so much attention that Oxford Dictionary has declared one of fake news's synonyms, "post-truth," as its 2016 Word of the Year.¹⁵ The term "fake news" found regular usage in the lexicon of journalists and citizens alike when, during his first press conference as President-elect, Donald Trump pointed at CNN's Jim Acosta while refusing to listen to his question and exclaimed, "You are fake news!"¹⁶ Since taking office, Trump has repeatedly called mainstream media outlets "fake news,"¹⁷

¹² See, e.g., Olivia Solon, *Facebook's Failure: Did Fake News and Polarized Politics Get Trump Elected?*, THE GUARDIAN (Nov. 10, 2016, 5:59 PM), <https://www.theguardian.com/technology/2016/nov/10/facebook-fake-news-election-conspiracy-theories>.

¹³ See generally Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO: MAGAZINE (Dec. 18, 2016), <http://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535>.

¹⁴ See, e.g., *Statistics & Facts About Fake News*, STATISTA, <https://www.statista.com/topics/3251/fake-news/> (last visited Mar. 16, 2018) ("Fake news was one of the most hotly-debated topics in 2016 and 2017.").

¹⁵ Amy B. Wang, *'Post-Truth' Named 2016 Word of the Year by Oxford Dictionaries*, WASH. POST (Nov. 16, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/11/16/post-truth-named-2016-word-of-the-year-by-oxford-dictionaries/?utm_term=.8204ef0cf466.

¹⁶ Donovan Slack, *Trump to CNN: 'You Are Fake News'*, USA TODAY (Jan. 12, 2017, 11:41 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/01/11/trump-cnn-press-conference/96447880/>.

¹⁷ See e.g., Donald Trump (@realDonaldTrump), TWITTER (Jan. 12, 2017, 6:22 AM), <https://twitter.com/realdonaldtrump/status/819550083742109696?lang=en> [<https://perma.cc/N44C-AD24>] ("@CNN is in a total meltdown with their FAKE NEWS because their ratings are tanking since election and their credibility will soon be gone!"); Donald Trump (@realDonaldTrump), TWITTER (Jan. 29, 2017, 5:00 AM), <https://twitter.com/realdonaldtrump/status/825690087857995776?lang=en> [<https://perma.cc/GN6F-7HN8>] ("Somebody with aptitude and conviction should buy the FAKE NEWS and failing @nytimes and either run it correctly or let it fold with dignity!"); Donald Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realdonaldtrump/status/832708293516632065?lang=en> [<https://perma.cc/6BBK-46UW>] ("The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American people!"). Recently, Trump announced via Twitter the winners of his "long-promised 'Fake News Awards,' an anti-media project that had alarmed advocates of press freedom and heartened his political base." Matt Flegenheimer & Michael M. Grynbaum, *Trump Hands Out 'Fake News Awards,' Sans the Red Carpet*, N.Y. TIMES (Jan. 17, 2018), <https://www.nytimes.com/2018/01/17/business/media/fake-news-awards.html>. For the list itself, see *The Highly Anticipated 2017 Fake News Awards*, REPUBLICAN NAT'L COMM. (Jan. 17, 2018), <https://www.gop.com/the-highly-anticipated-2017-fake-news-awards/> [<https://perma.cc/AG99-CSBP>].

and since the November, 2016, election, the number of Google searches for “fake news” increased noticeably.¹⁸

Concerns that fake news had materially and negatively impacted the 2016 presidential election began growing almost immediately after the results were announced.¹⁹ Outgoing President Barack Obama emphasized the threat that fake news presents to America’s political system: “If we are not serious about facts and what’s true and what’s not, if we can’t discriminate between serious arguments and propaganda, then we have problems.”²⁰ Hillary Clinton similarly advised: “It’s now clear that so-called fake news can have real-world consequences . . . It’s imperative that leaders in both the private sector and the public sector step up to protect our democracy and innocent lives.”²¹ And it is not just politicians who share this concern: According to a recent study conducted by the Pew Research Center, 64% of U.S. citizens believe that “fabricated news stories cause a great deal of confusion about the basic facts of current issues and events.”²² This sentiment varies little across gender, race, age, education level, income, and partisan lines.²³

Social media platforms were heavily criticized for promulgating fake news articles.²⁴ Facebook in particular “received heated criticism for its role in spreading a deluge of political misinformation.”²⁵ Indeed, although 84% of

¹⁸ See e.g., *Fake News*, GOOGLE TRENDS, <https://trends.google.com/trends/> (search in search bar for “fake news”; then click on “Past 12 months”; then click on “Custom time range”; then change the “From” date to “01/01/2016”; then click “OK”) (last visited Mar. 15 2018). From the beginning of January, 2016, for example, the number of times that “fake news” was searched on Google per week was low at around five or six times. See *id.* Beginning in November, 2016, the number of weekly searches for the term increased to average in the fifties or sixties. See *id.* Indeed, since the election of Donald Trump, the weekly number of searches for “fake news,” though fluctuating slightly, has remained noticeably higher than since before the election. See *id.*

¹⁹ See Solon, *supra* note 12.

²⁰ Olivia Solon, *Barack Obama on Fake News: ‘We Have Problems’ If We Can’t Tell the Difference*, THE GUARDIAN (Nov. 17, 2016), <https://www.theguardian.com/media/2016/nov/17/barack-obama-fake-news-facebook-social-media>.

²¹ Callum Borchers, *How Hillary Clinton Might Have Inspired Trump’s ‘Fake News’ Attacks*, Wash. Post (Jan. 3, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/01/03/how-hillary-clinton-might-have-inspired-trumps-fake-news-attacks/?utm_term=.881204a44f58.

²² Michael Barthel, Amy Mitchell, & Jesse Holcomb, *Many Americans Believe Fake News Is Sowing Confusion*, PEW RESEARCH CTR. (Dec. 15, 2016), <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/>.

²³ *Id.*

²⁴ See Fox, *infra* note 49; Levin, *infra* note 49.

²⁵ Alex Heath, *Facebook is Going to Use Snopes and Other Fact Checkers to Combat Fake News (FB)*, BUS. INSIDER: MKTS. INSIDER (Dec. 15, 2016, 1:52 PM),

Americans reported some level of confidence in their ability to spot fake news, calls for reform and accountability emerged: 42% of Americans felt that social networking sites and search engines should be responsible for stopping the spread of fake news; 45% believed that it was a job for the government, politicians, and elected officials; and 43% felt that members of the public bore that burden.²⁶ Fifteen percent of citizens felt that all three groups bore great responsibility, but 58% assigned it to only one or two of the groups.²⁷

With the recent emergence of fake news, the data presented above, and the fact that around 74% of Americans believe that fake news should not receive constitutional protection,²⁸ an interesting question arises in First Amendment jurisprudence: Where does fake news stand under the free speech doctrine, and should (or can) it be regulated?

Several countries have already enacted measures to combat fake news, especially around election times.²⁹ Moreover, in the United States, shortly after the election, a California lawmaker introduced a bill that would criminalize an individual who “knowingly and willingly” contributed to the online creation and sharing of fake news regarding both issues and candidates on which citizens will vote.³⁰ Around the same time at the federal level, in response to the incoming administration’s unique take on fake news and hostile attitude toward news media outlets, Democrats in the House of Representatives proposed a resolution subtitled “Opposing fake news and alternative facts.”³¹ Among other things, the resolution urged that (1) “the President must immediately acknowledge his support of the First Amendment,” (2) “White House spokespersons should not issue fake news,” and (3) “White House spokespersons who offer alternative or inaccurate facts should retract their statements immediately.”³²

<http://markets.businessinsider.com/news/stocks/Facebook-is-going-to-use-Snopes-and-other-fact-checkers-to-combat-fake-news-FB-1001608146>.

²⁶ Barthel, Mitchell, & Holcomb, *supra* note 22. Regarding the ability to identify fake news, 39% reported feeling very confident that they could spot it, and 45% reported feeling somewhat confident. *Id.*

²⁷ *Id.*

²⁸ *The State of the First Amendment*, NEWSEUM INST. 1, 5–18 (May 2017), http://www.newseuminstitute.org/wp-content/uploads/2017/06/FAC_SOFA17_report.pdf.

²⁹ See *infra* Part III.

³⁰ Dave Maass, *California Bill to Ban “Fake News” Would be Disastrous for Political Speech*, ELEC. FRONTIER FOUND. (Mar. 28, 2017), <https://www.eff.org/deeplinks/2017/03/california-bill-ban-fake-news-would-be-disastrous-political-speech>.

³¹ H. R. Res. 191, 115th Cong. (2017).

³² *Id.*

At first glance, one can perhaps see the benefit in having the government step in to regulate fake news. With a vast supply of financial and human capital at its disposal, the federal government seems to be in a good position to confront and control this phenomenon. Moreover, having a central authority monitor and implement laws and policies designed to stamp out fake news seems efficient. Further, the authority to impose fines or criminal punishment for the intentional dissemination of false information is a powerful tool that ought to ensure suppression of news deemed to be fake.

It is in part because of that last sentence, however, that the government should be kept out of fake news regulation. The power to decide what constitutes truthful speech and what constitutes false speech presents too much potential for abuse. Allowing political leaders to suppress speech with which they disagree on the grounds that it is fake news invites a dystopian society reminiscent of Orwell's Oceania from 1984.³³

This Note argues that under First Amendment jurisprudence, government regulation of any kind is likely not possible, and attempts to regulate would likely fail judicial review.³⁴ If any official regulation were to occur, it should come from those who are best suited to deal with it: the social media platforms on which fake news proliferates. Private corporations like Facebook are better suited to undertake speech-controlling measures without offending the First Amendment than if the government were to take similar measures. Moreover, Facebook has already undergone regulatory measures, showing that counterspeech—a First Amendment principle positing that

³³ For an interesting analysis of this comparison, see Michiko Kakutani, *Why '1984' is a 2017 Must-Read*, N.Y. TIMES (Jan. 26, 2017),

<https://www.nytimes.com/2017/01/26/books/why-1984-is-a-2017-must-read.html>.

³⁴ At the time this Note was written, reports on possible foreign interference with the U.S. political process via fake news articles on social media platforms had not yet emerged. For information on the investigation, see Press Release, U.S. Dep't of Justice, Grand Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the United States Political System (Feb. 16, 2018), <https://www.justice.gov/opa/pr/grand-jury-indicts-thirteen-russian-individuals-and-three-russian-companies-scheme-interfere>; Dustin Volz, *Facebook: Russian Agents Created 129 U.S. Election Events*, REUTERS (Jan. 25, 2018, 5:55 PM), <https://www.reuters.com/article/us-usa-trump-russia-facebook/facebook-russian-agents-created-129-u-s-election-events-idUSKBN1FE37M>. This Note, therefore, focuses exclusively on the question of whether the government may regulate fake news as it is created and disseminated by ordinary U.S. citizens. See, e.g., Caitlin Dewey, *Facebook Fake-News Writer: 'I Think Donald Trump is in the White House Because of Me'*, WASH. POST (Nov. 17, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/17/facebook-fake-news-writer-i-think-donald-trump-is-in-the-white-house-because-of-me/?utm_term=.152ee33099f2 (interviewing American writer Paul Horner, an "impresario of a Facebook fake-news empire" who "has made his living off viral news hoaxes for several years"). Discussion of whether the government may similarly regulate fake news in the context of foreign interference is beyond the scope of this Note.

truth rather than censorship is the answer to false speech³⁵—is a real, potential alternative to government intervention.

Citizens, too, are in a position to combat the spread of fake news. By using critical thinking skills and carefully evaluating the trustworthiness of the news source, social media users and other netizens³⁶ can engage in their own form of counterspeech, such as posting truth where there is falsity.

Analysis of the relationship between fake news and the First Amendment proceeds in three parts. Part I responds to the confusion surrounding the exact meaning of the term “fake news,” prompted by its seemingly different uses depending on the context, and sets forth a definition that narrowly defines the term as it is most commonly understood and accepted. Part II explores whether fake news is entitled to any First Amendment protection, noting that a recent Supreme Court opinion likely suggests that it is, though there may be room for distinction. Finally, Part III discusses the likelihood of success of regulation by both the government and social media platforms. Part III discusses regulatory efforts that social media platforms, specifically Facebook, have already undertaken as well.

I. THE POST-TRUTH ZONE: DEFINING AND DISTINGUISHING THE FAKE NEWS MARKET

Despite its seemingly recent eruption, the concept of fake news is far from novel. One notable example derives from an October 30, 1938, radio broadcast, when millions of U.S. citizens were briefly consumed by fear as they listened to the frighteningly realistic, carefully detailed account of a real-time Martian invasion, finding relief only later when they discovered that it was nothing more than an oral rendition of a science-fiction novel.³⁷ On a less extreme note, programs like *The Daily*

³⁵ See *Whitney v. California*, 274 U.S. 357, 377 (1927), (Brandeis, J., concurring) (introducing the concept of counterspeech), *overruled on other grounds by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); see also *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion) (citing and applying *Whitney* to modern speech issues).

³⁶ “Netizen” refers to “an active participant in the online community of the Internet.” *Netizen*, MERRIAM WEBSTER (Nov. 28, 2017), <https://www.merriam-webster.com/dictionary/netizen>.

³⁷ *Welles Scares Nation*, HISTORY (last visited Oct. 13, 2017), <http://www.history.com/this-day-in-history/welles-scares-nation>. Due to a competing program airing at a conflicting time, many listeners tuned into the radio broadcast after it had begun; they did not hear the initial disclaimer that the program they were listening to was an adaption of H.G. Wells’ *War of the Worlds*, presented by Orson Welles and the Mercury Theater Company. *Id.* By the time Welles learned of the misunderstanding and came on air to once again disclose that the account was fictitious, it appeared to have been too late. *Id.* (“Perhaps as many as a million radio listeners believed that a real Martian invasion was underway. Panic broke out across the country. In New Jersey, terrified civilians jammed highways seeking to escape the alien marauders. People begged police for gas masks to save them from the toxic

Show and *Last Week Tonight*, as well as publications like *The Onion*, dish out political satire and commentary on a regular basis. Fake news has existed in one form or another for centuries³⁸ and, given the profitability of comedy and sensationalism,³⁹ it will likely continue to proliferate in the future.

Not all fake news is created equal, however, and some forms appear to be potentially more concerning than others. This is especially true in an age where many U.S. citizens read their news online via social media websites,⁴⁰ platforms in which anyone can write up a story and label it breaking news, no matter the truth or falsity of its contents. In addition to the various forms that fake news may take, the term is often interpreted differently, depending on who is using it.⁴¹ It is therefore useful to identify and carefully define fake news as it is used in this Note.

To begin, despite apparent similarities and potential overlap, fake news as discussed in this context does not include parody or satire, two forms of speech long recognized as having First Amendment protection.⁴² There are two key distinctions: the nature of the work and the intent of the author. Satire is

gas and asked electric companies to turn off the power so that the Martians wouldn't see their lights."').

³⁸ See generally Soll, *supra* note 13.

³⁹ See Baharat N. Anand, *The U.S. Media's Problems Are Much Bigger Than Fake News and Filter Bubbles*, HARV. BUS. REV. (Jan. 5, 2017), <https://hbr.org/2017/01/the-u-s-medias-problems-are-much-bigger-than-fake-news-and-filter-bubbles>; Tobias Rose-Stockwell, *This is How Your Fear and Outrage Are Being Sold for Profit*, MEDIUM (July 4, 2017), <https://medium.com/the-mission/the-enemy-in-our-feeds-e86511488de> (noting that companies such as Facebook, Twitter, and CNN "saw massive traffic and revenue spikes thanks to the sensationalized news propagated on their platforms and the attention they captured"); Atul Singh, *Media Should Not Make Money*, HUFFPOST: THE BLOG (June 7, 2013, 2:46 PM), https://www.huffingtonpost.com/atul-singh/nonprofit-media_b_3404410.html (arguing that "[i]t is an irrefutable fact that sensationalism and partisanship sell better than analysis and objectivity").

⁴⁰ Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CTR. 1, 2 (Sept. 6, 2017), http://assets.pewresearch.org/wp-content/uploads/sites/13/2017/09/13163032/PJ_17.08.23_socialMediaUpdate_FINAL.pdf.

⁴¹ Forty-fifth President of the United States Donald Trump, for example, frequently labels mainstream media organizations with whom he disagrees, such as CNN, the New York Times, and NBC, fake news. See, e.g., Christopher Rosen, *All the Times Donald Trump Has Called the Media 'Fake News' on Twitter*, ENTMT WEEKLY (June 27, 2017, 11:11 AM), <http://ew.com/tv/2017/06/27/donald-trump-fake-news-twitter/>. Others, such as Harvard Professor Jonathan Zittrain, define fake news as information "that the person saying or repeating knows to be untrue or is indifferent to whether it is true or false." Clea Simon, *Fake News Is Giving Reality a Run for Its Money*, HARV. GAZETTE (Mar. 27, 2017), <http://news.harvard.edu/gazette/story/2017/03/harvard-panelists-discuss-future-of-journalism-in-fake-news-world/>.

⁴² See, e.g., *Campbell v. Acuff-Rose Music, Inc.* 510 U.S. 569, 579 (1994); *Hustler Magazine v. Falwell*, 485 U.S. 46, 57 (1988).

defined as “a literary work holding up human vices and follies to ridicule or scorn[,]”⁴³ while parody is defined as “a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule.”⁴⁴ Works of this nature draw from real life. They are transformative, taking something that already exists (such as a pop-rock song about a pretty woman) and turning it into something new (such as a rap song about a perhaps less-than-pretty woman).⁴⁵ Satire and parody serve to critique the source from which they came.⁴⁶ *The Onion* and *Saturday Night Live* are two examples of fake news that may properly be classified as satire. Rather than purporting to provide real news reporting, these parodies poke fun at current events. Their aim is not to convince viewers that what they are seeing should be taken as truth; rather, their goal is to provide comic relief. They exaggerate political figures not for the purpose of deceiving the public through dissemination of false information, but to instead provide social commentary on matters of public interest and concern.

By contrast, fake news, as applied here, is quite limited in scope and content. Known also as post-truths and alternative facts, fake news refers to unequivocal falsehoods that are intentionally and deliberately passed off as accurate, legitimate news.⁴⁷ Fake news overwhelmingly appeals to emotions and passion rather than to objective facts.⁴⁸ And, in the age of the Internet and social media, which have been asserted as contributing to the widespread dissemination of fake news,⁴⁹ these stories garner attention through the use of eye-catching, clickbait titles.⁵⁰ The phrases that make up the headlines,

⁴³ *Satire*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/satire> (last updated Mar. 8, 2018).

⁴⁴ *Parody*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/parody> (last updated Mar. 5, 2018).

⁴⁵ See *Campbell*, 510 U.S. at 579.

⁴⁶ See *Falwell*, 485 U.S. at 51.

⁴⁷ See, e.g., Nick Gaffney, *Top 10 Lessons From the Rise of “Fake News”*, L. J. NEWSL. (Feb. 2017), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2017/02/01/media-communicationtop-10-lessons-from-the-rise-of-fake-news/?slreturn=20170913155621> (“The term ‘fake news’ refers to fictitious content that attempts to (and all too often does) appear as factual . . .”).

³⁹ *Id.* (“Emotional appeal can be more influential than facts.”).

⁴⁹ See, e.g., Maggie Fox, *Fake News: Lies Spread Faster on Social Media Than Truth Does*, NBC NEWS (Mar. 8, 2018, 2:05 PM), <https://www.nbcnews.com/health/health-news/fake-news-lies-spread-faster-social-media-truth-does-n854896>; Sam Levin, *Mark Zuckerberg: I Regret Ridiculing Fears Over Facebook’s Effect on Election*, THE GUARDIAN (Sept. 27, 2017, 7:51 PM), <https://www.theguardian.com/technology/2017/sep/27/mark-zuckerberg-facebook-2016-election-fake-news>.

⁵⁰ “Clickbait” refers to “something (such as a headline) designed to make readers want to click on a hyperlink especially when the link leads to content of dubious value or interest.” *Clickbait*, MERRIAM-WEBSTER, <https://www.merriam->

however, are either (a) not actually mentioned in the articles themselves, or (b) changed so that the implied meaning from the headline subtly shifts.⁵¹

Legitimate news and news sources, on the other hand, write to inform and educate. Ideally, reporters from legitimate news sources have studied their craft and abide by the Code of Ethics maintained by the Society of Professional Journalists.⁵² Legitimate news sources should also have a track record of presenting reliable information and should report the news in an unbiased manner.⁵³ However, modern media giants such as MSNBC and Fox News, who are largely left-leaning and right-leaning, respectively,⁵⁴ show that this is not necessarily a determinative requirement for legitimacy. The key to legitimacy is presenting accurate, verifiable information that has been thoroughly researched, and offering retractions when something is misreported.

Fake news does not meet any of those requirements, yet it proliferates. This success may be attributed to a number of factors. Perhaps most influential is how trustworthy and convincing fake news websites appear, making it difficult to distinguish between fake and legitimate news sources. The most dangerous fake news sites are those that, upon first glance, can deceive even the most critical eye because of how closely they mimic real media outlets.⁵⁵ For example, the article claiming that President Obama eliminated the Pledge of Allegiance appears on a website whose URL is “abcnews.com.co”; the site’s banner contains a black and white logo that is nearly identical to the one on ABC News’s website; and the author is attributed as writing for ABC News, with the article marked as a contribution to the Associated Press.⁵⁶ The website, however,

webster.com/dictionary/clickbait (last updated Nov. 28, 2017); see also *Clickbait*, OXFORD ENGLISH LIVING DICTIONARIES, <https://en.oxforddictionaries.com/definition/us/clickbait> (last visited Jan. 1, 2018) (defining clickbait as “(on the Internet) content whose main purpose is to attract attention and encourage visitors to click on a link to a particular web page”).

⁵¹ See Ben Frampton, *Clickbait: The Changing Face of Online Journalism*, BBC NEWS (Sept. 14, 2015), <http://www.bbc.com/news/uk-wales-34213693>.

⁵² See *SPJ Code of Ethics*, SOC’Y OF PROF’L JOURNALISTS (Sep. 6, 2014, 4:49 PM), <http://www.spj.org/ethicscode.asp>.

⁵³ See *id.*

⁵⁴ See, e.g., Aaron Blake, *Ranking the Media From Liberal to Conservative, Based on Their Audiences*, WASH. POST (Oct. 21, 2014), https://www.washingtonpost.com/news/the-fix/wp/2014/10/21/lets-rank-the-media-from-liberal-to-conservative-based-on-their-audiences/?utm_term=.51196bea7980.

⁵⁵ See generally, Soll *supra* note 13.

⁵⁶ The URL to the website is as follows: <http://abcnews.com.co/obama-executive-order-bans-pledge-of-allegiance-in-schools/>. As of July 2, 2017, the article has been removed from abcnews.com.co’s website, where it originally appeared. Similarly, the same article previously appeared on another fake news website; this one resembled

does not belong to ABC, whose official URL is "abcnews.go.com."⁵⁷

Another factor contributing to the success of fake news is America's growing mistrust of mainstream media.⁵⁸ A 2016 Gallup Poll found that only 32% of Americans express either a "great deal" or "fair amount" of trust in "mass media—such as newspapers, TV and radio—when it comes to reporting the news fully, accurately, and fairly."⁵⁹ That level of trust has been in a subtle yet steady decline since 2003, at which point the reported trust was at 54%.⁶⁰ The year 2003 also marks the last time in which more than a majority of Americans expressed a great deal or fair amount of trust in the media, and the most recent study marks the lowest level of such trust reported since the poll began in 1972.⁶¹ Additionally, in 2016, more Americans reported having a "great deal" or "quite a lot" of confidence in the presidency (36%) than they had in newspapers (20%).⁶² This is particularly troubling given the press's vital role as the Fourth Estate and additional check on government power.⁶³

Finally, it is important to note that although fake news largely targets political figures,⁶⁴ it can have devastating collateral effects on private figures as well. One of the most

CNN, was authored by who appeared to be a CNN reporter, and was designated as a contribution by the Associated Press. See Jimmy Rustling, *Obama Signs Executive Order Banning the Pledge of Allegiance In Schools Nationwide*, <http://cnn.com/de/news/obama-signs-executive-order-banning-pledge-allegiance-schools-nationwide/> (last visited July 2, 2017). The URL for this website (cnn.com.de) however, differs from the real CNN's URL (cnn.com). The "author" of the piece was likely fake as well. See Glenn Kessler, *The Fact Checker's Guide for Detecting Fake News*, WASH. POST (Nov. 22, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/11/22/the-fact-checkers-guide-for-detecting-fake-news/?utm_term=.d58448ff619f (discussing "clues" suggesting that "Jimmy Rustling" is not real).

⁵⁷ ABC NEWS, <http://abcnews.go.com/> (last visited Mar. 17, 2018).

⁵⁸ Gaffney, *supra* note 47.

⁵⁹ Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx>. To break this down even further, only 8% of respondents reported having a great deal of confidence in mass media, leaving 24% expressing only a fair amount. *Trust in Government*, GALLUP, <http://news.gallup.com/poll/5392/trust-government.aspx> (last visited Mar. 16, 2018).

⁶⁰ *Trust in Government*, *supra* note 59.

⁶¹ Swift, *supra* note 59.

⁶² *Confidence in Institutions*, GALLUP, <http://www.gallup.com/poll/1597/confidence-institutions.aspx> (last visited Mar. 16, 2018). It would be interesting, however, to see if these numbers have shifted since 2017, when a new president took office.

⁶³ For a discussion on the media as the Fourth Estate, see Matthew Gentzkow, Edward L. Glaeser, & Claudia Goldin, *The Rise of the Fourth Estate: How Newspapers Became Informative and Why It Mattered*, in CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 187, 230 (Glaeser & Goldin eds., 2006).

⁶⁴ See, e.g., *Fake News*, SNOPES, <https://www.snopes.com/fact-check/category/fake-news/> (last visited Mar. 17, 2018) (archiving a list of fake news stories appearing on the Internet, many of which are about public figures).

notorious examples of this is the conspiracy known as “Pizzagate.” In late 2016, Edgar Maddison Welch traveled more than 300 miles to investigate a Washington, D.C. pizzeria after reading several fake news stories claiming that the restaurant was “part of a child-abuse ring led by Hillary Clinton.”⁶⁵ Accompanying Welch was a military-style assault rifle, which he began firing shortly after his arrival.⁶⁶ Stories promoting the conspiracy began making their rounds on various social media sites right before the election in October, 2016.⁶⁷ Reports by *The New York Times*, *The Washington Post*, and Snopes debunking the theory only fueled the Pizzagate believers.⁶⁸ The fake news continued:

Within hours of the publication of one of the debunking articles, a post on Twitter by Representative Steven Smith of the 15th District of Georgia—not a real lawmaker and not a real district—warned that what was fake news was the information being peddled by the mainstream media. It was retweeted dozens of times.⁶⁹

Real individuals, such as Michael Flynn, Jr., whose father served briefly as Donald Trump’s national security advisor, also encouraged the theory.⁷⁰ Flynn, Jr. expressed his support via Twitter: “Until #Pizzagate proven to be false, it’ll remain a story. The left seems to forget #PodestaEmails and the many ‘coincidences’ tied to it.”⁷¹ Since the conspiracy’s

⁶⁵ Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/business/media/comet-ping-pong-pizza-shooting-fake-news-consequences.html?action=click&contentCollection=U.S.&module=RelatedCoverage®ion=Marginalia&pgtype=article>.

⁶⁶ *Id.* Fortunately no one was hurt, and Welch was arrested. *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Incoming National Security Adviser’s Son Spreads Fake News About D.C. Pizza Shop*, POLITICO (Dec. 4, 2016, 11:53 PM), <http://www.politico.com/story/2016/12/incoming-national-security-advisers-son-spreads-fake-news-about-dc-pizza-shop-232181>.

⁷¹ *Id.* The reference to Podesta e-mails is how the “Pizzagate” conspiracy began: members of the social media forum site Reddit created a thread in which they purported to deconstruct the leaked e-mails of John Podesta, campaign chairman for Hillary Clinton. Gregor Aisch, Jon Huang, & Cecilia Kang, *Dissecting the #PizzaGate Conspiracy Theories*, N.Y. TIMES (Dec. 10, 2016), <https://www.nytimes.com/interactive/2016/12/10/business/media/pizzagate.htm>

emergence, the pizza restaurant, as well as neighboring businesses, have suffered: not only have individuals falsely accused the businesses of harboring the trafficking ring, but the owners have received threatening phone calls as well.⁷²

Fake news is not a small problem, nor is it, in some circumstances, particularly harmless. With the situations presented above, it is easy to empathize with those calling for the end of fake news. However, as will be discussed next, fake news may not be so easy to regulate, nor is regulation necessarily desirable, depending on who is tasked with the job. In fact, despite its seemingly little value to the exchange of ideas, fake news may nonetheless be protected under the First Amendment.

II. TO PROTECT OR NOT TO PROTECT: WHERE DOES FAKE NEWS STAND UNDER THE FIRST AMENDMENT?

There is perhaps no other right held in such high esteem by the United States Supreme Court as the freedom of speech. This sentiment is reflected in the very limited list of speech that is categorically excluded from First Amendment protection, such as obscenity,⁷³ fighting words,⁷⁴ true threats,⁷⁵ and child pornography.⁷⁶ It is also reflected in the Court's staunch reluctance to expand this exclusionary list further, refusing, for example, to automatically deny protection to such controversial topics as the creation of virtual child pornography⁷⁷ and intentional infliction of emotional distress claims brought by private individuals against other private individuals.⁷⁸

Prior to 2012, the question of whether fake news deserves any protection under the First Amendment would seem to have a rather obvious answer: No, it does not. After all, fake news constitutes nothing more than demonstrable falsehoods, and the Supreme Court has, in several instances, appeared to dismiss the notion that false statements were protected under the Free Speech Clause.⁷⁹ In fact, earlier

1. Some of the e-mails contained correspondence between Podesta and the pizzeria owner regarding a fundraising event, and Reddit users claimed that food-related words, such as "cheese pizza", "ice cream", and "walnut" were code words for common child pornography phrases. *Id.*

⁷² Kang & Goldman, *supra* note 65.

⁷³ *Miller v. California*, 413 U.S. 15, 36 (1973).

⁷⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

⁷⁵ *Watts v. United States*, 394 U.S. 705, 707 (1969).

⁷⁶ *New York v. Ferber*, 458 U.S. 747, 763 (1982). For a more complete list of unprotected speech, see *United States v. Alvarez*, 567 U.S. 709, 717 (2012).

⁷⁷ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245 (2002).

⁷⁸ *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

⁷⁹ See, e.g., *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas,

opinions emphasized that providing such protection ran counter to—and indeed impeded—the ideals promoted by the First Amendment, particularly the constant search for truth among a marketplace of competing ideas.⁸⁰ With so much judicial language seemingly stacked against the creation and distribution of fake news, one was seemingly hard-pressed to argue that it is a form of protected speech.

But in 2012, the Supreme Court—in a plurality opinion—decided *United States v. Alvarez*,⁸¹ and the notion that lies were not protected under the First Amendment was no longer so firmly decided. The respondent in *Alvarez* was charged with violating section 704(b) of the Stolen Valor Act,⁸² which criminalized “[f]raudulent [r]epresentations [a]bout [r]eceipt of [m]ilitary [d]ecorations or [m]edals.”⁸³ Rejecting arguments by the government that the law was no different from existing, permissible regulations on such acts as perjury, lying to a government official, and impersonating a government official or representative,⁸⁴ a plurality of the Court held that this particular section of the Stolen Valor Act was invalid because it punished speech solely for its falsity, rather than for, *e.g.*, its obstruction to the legal process or connection to fraudulent activity.⁸⁵ In sum, whereas criminalizing perjury and impersonating a government official are acceptable ways of maintaining the integrity of the justice system, criminalizing lying about receiving a government medal serves no similar, compelling end.

In reaching its decision, the plurality clarified that “falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless

and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’ . . . Hence the knowingly false statement and the false statement made with reckless disregard of truth, do not enjoy constitutional protection.” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)); *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (“Of course, demonstrable falsehoods are not protected by the First Amendment in the same manner as truthful statements.” (citing *Gertz v. Robert Welch, Inc.* 418 U.S. 323, 340 (1974))); *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002) (“[F]alse statements may be unprotected for their own sake . . .”).

⁸⁰ See *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual’s reputation that cannot easily be repaired by counterspeech, however persuasive or effective.”).

⁸¹ 567 U.S. 709 (2012) (plurality opinion).

⁸² *Id.* at 713.

⁸³ 18 U.S.C. § 704(b) (2012).

⁸⁴ *Alvarez*, 567 U.S. at 720–22.

⁸⁵ *Id.* at 724; see also *id.* at 722–23 (“The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.”).

falsehood.”⁸⁶ More significantly, the lie must be made for the purpose of gaining some material benefit, such as “to effect a fraud or secure moneys or other valuable considerations, say offers of employment.”⁸⁷ In those instances, “it is well established that the government may restrict speech without affronting the First Amendment.”⁸⁸ But the proposition that speech may be punished merely because it is untrue and where, as here, the speaker incurs no benefit other than a boost to his own self-esteem, is not supported by case law.⁸⁹ Such regulation, the plurality warned, would substantially subdue the First Amendment:

Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.⁹⁰

The plurality did not come to its conclusion unsupported. *Alvarez* is inundated with references to case law in which the Court held that, while false speech may not necessarily be protected to the same extent as truthful speech, it has never been held that false speech is completely unprotected.⁹¹ After all, “some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression [that] the First Amendment seeks to guarantee.”⁹² Moreover, “it is sometimes

⁸⁶ *Id.* at 719.

⁸⁷ *Id.* at 723.

⁸⁸ *Id.* (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976)).

⁸⁹ *See generally id.*

⁹⁰ *Id.* at 723.

⁹¹ *See generally id.*; *see also id.* at 719 (“The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection.”).

⁹² *Id.* at 718 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964)).

necessary to extend a measure of strategic protection to these statements in order to ensure sufficient ‘breathing space’ for protected speech.”⁹³ An example of such “breathing space” is the requirement of malice or reckless disregard for the falsity of one’s statement in cases of libel and defamation; this stringent mental state requirement allows for the uninhibited exchange of ideas about public figures and other issues of public significance without excessive fear of legal repercussion for unwittingly made false statements.⁹⁴ In other words, to ensure that protected speech is not improperly suppressed, it may be crucial to permit lies in certain circumstances.

Alvarez and the Stolen Valor Act are not the first times the U.S. government has tried to control the production and spread of misinformation. In 1798, Congress passed the Sedition Act, which made it a crime to “write, print, utter, or publish [or assist in such] . . . any false, scandalous and malicious writing against the Government.”⁹⁵ The Act was largely “enforced in a partisan way and was used to suppress opinions with which the Government disagreed.”⁹⁶ Several newspaper editors belonging to the opposing political party were punished under the Act.⁹⁷ Because judicial review had not yet been established, the Supreme Court was unable to evaluate the constitutionality of the law.⁹⁸ And though expiration of the law two years after enactment prevented it from ever reaching the Court, “[t]he invalidity of the Act has . . . been assumed by Justices of [the] Court,” reflecting a “broad consensus that the Act, because of the restraint it imposed upon criticism of Government and public officials, was inconsistent with the First Amendment.”⁹⁹

Therefore, as U.S. advocates, scholars, and courts wade further into the murky depths of fake news in First Amendment jurisprudence, *Alvarez* and its predecessors should stand at the forefront of analysis, for they will no doubt serve as important guidance on this issue.¹⁰⁰

⁹³ *Id.* at 750 (Alito, J., dissenting) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974)) (internal quotation marks and alterations omitted).

⁹⁴ *See, e.g., id.* at 732 (Breyer, J., concurring).

⁹⁵ 19e. *The Alien and Sedition Acts*, U.S. HISTORY, <http://www.ushistory.org/us/19e.asp> (last visited March 16, 2018).

⁹⁶ Eugene Volokh, *Fake News and the Law, From 1798 to Now*, WASH. POST (Dec. 9, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/09/fake-news-and-the-law-from-1798-to-now/?utm_term=.814c7ae9c178.

⁹⁷ *See* 19e. *The Alien and Sedition Acts*, *supra* note 95.

⁹⁸ *Id.*; *see also* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964) (noting that the Act was “never tested” in the Supreme Court).

⁹⁹ *Sullivan*, 376 U.S. at 276.

¹⁰⁰ Interestingly, courts may soon have an opportunity to address fake news directly. For example, a Colorado newspaper has accused a state senator of defamation after

III. CREATING A MINISTRY OF TRUTH: CAN (AND SHOULD) FAKE NEWS BE REGULATED?

The United States is not the only country grappling with what some may consider a fake news epidemic.¹⁰¹ In Indonesia, Africa, Germany, Spain, Italy, and the Philippines, fake news about political figures proliferates, aided by popular social media sites such as Facebook.¹⁰² Citizens in developing countries especially tend to believe fake news, and some of these countries have responded by shutting down fake news sites or temporarily banning the use of certain social media platforms right before elections.¹⁰³

Although similar shutdowns may be viewed positively by some groups in the United States,¹⁰⁴ any effort to do so by the government will be viewed with “exacting scrutiny” by courts¹⁰⁵ and, based on First Amendment principles, will likely fail. However, even if governmental action was found to be constitutional, such action should be the least welcoming response, particularly for advocates of free speech. Permitting the government to regulate what it itself deems “fake news” would allow a political leader to silence not only his critics, but also those with whom he merely disagrees, creating an opposite form of government than that envisioned by the Framers.¹⁰⁶ Therefore, lest the United States become a nation of censorship, any regulation of fake news should come from the social media sites that provide a platform for fake news. More importantly, though, regulation should come from the users who provide an audience.

the senator called the outlet “fake news.” Bente Birkeland, *When a Politician Says ‘Fake News’ and a Newspaper Threatens to Sue Back*, NPR (Feb. 17, 2017, 12:36 PM), <http://www.npr.org/2017/02/17/515760101/when-a-politician-says-fake-news-and-a-newspaper-threatens-to-sue-back>.

¹⁰¹ See generally Paul Mozur & Mark Scott, *Fake News in U.S. Election? Elsewhere, That’s Nothing New*, N.Y. TIMES (Nov. 17, 2016), <https://www.nytimes.com/2016/11/18/technology/fake-news-on-facebook-in-foreign-elections-thats-not-new.html>.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See *supra* note 27 and accompanying text.

¹⁰⁵ See *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (plurality opinion) (“When content-based speech regulation is in question, however, exacting scrutiny is required.”).

¹⁰⁶ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274 (1964) (citing 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 553–54 (1876)).

A. Precluding Big Brother: Why the Government Cannot and Should Not Regulate Fake News

United States v. Alvarez stands for the proposition that lying is not necessarily excluded from First Amendment protection, and the government may not infringe upon that type of speech merely because it is false.¹⁰⁷ The *Alvarez* opinion, however, leaves room to possibly distinguish fake news from lies about receiving a military award. As Justice Kennedy—writing for the plurality—pointed out, the respondent in *Alvarez* lied about his status as a medal recipient not for the purpose of monetary or other gain, but rather, for his own inflation of self-worth.¹⁰⁸ Creators of fake news, by contrast, often possess a financial motive. During the 2016 U.S. presidential election, for example, a small town in Macedonia became a notorious hotbed of incessant fake news publications as hundreds of teenagers promulgated false stories disguised as real news.¹⁰⁹ Most of these stories were about Republican nominee Donald Trump, but there were also several negative stories about Democratic candidate Hillary Clinton as well.¹¹⁰ Not caring whether the statements conveyed were true or false, these teens grew their business by paying “Facebook to share [them] with a target [U.S.] audience hungry for Trump news.”¹¹¹ One teen described how, with the help of “catchy new headline[s], . . . Americans clicked on his stories and began to like and share them” on Facebook, allowing him to earn thousands of dollars of revenue from advertisements on his website.¹¹²

Even where a financial motive is not so explicit, one could be presumed given the relationship between fake news and social media. For instance, many fake news websites contain “recommended content ads” that employ eye-catching headlines and intriguing photographs to entice website visitors to click on them.¹¹³ As more people click on the ads, fake news

¹⁰⁷ *Alvarez*, 567 U.S. at 719 (“[T]he Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”).

¹⁰⁸ *See id.* at 714.

¹⁰⁹ Emma Jane Kirby, *The City Getting Rich from Fake News*, BBC NEWS (Dec. 5, 2016), <http://www.bbc.com/news/magazine-38168281>.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* Similar success has been found elsewhere as well. *See, e.g.*, Joshua Gillin, *The More Outrageous, the Better: How Clickbait Ads Make Money for Fake News Sites*, POLITIFACT: PUNDITFACT (Oct. 4, 2017, 11:34 AM), <http://www.politifact.com/punditfact/article/2017/oct/04/more-outrageous-better-how-clickbait-ads-make-mone/>; Nathan McAlone, *This Fake-News Writer Says He Makes Over \$10,000 a Month, and He Thinks He Helped Get Trump Elected*, BUS. INSIDER (Nov. 17, 2016, 10:01 AM), <http://www.businessinsider.com/fake-news-writer-paul-horner-thinks-he-got-trump-elected-2016-11>.

¹¹³ *See* Craig Silverman, Jeremy Singer-Vine, & Lam Thuy Vo, *In Spite of the Crackdown, Fake News Publishers Are Still Earning Money From Major Ad Networks*,

authors and publishers gain more revenue.¹¹⁴ Therefore, the presence of advertisements and the number of ads on fake news websites could be one indicator of a financial motive.

Considering that fake news has an advertising and financial incentive, one potential avenue that the government may pursue is to delegate regulatory authority to the Federal Trade Commission (“FTC”), which is in part charged with regulating fraud.¹¹⁵ According to MSNBC Chief Legal Correspondent Ari Melber, “fake news is essentially a scheme to trick the consumer—a fraud.”¹¹⁶ Thus, relabeling “fake news” as “fraud news” could potentially bring it under the FTC’s jurisdiction.

Unfortunately, this approach is not so easy. A full discussion on the ability of the FTC to regulate fake news is beyond the scope of this Note,¹¹⁷ but a few key points can be made. First, the government’s interests in regulating fraud are different than the interests in regulating fake news. Melber asserts that the government has an interest in controlling fraudulent information (*i.e.*, fake news) because it “offer[s] virtually no benefit to society” and “can influence elections and impact public safety.”¹¹⁸ Fraud regulation, however, is typically concerned with consumer protectionism.¹¹⁹ The government has a stronger interest in preventing its citizens from purchasing dangerous products than it does in preventing its citizens from reading fake news. The harm is greater, more direct, and more concrete.

BUZZFEED (Apr. 4, 2017, 9:05 AM), https://www.buzzfeed.com/craigsilverman/fake-news-real-ads?utm_term=.esyNX9ALJ#.qi5Qb8Dpk.

¹¹⁴ See Abby Ohlheiser, *This is How Facebook’s Fake-News Writers Make Money*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/news/the-intersect/wp/2016/11/18/this-is-how-the-internets-fake-news-writers-make-money/?utm_term=.ff5f53fa9628.

¹¹⁵ See *Enforcement*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement> (last visited Mar. 16, 2018).

¹¹⁶ Ari Melber, *Capitol Report: Regulating Fraud News*, N.J.L.J. (Jan. 30, 2017, 12:07 AM), <http://www.njlawjournal.com/id=1202777960120>.

¹¹⁷ Exploration of this avenue should perhaps begin with *FTC v. LeadClick Media, LLC*, 838 F.3d 158 (2d Cir. 2016), which held that “under [15 U.S.C. § 45(a)(1) and (a)(2)], a defendant may be held liable for engaging in deceptive practices or acts if, with knowledge of the deception, it either directly participates in a deceptive scheme or has the authority to control the deceptive content at issue,” *id.* at 168.

¹¹⁸ Melber, *supra* note 116. The public safety concern may refer to the Pizzagate incident discussed *supra* Part I, as well as similar incidents that may arise in response to fake news stories.

¹¹⁹ See *Protecting Consumers*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/media-resources/truth-advertising/protecting-consumers> (last visited Mar. 17, 2018) (“As the nation’s consumer protection agency, the Federal Trade Commission has a broad mandate to protect consumers from fraud and deception in the marketplace.”).

Another argument in support of FTC regulation is that, with its commercial element and financial incentive, fake news may be likened to commercial speech, which is afforded less First Amendment protection than private speech.¹²⁰ The problem, however, is that recent FTC enforcement typically involves the subject “post[ing] misinformation about a product, [and] then [selling] the product. In fraud news, however, the political misinformation *is* the product. And, it’s free.”¹²¹ Consumers of fake news have not purchased the content they are reading. Creators of fake news, while making money off of advertising on their websites, are not selling anything to their audiences. They are providing ideas, however false, and ideas—even controversial ones—are protected under the First Amendment.¹²²

The government may also attempt to control the dissemination of fake news by passing legislation that targets the stories directly. Such regulation may range from something as extreme as censorship (*i.e.*, removing fake news sources entirely from the Internet) to something less, such as imposing fines on its creators or website hosts. It may also involve placing some kind of label onto fake news articles and websites designating that they are false or that the truth of their stories is contested.

First Amendment case law, however, overwhelmingly suggests that the government does not possess this type of authority. Enforcers of any law seeking to prohibit or otherwise regulate the dissemination of fake news stories would necessarily need to know the substance of such stories; after all, how could the government determine that something is fake without reading and evaluating the information contained therein? This places a severe handicap on the government, for such content-based regulations are presumptively invalid, and the government must prove that such laws do in fact comply with the Constitution.¹²³ To do this in the context of false speech, as *Alvarez* points out, the government must satisfy “exacting scrutiny.”¹²⁴ Not only must it have a compelling interest in regulating fake news, but it must also utilize means

¹²⁰ Melber, *supra* note 116 (“[T]he general rationale has been that words used on behalf of a business are less important than words used on behalf of actual people to express ideas or participate in democracy.”).

¹²¹ *Id.* (emphasis added).

¹²² Of course, if the ideas presented crossed the line into unprotected speech, then the speaker’s constitutional protection wanes and the government’s interest becomes controlling. In addition, if the disseminators of fake news are ultimately likened to the defendants in *LeadClick Media*, discussed *supra* note 117, then the argument for enforcement strengthens.

¹²³ *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

¹²⁴ *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (plurality opinion).

that are “actually necessary to achieve its interest.”¹²⁵ These means “must be ‘the least restrictive means among available, effective alternatives.’”¹²⁶ Finally, “[t]here must be a direct causal link between the restriction imposed and the injury to be prevented.”¹²⁷

In the context of regulating fake news, it is unlikely that these requirements will be met. The first issue is discerning whether the government has a compelling interest in such regulation. The government could possibly argue that it has an interest in ensuring a fair and honest electoral process. After all, if the key to a successful democracy is an informed citizenry,¹²⁸ then certainly the government has an interest in controlling false information that would poison the process. Another possible interest is ensuring that the integrity of the legitimate press is not tarnished. Just as Congress in *Alvarez* was concerned with defending the honor of the military and the Congressional Medal, so too might the government have a compelling interest in upholding the integrity of the press. This is certainly a worthy goal that courts should consider, particularly given how fundamentally vital a free, independent, and trustworthy press is as an additional check on governmental power. But assuming that a court were to accept these or other interests that the government may offer, it is still not certain that regulation would be necessary to achieve those interests.

After all, a firm cornerstone of the First Amendment is the idea of counterspeech: “[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”¹²⁹ Where counterspeech is present and effective, state-sponsored censorship need not, and should not, occur. In *Alvarez*, the plurality found that the government failed to show, “why counterspeech would not suffice to achieve its interests.”¹³⁰ In fact, the circumstances surrounding *Alvarez*’s lie actually seemed to disprove the government’s argument that the Stolen Valor Act was necessary to protect the integrity of the military, because “[e]ven before the FBI began investigating

¹²⁵ *Id.* at 725 (citing *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011)).

¹²⁶ *Id.* at 729 (citing *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004)).

¹²⁷ *Id.* at 725.

¹²⁸ See, e.g., Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 ELECTION L.J. 111, 111 (2010)

(commenting that “[p]olitical scientists concur that a knowledgeable citizenry is necessary for effective and gratifying democratic governance”).

¹²⁹ *Alvarez*, 567 U.S. at 727 (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

¹³⁰ *Id.* at 726.

him for his false statements Alvarez was perceived as a phony.”¹³¹ Without the need for government intervention, counterspeech was already working to correct the falsehood that entered the market. Similarly, in the context of fake news, counterspeech can—and in fact does—play a crucial role in combatting the false statements coming from both social media and political figures themselves. Journalists and netizens alike continuously call out lies, challenge false or questionable statements purported to be the truth, and make corrections where needed. *The Washington Post* in particular has taken an active leadership position in the fight against fake news,¹³² and fact-checking websites like Snopes, FactCheck.Org, and PolitiFact continuously research and debunk fake news stories on a regular basis.¹³³

Finally, moving to the third requirement for speech regulation, the Government will find it difficult to show “a direct causal link between the restriction imposed and the injury to be prevented.”¹³⁴ The primary conceivable injury caused by fake news, which some have already put forth, is that the dissemination and consumption of fake news negatively affects the election process in a material way.¹³⁵ This argument is premised on the theory that because individuals read damaging but false information about political candidates—information that is intended to appeal to emotions, partisanship, and the like—their status as an informed voter is compromised. Rather than basing political decisions on critical analysis and a true understanding of the issues, readers of fake news will vote out of inflamed passion and misperceptions.

But proof that fake news influences an election in any material way may be difficult to show. For example, whether or not the most recent presidential election was in any way compromised remains highly contested. While one study

¹³¹ *Id.*

¹³² See Washington Post (@wapofactchecker), *Fact Checker*, from the Washington Post, FACEBOOK, <https://www.facebook.com/wapofactchecker/> (last visited Mar. 16, 2018) (providing short video clips fact-checking statements made by various politicians).

¹³³ PolitiFact and FactCheck.org are devoted specifically to investigation and evaluating the accuracy of claims related to the political process. See Angie Drobnic Holan, *The Principles of the Truth-O-Meter: PolitiFact's Methodology for Independent Fact-Checking*, POLITIFACT (Feb. 12, 2018, 12:00 PM), <http://www.politifact.com/truth-o-meter/article/2018/feb/12/principles-truth-o-meter-politifact-methodology-i/> (“From the beginning, PolitiFact focused on looking at specific statements made by politicians and rating them for accuracy.”); *Our Mission*, FACTCHECK.ORG, <https://www.factcheck.org/about/our-mission/> (last visited Mar. 16, 2018) (“We are a nonpartisan, nonprofit ‘consumer advocate’ for voters that aims to reduce the level of deception and confusion in U.S. politics. We monitor the factual accuracy of what is said by major U.S. political players . . .”).

¹³⁴ *Alvarez*, 567 U.S. at 725.

¹³⁵ See Solon, *supra* note 12.

conducted recently by the Pew Research Center found that a majority of Americans receive their news online from social media sites like Facebook and Twitter,¹³⁶ and another study conducted by BuzzFeed revealed that fake news stories received far more engagement on social media platforms than stories from legitimate news outlets,¹³⁷ economists Matthew Gentzkow of Stanford University and Hunt Alcott of New York University found that “social media played a much smaller role in the election than some might think.”¹³⁸ According to Gentzkow’s and Alcott’s analysis, “[f]or fake news to have changed the outcome of the [2016 presidential] election, a single fake news story would need to have convinced about 0.7 percent of Clinton voters and non-voters who saw it to shift their votes to Trump, a persuasion rate equivalent to seeing 36 television campaign ads.”¹³⁹ This would require, in part, that readers of fake news actually believe what they are reading; mere exposure is not enough.¹⁴⁰ Their study suggested that respondents did not remember the fake news articles that they read on social media enough to meet this calculation.¹⁴¹

The trend in Americans’ views toward the media may also present a challenge to government regulation. In striking down part of the Stolen Valor Act in *Alvarez*, Justice Kennedy stated that “in order to show that public refutation [or counterspeech] is not an adequate alternative, the Government must demonstrate that unchallenged claims [*i.e.*, claims *not* refuted by counterspeech] undermine the public’s perception of

¹³⁶ Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RESEARCH CTR. (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>.

¹³⁷ Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News on Facebook*, BUZZFEED (Nov. 16, 2016, 4:15 PM), <https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>. Engagement refers to the number of times a story was liked, shared, and commented on by a Facebook user. See *Post Engagement*, FACEBOOK: BUS., <https://www.facebook.com/business/help/735720159834389> (last visited Mar. 16, 2018).

¹³⁸ Krysten Crawford, *Stanford Study Examines Fake News and the 2016 Presidential Election*, STAN. NEWS (Jan. 18, 2017), <http://news.stanford.edu/2017/01/18/stanford-study-examines-fake-news-2016-presidential-election/>.

¹³⁹ *Id.*

¹⁴⁰ Hunt Alcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 228 (2017).

¹⁴¹ *Id.* at 230, 232. But see Morten Bay, *News Coverage Says a Study Claimed Fake News on Facebook Didn’t Effect the Election, But News Coverage is Wrong*, SLATE (Feb. 1, 2018, 9:04 AM), <https://slate.com/technology/2018/02/no-a-study-did-not-claim-that-fake-news-on-facebook-didnt-affect-the-election.html> (noting that the study is flawed because “it looked only at Facebook users who actually *clicked* on one of the fake news links” and failed to consider other ways in which fake news may have affected the election results, such as when stories were shared but not read).

the military and the integrity of its awards system.”¹⁴² The government failed to make that showing.¹⁴³ It is possible that the government would fail in the context of fake news as well, given that the public’s perception of mainstream media has been in decline for more than a decade,¹⁴⁴ long before the uprising of fake news. Thus, without something more direct, it may be difficult to show that the devaluation of the media is due to a lack of counterspeech responding to fake news. In other words, if the American public’s trust in media was already on a steady decline prior to the onset of abundant fake news, then how can one say that undisputed fake news stories undermined the public’s perception of the media? One counterargument to this, though, is that prior to 2015, the public’s mistrust declined rather steadily. Aside from a large decline in 2004, the public’s trust has typically fallen by a few percentage points.¹⁴⁵ From 2015 to 2016, however, the drop was much larger, falling from 40% trust in the mainstream media to 32%.¹⁴⁶ This sudden, more pronounced decline may serve as an indicator of the impact that fake news had on Americans’ trust in the media, but one instance will likely be insufficient to support such an argument in court. Moreover, to counter that point, the decline in trust may be due to factors other than fake news, such as individuals buying into a president’s incessant attempts to delegitimize the mainstream media.¹⁴⁷

Even if the government were able to satisfy the requirements set forth in *Alvarez*, allowing the government to regulate fake news is disconcerting, particularly when the country is in the hands of leader that continuously labels well-established, legitimate news organizations such as the *New York Times*, CNN, NBC, ABC, and CBS fake news and “the enemy

¹⁴² United States v. Alvarez, 567 U.S. 709, 728 (2012) (plurality opinion).

¹⁴³ *Id.*

¹⁴⁴ See Swift, *supra* note 59 and accompanying text.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., Chris Wallace, Opinion, *The Media is Giving Up Its Place in Our Democracy*, WASH. POST (Nov. 17, 2017), https://www.washingtonpost.com/opinions/trump-is-assaulting-our-free-press-but-he-also-has-a-point/2017/11/17/b3b8ec24-c8b2-11e7-b0cf-7689a9f2d84e_story.html?utm_term=.328744224743 (“President Trump is engaged in the most direct, sustained assault on the free press in our history. Since early in the campaign, he has done everything he could to delegitimize the media—attacking us institutionally and individually.”); Craig Silverman, *Trump is Causing Democrats to Trust Media More, While Republicans Are Endorsing More Extreme Views, Says a New Study*, POYNTER (Dec. 4, 2017), <https://www.poynter.org/news/trump-causing-democrats-trust-media-more-while-republicans-are-endorsing-more-extreme-views> (quoting Dartmouth College political science professor Brendan Nyhan as saying, “Trump’s negative approach to the press could be causing ‘the strongest relationship between presidential approval and media attitudes that has been observed to date’”).

of the American people.”¹⁴⁸ Allowing the government to determine what is truth and what is not, to place a stamp of approval on sources with which it agrees and a stamp of disapproval on all others, sounds dangerously close to propaganda and creates a very harrowing precedent that the First Amendment was enacted to prevent. As Justice Alito’s dissent in *Alvarez* points out, in “matters of public concern . . . it is perilous to permit the state to be the arbiter of truth” and “[a]llowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends.”¹⁴⁹

B. Enlisting Counterspeech: Encouraging Social Media Sites to Address the Problem

If any institutions are to be tasked with regulating fake news, it should be those that provide the platform: social media giants such as Facebook and Twitter. Not only are these private actors better able to identify and manage fake news articles, but their voluntary action in doing so does not create the same concerns as state-sponsored censorship, nor does it implicate First Amendment principles.¹⁵⁰ Facebook in particular has taken an active role in eliminating the proliferation of fake news on its platform. Though not perfect, the methods by which Facebook is attempting to address fake news provide a practical, potentially effective example of the Supreme Court’s preferred method of combatting false words: counterspeech.

Shortly after the 2016 presidential election, Facebook CEO Mark Zuckerberg dismissed claims that his platform and the fake news circulating therein had any effect on the election’s outcome.¹⁵¹ However, he has recently recanted his dismissal¹⁵² and has begun to implement methods of monitoring and

¹⁴⁸ Aaron Blake, *Donald Trump’s Fake Case Against the ‘Fake News Media’*, WASH. POST (Feb. 24 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/24/donald-trumps-fake-case-against-the-fake-news-media/?utm_term=.605a675428ae.

¹⁴⁹ *United States v. Alvarez*, 567 U.S. 709, 751–52 (2012) (Alito, J., dissenting).

¹⁵⁰ See, e.g., *Kay v. N.H. Democratic Party*, 821 F.2d 31, 33 (4th Cir. 1987) (noting “the general rule that the First Amendment does not protect against private action”); *Buckley v. Am. Fed’n of Television & Radio Artists*, 496 F.2d 305, 309 (1st Cir. 1974) (“It is elementary constitutional doctrine that the first amendment [sic] only restrains action undertaken by the Government.” (citing *Ry. Emps.’ Dep’t v. Hanson*, 351 U.S. 225 (1956))).

¹⁵¹ Jessica Guynn, *Mark Zuckerberg: Facebook Fake News Didn’t Sway Election*, USA TODAY (Nov. 11, 2016, 9:15 AM), <http://www.usatoday.com/story/tech/news/2016/11/10/mark-zuckerberg-facebook-fake-news-didnt-sway-election/93622620/>.

¹⁵² Mark Zuckerberg Facebook Post, FACEBOOK (Sept. 27, 2017, 5:38 PM), <https://www.facebook.com/zuck/posts/10104067130714241?pnref=story>.

counterbalancing fake and misleading stories that appear on users' news feeds.¹⁵³

The monitoring of fake news on Facebook relies primarily on Facebook users themselves. In a pilot program, users were originally given the option of flagging stories they believed to be suspect.¹⁵⁴ The story was then routed to third-party, nonpartisan fact-checkers who would review the story and determine its authenticity.¹⁵⁵ Fact checkers were chosen from various news organizations committed to the fact-checking code of ethics created by the Poynter Institute for Media Studies,¹⁵⁶ a "global leader in journalism" that strives to teach and promote ethical, credible news reporting.¹⁵⁷

For this plan, Facebook enlisted the aid of four of those organizations—Snopes, Factcheck.org, ABC News, and PolitiFact—and has also partnered with the Associated Press.¹⁵⁸ If one of these organizations determined that the flagged news story was indeed fake, it would be appropriately labeled in order to alert Facebook users.¹⁵⁹ If users attempted to share the fake news article, they were presented with a warning that read: "Before you share this story, you might want to know that independent fact-checkers disputed its accuracy."¹⁶⁰ Similarly, fake news stories were accompanied by a red warning label and a message proclaiming that the story is "Disputed by Third-Party Fact-Checkers."¹⁶¹ Users would have been able to click the warning label to read why the story's accuracy was called into question.¹⁶²

Around a year later, however, Facebook abandoned its "Disputed Flags" method of designating news as false and unveiled a new plan.¹⁶³ Users still take an active role in helping

¹⁵³ See *How is Facebook Addressing False News Through Third-Party Fact-Checkers?* Facebook: HELP CTR., <https://www.facebook.com/help/1952307158131536> (last visited Mar. 16, 2018) [hereinafter *How is Facebook Addressing False News*].

¹⁵⁴ Alex Heath, *Facebook is Going to Use Snopes and Other Fact-Checkers to Combat and Bury 'Fake News'*, BUS. INSIDER (Dec. 15, 2016, 1:00 PM), <http://www.businessinsider.com/facebook-will-fact-check-label-fake-news-in-news-feed-2016-12>.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *A Brief History of the Poynter Institute*, POYNTER INST., <http://about.poynter.org/about-us/mission-history> (last visited Mar. 16, 2018).

¹⁵⁸ Heath, *supra* note 154.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Alex Heath, *Mark Zuckerberg: Facebook Will 'Proceed Carefully' With Fighting Fake News and Won't Block 'Opinions'*, BUS. INSIDER (Dec. 16, 2016, 11:29 AM), <http://www.businessinsider.com/mark-zuckerberg-on-how-facebook-will-fight-fake-news-2016-12>.

¹⁶² *Id.*

¹⁶³ Thuy Ong, *Facebook Found a Better Way to Fight Fake News*, THE VERGE (Dec. 21, 2017, 5:26 AM), <https://www.theverge.com/2017/12/21/16804912/facebook-disputed-flags-misinformation-newsfeed-fake-news>. Reasons for abandonment

identify fake news; however, the way Facebook handles such information has changed slightly. Users are still able to “flag” potential fake news by using Facebook’s reporting feature.¹⁶⁴ But, as of 2018, users may also receive a survey asking (1) whether they recognize the news source and (2) how trustworthy they believe the source to be, rated on a scale from “entirely” to “not at all.”¹⁶⁵ This feedback, combined with algorithms already in use, brings potentially false news stories to Facebook’s attention.¹⁶⁶ The suspicious stories are sent to “independent third-party fact-checkers certified through a non-partisan International Fact-Checking Network” for review.¹⁶⁷ Stories determined to be false are placed lower in users’ news feeds, underneath stories that fact checkers have rated as true.¹⁶⁸ Facebook believes that this lower visibility on the platform will significantly reduce the number of times such stories are viewed and shared, thus stopping—or at least severely inhibiting—the fake news from spreading.¹⁶⁹

False stories that do appear in users’ news feeds will be addressed by Facebook’s Related Articles feature (though this feature applies to non-questionable articles as well).¹⁷⁰ Under this feature, whenever users click on a news story, a list of articles from other sources covering the same or similar topic is displayed underneath the original story.¹⁷¹ Where the original story has been designated as false, fact-checked stories debunking the fake news will appear under Related Articles.¹⁷²

included slow processing time (accuracy ratings took around three days to produce) and potential counter-productivity (“the company found that Disputed Flags inadvertently buried critical information that explained the inaccuracies, and could backfire by entrenching a person’s false beliefs”). *Id.*

¹⁶⁴ *How Do I Mark a News Story as False?*, FACEBOOK: HELP CTR., https://www.facebook.com/help/572838089565953?helpref=faq_content (last visited Mar. 16, 2018).

¹⁶⁵ Mark Zuckerberg Facebook Post, FACEBOOK (Jan. 19, 2018, 3:36 PM), <https://www.facebook.com/zuck/posts/10104445245963251?pnref=story>; Alex Kantrowitz, *This is Facebook’s News Survey*, BUZZFEED (Jan. 23, 2018, 4:16 PM), https://www.buzzfeed.com/alexkantrowitz/this-is-facebooks-news-survey?utm_term=.pdwKvzaVY#.lxkmPz6xL.

¹⁶⁶ *How is Facebook Addressing False News*, *supra* note 153.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*; Sara Su, *News Feed FYI: New Test With Related Articles*, FACEBOOK: NEWSROOM (Apr. 25, 2017), <https://newsroom.fb.com/news/2017/04/news-feed-fyi-new-test-with-related-articles/>. Launched in 2013, Related Articles was originally designed “to help people discover new articles they may find interesting about the same topic.” *Su, supra*.

¹⁷¹ Varun Kacholia & Minwen Ji, *News Feed FYI: Helping You Find More News to Talk About*, FACEBOOK: NEWSROOM (Dec. 2, 2013), <https://newsroom.fb.com/news/2013/12/news-feed-fyi-helping-you-find-more-news-to-talk-about/>.

¹⁷² *How is Facebook Addressing False News*, *supra* note 153. The stories appearing under Related Articles will be identified as having been fact-checked and by whom. *Id.*

Overall, Facebook intends that these supplemental articles will “provide . . . additional perspectives and information” and therefore aid in correcting “misinformation” and “reduce misperceptions.”¹⁷³

Finally, Facebook has also made it more difficult for creators and distributors of fake news to reap financial rewards from their activities. Specifically, Facebook prohibits advertisers from “run[ning] ads that link to stories that have been marked false” by its fact checkers.¹⁷⁴ In addition, Pages (i.e., professional accounts for businesses, organizations, brands, etc. rather than personal accounts)¹⁷⁵ that “repeatedly share stories marked as false . . . will lose the ability to advertise on Facebook.”¹⁷⁶ These Pages, “masquerading as legitimate news publishers,” post fake news stories in the hopes that people will click on them and be directed to their websites, “which are often mostly ads.”¹⁷⁷ As more individuals click the fake news stories, ad revenue increases,¹⁷⁸ turning the fake news market into a lucrative venture.

Though still in its beginning phases, Facebook’s approach to countering fake news appears promising. The company smartly recognizes that many fake news creators are financially motivated.¹⁷⁹ By restricting creators’ ability to run advertisements on its platform, Facebook makes fake news less profitable. This, in turn, may reduce the number of individuals creating fake news. In addition, by presenting additional, fact-checked articles alongside false ones, Facebook has begun to foster an environment in which its users are exposed to various accounts of a particular issue. Equipping users with multiple sources encourages them to undertake their own research, think critically about the stories presented, and evaluate for themselves what is accurate and what is not. Finally, by reducing the visibility of news articles and publishers that users have rated as untrustworthy, Facebook seemingly exemplifies the theory of the marketplace of ideas—that truth competes with, and ultimately overcomes, falsity.

¹⁷³ Ong, *supra* note 163.

¹⁷⁴ Satwik Shukla & Tessa Lyons, *Blocking Ads from Pages that Repeatedly Share False News*, FACEBOOK: NEWSROOM (Aug. 28, 2017), <https://newsroom.fb.com/news/2017/08/blocking-ads-from-pages-that-repeatedly-share-false-news/>.

¹⁷⁵ See *Create a Page*, FACEBOOK, <https://www.facebook.com/pages/create.php> (last visited Mar. 17, 2018).

¹⁷⁶ Shukla & Lyons, *supra* note 174. Pages may earn the privilege of running ads again if they stop sharing fake news. *Id.*

¹⁷⁷ *How Facebook is Addressing False News*, *supra* note 153.

¹⁷⁸ See *id.*

¹⁷⁹ See *supra* notes 112–114 and accompanying text.

Facebook's approach, however, is not entirely flawless. One potential problem with Facebook's approach is that it may result in under-inclusive enforcement, leaving it less efficient than it could be. Zuckerberg has emphasized that his "focus [is] on fighting spam, not flagging opinions."¹⁸⁰ He explained, "For example, we're focused on obvious hoaxes with headlines like 'Michael Phelps just died of a heart attack' designed to get people to click on the stories and see ads."¹⁸¹ Creators of fake news may then respond by changing titles in a manner that sounds less sensational but is still enticing enough to encourage viewers to click on them. Creators may also qualify their titles with such words as "opinion" or "editorial," which may impede Facebook's efforts to drive these creators from the marketplace.

Perhaps a larger concern, however, lies in the platform's heavy reliance on and deference to its users to detect fake news. The convincing appearance of some fake news outlets may make it difficult for users to correctly identify them as fake. This may result in fewer articles being reported to Facebook as false stories, which in turn decreases the chance that the stories will be investigated by fact checkers. Additionally, although Zuckerberg believes that "hav[ing] the [Facebook] community determine which sources are broadly trusted would be the most objective,"¹⁸² Facebook users are often exposed to news and other stories that conform to their own beliefs and ideology.¹⁸³ Therefore, when asked whether a particular source is trustworthy or untrustworthy, users may be inclined to rate the source favorably, as rating it negatively may seem counterintuitive and antagonistic to their viewpoints. Alternatively, users may rate as untrustworthy a source with which they disagree, even if the story is factual and presented by an established institution. Facebook's attempts to place untrustworthy sources (*i.e.*, fake news) at the bottom of users' news feeds and trustworthy sources (*i.e.*, legitimate news) at the top, then, is compromised and potentially inaccurate. To counteract the role that user bias may play in selecting trustworthy news sources, Facebook should focus on strengthening its use of fact checkers, providing them a more

¹⁸⁰ Heath, *supra* note 161.

¹⁸¹ *Id.*

¹⁸² Mark Zuckerberg Facebook Post, *supra* note 165.

¹⁸³ See Regina Mack, *Assessing the Negative Effects of Fake News*, IND. DAILY STUDENT (Nov. 17, 2016, 7:49 PM), <http://www.idsnews.com/article/2016/11/assessing-the-negative-effects-of-fake-news> ("Social media tends to personalize what we are interested in . . . This creates what are called echo chambers, where people are exposed to information that tends to confirm what they already believe and isolates them from ideologically different opinions and news.").

active role in seeking out fake news articles and publishers rather than relying primarily on users' reports.

These concerns are minor, though, when compared to the alternative of allowing the government to regulate fake news. It is unrealistic to believe that all fake news can be eliminated from the Internet; as it is driven away from one platform, it will only move on to another. As a general matter, though, Facebook's plans seem promising, and tweaks may be made as they progress. Perhaps as Facebook becomes more comfortable in its role as fact-checker, and partners with more fact-checking organizations, it can expand its approach to fake news in a manner that relies less on user reporting and more on neutral, third-party institutions.

Individual monitoring and reporting from users is still undeniably important. Citizens should actively question, criticize, and check their government and political leaders. Doing so is a necessary element of democracy, a form of government on which the United States prides itself. However, if the fake news problem is as concerning as some individuals make it out to be, then individuals must engage in their own form of counterspeech and fact-checking; they must continuously call out fake news, either through some labeling and reporting system (such as the one used by Facebook) or through words of their own.

The most important element of social media regulation is that it remain truly independent from the government. For example, the government should not offer financial or other incentives to social media websites to encourage them to adopt regulatory measures. While this may make such regulation more enticing, there exists a danger that social media sites will bow to partisan funds, completely undermining the purpose of the regulation. To be successful, Facebook and similar domains must be truly free from federal or state oversight. Nonpartisan, ethical journalists and fact-checkers—and not the government—must remain the driving force behind regulating fake news.

CONCLUSION

Fake news is a centuries-old phenomenon¹⁸⁴ that experienced a recent resurgence beginning around the 2016 U.S. presidential election. The term and its analogues are thrown out by politicians, journalists, and ordinary citizens alike, each of whom has his own interpretation of what “fake

¹⁸⁴ Soll, *supra* note 13.

news” means.¹⁸⁵ This has led to some confusion about the true definition of fake news. However, there appears to be a consensus that it ultimately refers to deliberately false or misleading information, disguised as legitimate news, meant solely to deceive the public, perhaps in part for financial gain. It feeds off of emotions and sensationalism, while facts and objectivity are left behind. It has the potential to affect well-known public figures, but can bring collateral harm to private citizens as well.

In an age where (1) public mistrust of mainstream media appears to be increasing,¹⁸⁶ (2) social media has become a primary source from which to find and share news,¹⁸⁷ (3) there is growing concern that fake news negatively and materially impacts the political process,¹⁸⁸ and (4) a majority of Americans believe that fake news should not be protected under the First Amendment,¹⁸⁹ one can perhaps understand the calls for regulation. Fake news has no apparent social value and arguably does more harm than good.

Any regulation, however, must not come from the government. Allowing the government to control any form of speech, no matter how undesirable the speech may be, presents chilling concerns of state-sponsored censorship and propaganda, particularly when elected officials have differing opinions as to what constitutes fake news. Moreover, *United States v. Alvarez* makes it clear that criminalization of false statements merely because they are false will not receive the same deferment that other pieces of legislation may.¹⁹⁰ Such laws implicate a core principle of the Constitution—the freedom of speech—and the government must satisfy exacting scrutiny in order for its law to stand. In *Alvarez*, the government failed to do this. In the realm of fake news, the government may fail again.

Instead, social media websites, which in large part account for the spread of fake news, should lead the charge in regulating the production of fake news. Ideally, this would allow for genuinely neutral, third-party fact-checkers to serve as monitors of news. Indeed, websites such as Facebook and Google have already taken steps in this direction, exemplifying the existence of counterspeech that may prohibit the need for government intervention.

¹⁸⁵ See *supra* text accompanying note 41.

¹⁸⁶ *Supra* notes 58–62 and accompanying text.

¹⁸⁷ Gottfried & Shearer, *supra* note 136.

¹⁸⁸ Solon, *supra* note 12.

¹⁸⁹ *The State of the First Amendment*, *supra* note 28.

¹⁹⁰ See *supra* Part II.

Ultimately, however, the monitoring of fake news must come from individual citizens themselves, aided perhaps by courses that encourage the use of critical thinking, instruct on media literacy, and provide techniques on how to identify fake news. These skills are necessary to a free democracy. The lack of such skills creates room for the government to step in and decide which speech is true and which is false, leaving the First Amendment compromised. This is undesirable, and contrary to what the Founders envisioned. After all, “suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.”¹⁹¹

¹⁹¹ United States v. Alvarez, 567 U.S. 709, 728 (2012) (plurality opinion).

MALADIES IN THE MISINFORMATION MARKETPLACE

Emily A. Thorson* & Stephan Stohler[†]

ABSTRACT

The marketplace of ideas theory of the First Amendment's Free Speech Clause holds that good ideas will win out over inferior competitors if competition is uninhibited. Although seductive, this theory rests on several problematic assumptions, including one thus far not considered. The theory assumes that participants in the marketplace are able to discard bad or false ideas without those ideas impacting participants' attitudes. Experimental evidence suggests that this assumption is false: the attitudinal effects of misinformation can linger even after a person recognizes the misinformation to be false. This Article explores the legal implications of this empirical finding, concluding that the marketplace of ideas theory is an ill-suited theory for determining when misinformation deserves constitutional protection. We argue instead that political misinformation should be evaluated in terms of how it affects citizens' ability to connect their values to their political participation. Only when political misinformation substantially interferes with political participation, thereby threatening individuals' democratic competence, should courts begin to consider whether government regulation is appropriate.

INTRODUCTION

False information and fake news repeatedly dominated news coverage of the 2016 presidential election. One of the most extreme examples, commonly referred to as “PizzaGate,” involved a conspiracy theory linking the Democratic Party's presidential nominee, Hillary Clinton, to a sex-trafficking ring managed from a pizza restaurant in Washington, D.C. The rumor, which first emerged in online communities and soon spread more widely, came to a dramatic head when Edgar Maddison Welch took matters into his own hands. Welch, a resident of North Carolina, made a special trip to Washington, D.C. to investigate the story. But when restaurant employees

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prevented Welch from entering restricted parts of the restaurant, Welch produced a rifle and fired shots inside the pizzeria.¹

Misinformation like this has generated substantial concern among journalists, politicians, and the public more generally. While the PizzaGate rumor circulated mainly in online communities, other misinformation has reached more mainstream audiences. Indeed, some fake news stories generated more social media traffic than prominent mainstream news articles during the 2016 election.² In October 2017, Congress held hearings to better understand the extent to which Russian propaganda, including misinformation, could have interfered with the 2016 election.³ Representative surveys also show a growing public concern about the existence of misinformation in the information news ecosystem. Sixty-four percent of U.S. adults indicated that fake news has caused a “great deal of confusion” about the basic facts of current events.⁴

In the face of this public consternation over misinformation, new questions have emerged about whether and under what circumstances authorities can regulate the spread of misinformation in ways that are consistent with the First Amendment. The potentially negative effects of misinformation seemingly warrant greater regulation when viewed through the lens of the prominent “marketplace of ideas” theory of free speech. In this Article, we examine the utility of the marketplace of ideas theory for deciding when regulation of political misinformation is appropriate. In particular, we focus on “belief echoes” in the marketplace of ideas. Belief echoes are lingering attitudinal effects of misinformation that persist even after misinformation is successfully corrected.⁵ The existence of belief echoes suggests that the effects of false information may have greater negative consequences for the marketplace of ideas than

¹ Eric Lipton, *Man Motivated by ‘Pizzagate’ Conspiracy Theory Arrested in Washington Gunfire*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/us/pizzagate-comet-ping-pong-edgar-maddison-welch.html>.

² Craig Silverman, *This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook*, BUZZFEED (Nov. 16, 2016, 5:15 PM), <https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>.

³ April Glaser, *Twitter Could Do a Lot More to Curb the Spread of Russian Misinformation*, SLATE (Oct. 2, 2017, 3:02 PM), http://www.slate.com/articles/technology/future_tense/2017/10/twitter_could_do_more_to_stop_its_russian_bot_problem_and_defend_democracy.html.

⁴ Michael Barthel, Amy Mitchell, & Jesse Holcomb, *Many Americans Believe Fake News Is Sowing Confusion*, PEW RESEARCH CTR. 1, 3 (Dec. 2016), http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/12/14154753/PJ_2016.12.15_fake-news_FINAL.pdf.

⁵ Emily A. Thorson, *Belief Echoes: The Persistent Effects of Corrected Misinformation*, 33 POL. COMM. 460 (2016).

previously thought. Exposure to false information, even if it is successfully corrected, can have lingering downstream effects on political attitudes. Simply put, even if a person consciously recognizes that a piece of information is false, the incorrect information can alter her attitudes toward a political candidate or policy. Belief echoes seemingly interfere with the operation of the marketplace of ideas because individuals are unable to wholly divorce themselves of bad ideas in favor of their superior competitors. As such, belief echoes constitute a breakdown of the marketplace of ideas, which courts have traditionally used as a justification supporting government regulation of speech.

We argue that although belief echoes pose serious problems for the marketplace of ideas, they do not necessarily justify regulation. Rather, their existence highlights the inadequacy of the marketplace of ideas theory for assessing the consequences of political misinformation. We argue instead that in the realm of politics, one potential standard for judging whether misinformation requires intervention is whether it affects *democratic competence*, or the ability of citizens to connect their values to their political participation. Using this standard, we find that even misinformation which creates belief echoes does not necessarily threaten democratic competence and, therefore, does not warrant regulation consistent with the First Amendment.

I. MISINFORMATION IN THE MARKETPLACE OF IDEAS

Before we examine belief echoes and the ways that misinformation may have lingering effects on citizens' attitudes, it is useful to review the marketplace of ideas and how the courts have used this theory to warrant regulation and punishment of speech in some cases but not others.

A. *The Marketplace of Ideas*

The marketplace of ideas theory of the First Amendment holds that good ideas will win out over inferior competitors in unconstrained competition.⁶ Governments, the theory suggests, should therefore be reluctant to interfere with speech unless and until the speech itself undermines the desired results of free competition.

This view of the First Amendment is perhaps most closely associated with progressive-era constitutional reformers, like

⁶ The Supreme Court has not elaborated a robust statement of the marketplace of ideas theory. For a more precise version, see C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 6-24 (1989). Baker, however, did not advocate the marketplace of ideas theory.

Justices Oliver Wendell Holmes and Louis Brandeis, who had grown uncomfortable with the implications of existing doctrinal positions that readily supported government suppression of unpopular ideas.⁷ Indeed, Justice Holmes himself had contributed to early doctrinal interpretations which readily supported government punishment of speech. In *Schenck v. United States*,⁸ for example, Justice Holmes held that the “question in every case [was] whether the words used [were] used in such circumstances and [were] of such a nature as to create a clear and present danger that they [would] bring about the substantive evils that Congress [had] a right to prevent.”⁹ This original formulation of the clear and present danger test, governing advocacy of illegal action, seemingly relied on a theory that the effects of speech should be punished just like any other actions taken in pursuit of an inchoate crime. If those actions—or in this case speech—tended to contribute to the realization of the crime, then government actions to counter unlawful behavior were in order.

But some of the Court's progressives grew uncomfortable with the implications of this approach.¹⁰ In a series of cases, these justices developed an alternative interpretation.¹¹ Instead of allowing governments to punish speech, which had the tendency to produce lawless action, these justices proposed a clever alternative. Governments could not interfere with such speech unless and until time had run out for would-be criminals to change their minds. Only after this point-of-no-return could proponents of illegal action be punished for their speech. While Justice Brennan did not invoke the conception of the marketplace explicitly in *Brandenburg v. Ohio*,¹² the Court's

⁷ THOMAS HEALY, *THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 187–97* (2013); G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*, 80 CALIF. L. REV. 391 (1992).

⁸ 249 U.S. 47 (1919).

⁹ *Id.* at 52.

¹⁰ *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting) (“To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.”); HEALY, *supra* note 7, *passim* (chronicling the evolution of Justice Holmes’ thinking about free expression and how it should be handled by the Court).

¹¹ *See, e.g., Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring); *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

¹² 395 U.S. 444 (1969).

conclusion in that case is entirely consistent with a marketplace theory.¹³ The Court has largely remained committed to this view, with only one recent exception.¹⁴

The marketplace theory was adopted to solve a particular problem, namely how to resist the inclination to punish speech that advocated violence or illegal action. But, perhaps because of its normative appeal, judges and scholars have applied the theory to other legal problems as well. For example, although judicial opponents of campaign finance restrictions have not always signaled their reliance on the marketplace theory explicitly, their decisions again seem consistent with such interpretative understandings. In *First National Bank of Boston v. Bellotti*,¹⁵ Justice Lewis Powell seemed to have something similar in mind when he struck down expenditure limits impacting a Massachusetts referendum.¹⁶ In *Austin v. Michigan Chamber of Commerce*,¹⁷ the Court's justices seemingly pitted competing theories of the First Amendment against one another, with conservatives favoring competition free from government interference while liberals favored a view stressing personal liberty.¹⁸ Dissenters were more explicit in *McConnell v. Federal Election Commission*,¹⁹ referring to the marketplace metaphor directly.²⁰

In each of these cases, the marketplace of ideas was used to support decisions that either did or would have struck down a statute that placed restrictions on political expenditures. The argument, generally speaking, was that governments should not be allowed to interfere with the speech of natural or corporate persons, seeking to influence election outcomes absent market breakdowns, because such interference simply resulted in governments favoring some speech over others. If, as these

¹³ *Id.* at 447 (“[T]he constitutional guarantees of free speech and free press do 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.”).

¹⁴ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 8 (2010) (upholding a provision of the USA PATRIOT Act that prohibited material support to foreign terrorist organizations, including support for training to resolve conflicts peacefully).

¹⁵ 435 U.S. 765 (1978).

¹⁶ *Id.* at 777 (“The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.”).

¹⁷ 494 U.S. 652, 680 (1990).

¹⁸ *Id.* at 680 (Scalia, J., dissenting) (declaring “the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the ‘fairness’ of political debate.”).

¹⁹ 540 U.S. 93 (2003), *overruled by* *Citizens United v. FEC*, 558 U.S. 310 (2010).

²⁰ *Id.* at 248–49 (Scalia, J., dissenting); *id.* at 265 (Thomas, J., concurring in part, dissenting in part) (“The ‘very purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.’” (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969))); *see also* *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986).

opinions presume, the First Amendment protects a true marketplace of ideas, then the marketplace will regulate itself.

This conception of a marketplace of ideas rests on the notion that individuals can liberate themselves of the lingering effects that false information has on attitudes. But, as we discuss subsequently, this may not be true. Rather, misinformation can create residual “belief echoes” that affect attitudes even if participants in the marketplace ultimately accept the corrected information as true.

B. Misinformation and Belief Echoes

Any attempt to understand, study, and regulate fake news and misinformation must wrestle with basic definitional issues about how to identify and differentiate among potentially contested claims about the world. We avoid rehearsing this debate here and instead proceed by adopting a common-sense definition of information in order to address the legal question of when misinformation can be regulated consistent with the First Amendment. We assert that correct information must accurately represent or correspond with phenomena that lie beyond our subjective experiences. Misinformation, on the other hand, misrepresents the real world.

In the world of politics, this seemingly simple definition is complicated by several factors. First, much of the information considered important to political decision making is not entirely subject to independent verification or falsification. For example, few are in a position to adjudicate a claim that the Affordable Care Act will reduce health care costs by fifteen percent in 2020, or a claim that Hillary Clinton’s “true beliefs” about abortion are different from her public statements.

In addition, unlike facts about easily observable phenomena, many key pieces of political information are mediated.²¹ Economic data are collected through the Congressional Budget Office; hour-long speeches are summarized in brief articles; policies are reduced to talking points. The decisions made by institutions, journalists, and politicians about how to communicate political information to the public are not made at random but are themselves shaped by the political environment. James Kuklinski and his colleagues emphasize this point when they argue that “the criteria for and

²¹ WALTER LIPPMANN, *PUBLIC OPINION* 25 (1946) (“We shall assume that what each man does is based not on direct and certain knowledge, but on pictures made by himself or given to him.”).

relevance of political facts are determined within, not outside, politics.”²²

These difficulties should not be ignored, but rather built into our understanding of how misinformation can affect attitudes. Political facts are often both contested and contestable. However, an acknowledgment of relativity should not be taken as an abandonment of the goal of objectivity. Any given piece of information resides somewhere on the spectrum from falsifiable to unfalsifiable. Here we restrict our focus to factual assertions that fall on the more objective side of this spectrum and are still relevant to political decision-making. For example, we can determine with relative, though not complete, certainty whether a candidate accepted campaign donations from a criminal; whether Barack Obama was born in the United States; or whether infant mortality rates rose in a particular state during a particular time frame. While these claims might not be as clear-cut as an assertion about what type of cheese John Kerry ordered on his cheese steak, they are more verifiable than a claim about how John Kerry's economic plan will benefit the middle class.

Efforts to correct misinformation are driven by concerns over the consequences of a misinformed citizenry. Insofar as attitudes are based on factual knowledge, citizens who possess inaccurate information may form opinions that differ substantially from the opinions they would have formed were they correctly informed. The emphasis on fact-checking in today's media environment is aimed at preventing these problems, thereby moving us closer to the idealized marketplace of ideas.²³ Social media, the proliferation of independent and decentralized blogs, and the 24-hour news cycle all increase citizens' access to a greater quantity of information. Some of this information may indeed be misleading, but it is also the case that factual claims often encounter widespread and decentralized scrutiny in ways that resemble the idealized and stylized marketplace of ideas.

But the marketplace of ideas makes a critical assumption that has largely gone unexamined. After individuals discard information that is shown to be false, the theory assumes, false information will cease to affect attitudes. In other words, reading a correction should cause attitudes initially affected by false claims to revert back to their pre-exposure state. This assumption must be true according to the marketplace of ideas because

²² James H. Kuklinski et al., “*Just the Facts, Ma'am:*” *Political Facts and Public Opinion*, 560 ANNALS AM. ACAD. POL. & SOC. SCI. 143, 147 (1998).

²³ LUCAS GRAVES, DECIDING WHAT'S TRUE: THE RISE OF POLITICAL FACT-CHECKING IN AMERICAN JOURNALISM 10 (2016) (Fact-checkers “try to balance the daily realities of highly partisan, often vicious discourse online with their formal commitment to inform a reasoning democratic public”).

otherwise individuals might be left worse-off—or at least change their minds about political matters in ways that are not supported by factual information—by participating in the marketplace of ideas. Such results would run counter to the promised end state of greater awareness, if not truth.

There are reasons to be skeptical, however, that corrections—even if they succeed at correcting false beliefs—can also be entirely successful at erasing any attitudinal change caused by the initial exposure to misinformation. Rather, exposure to misinformation can create “belief echoes:” lingering attitudinal effects that persist even after a piece of misinformation is successfully corrected.²⁴ In a series of experiments employing realistic political scenarios, individuals’ attitudes were affected by exposure to misinformation despite recognizing that the misinformation was false.²⁵ In one of these experiments, individuals were randomly assigned into one of three different groups and asked to read a news article containing a piece of misinformation about a candidate, which was subsequently corrected. A second group read the same article without the correction. A third saw neither the misinformation nor the correction. The correction was fully successful at eliminating participants’ belief in the misinformation. In other words, the marketplace of ideas “worked” in that the correction erased belief in the misinformation. However, when it came to attitudes, the correction was less successful. People who saw the misinformation evaluated the candidate more negatively than those who did not, despite consciously knowing that the information was not true. Thus, exposure to political misinformation has the potential to create belief echoes: attitudinal shifts that persist even after individuals abandon their commitment to incorrect information.

The existence of belief echoes suggests that even when the marketplace of ideas operates efficiently to correct false claims, misinformation can still shape citizens’ attitudes, challenging the basic mechanism through which the marketplace of ideas purportedly operates. Individuals, according to the theory, should be able to participate in the marketplace and discard inferior arguments without collateral consequences on their political attitudes. But, if misinformation has lingering effects on those attitudes, then individuals who participate in the metaphorical marketplace may change their minds not because they are persuaded by superior arguments, but because of their declining support for candidates or policies. This is not a market failure so much as a violation of the basic assumptions of the

²⁴ Thorson, *supra* note 5.

²⁵ *Id.*

theory. This distinction is important because metaphorical market failures have been held to support restriction of speech.²⁶ When the market fails because the theory rests on false assumptions, however, then speech restrictions may not be warranted. Rather, the failure indicates a larger problem, raising concerns that the theory might be misapplied in ways that restrict otherwise constitutionally protected speech.

The Supreme Court has exhibited two approaches to false speech. While it has repeatedly demonstrated some reluctance to offer outright protection for false speech because of its low value, the Court has nonetheless recognized that false statements are inevitable in free debate.²⁷ Indeed, the Court has often tolerated false statements because it has feared that any prohibitions on false speech could have a so-called “chilling effect” on otherwise permissible speech that might discourage a free exchange of ideas.²⁸ But misinformation that has the capacity to create belief echoes seems to fall outside of the scope of this limited approach. Belief echoes describe how misinformation shapes citizens' evaluations of political objects (including candidates, policies, and groups). While under some circumstances, these evaluations may also alter individuals' political behavior (for example, voting), this is only rarely the case. Indeed, substantial empirical research shows that in the realm of politics, it is remarkably difficult for any single piece of information (or misinformation) to alter behavior, because individuals' pre-existing attitudes (in particular, partisanship) exert a strong effect on what they attend to, recall, and use to inform their political decision making.²⁹ Put another way, even if misinformation affects a person's attitudes, such consequences are not necessarily sufficient to shape her behavior. However, the marketplace of ideas theory of free speech simply does not have the nuance to recognize this important distinction between attitudes and behavior. This failure points to the benefits of employing a different approach for deciding when misinformation should be regulated consistent with the First Amendment.

²⁶ See *Abrams v. United States*, 250 U.S. 616, 630 (“[U]nless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”).

²⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

²⁸ *Id.* at 300.

²⁹ See generally MILTON LODGE & CHARLES S. TABER, *THE RATIONALIZING VOTER* (2013).

II. DEMOCRATIC COMPETENCE AS AN ALTERNATIVE APPROACH

Most scholars agree that citizens' knowledge is a cornerstone of a functioning democracy, but disagreement persists about *what* exactly citizens need to know for democracy to function properly.³⁰ The prevalence of misinformation in electoral politics has only made this debate more urgent. One potentially fruitful approach, with important implications for legal debates over speech regulation, focuses on the relationship between citizens' knowledge and democratic competence.³¹ Arthur Lupia argues that any given piece of information matters for democratic functioning insofar as it allows citizens to transform their values into concrete political action. For example, a person who is deeply concerned about rising health insurance costs might require information about the candidates' health plans to address this issue in order to connect her values (health care) to her actions (vote choice). This particular piece of information would increase her competence in a way that information about the candidates' stance on abortion might not.

We argue that this standard of competence is also relevant for assessing the effects of *misinformation* and can also establish a baseline for determining whether and under what circumstances misinformation can be regulated. According to this standard of competence, not all misinformation is necessarily problematic. Rather, only misinformation that directly threatens citizens' ability to connect their values to political action should be excluded from First Amendment protection.

An illustration may be useful here. Misinformation often appears in the context of elections. But misinformation is particularly problematic when it relates to deceptive election practices. A classic, if not common, example of such deceptive practices, Richard Hasen recalls, "is a flyer distributed in African-American neighborhoods claiming that Democrats are allowed to vote on Wednesday, not Election Day Tuesday."³² Elections rarely occur on Wednesdays in the United States. By missing election day, those who would rely on this information

³⁰ See, e.g., Cheryl Boudreau and Arthur Lupia, *Political Knowledge*, in CAMBRIDGE HANDBOOK OF EXPERIMENTAL POLITICAL SCIENCE 171 (James N. Druckman et al. eds., 2011) ("Some scholars raised questions about the practice of basing broad generalizations of citizen competence or knowledge on a relatively small set of idiosyncratic, fact-based survey questions.")

³¹ For elaboration on this approach, see ARTHUR LUPA, UNINFORMED: WHY PEOPLE KNOW SO LITTLE ABOUT POLITICS AND WHAT WE CAN DO ABOUT IT (2016).

³² RICHARD L. HASEN, VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN 78 (2012).

would necessarily be deprived of translating their political attitudes into meaningful political action and thereby falling short of the competence standard. Such misinformation would rightly be subject to regulation consistent with the First Amendment.

But, as indicated, not all misinformation runs afoul of this democratic competence standard. In another example, Hasen considers an advertisement paid for by Latinos for Reform encouraging Spanish-speaking voters abstain from voting in an upcoming election essentially to punish Democratic leaders for not acting sufficiently on immigration reform.³³ The primary funders of the sponsoring organization, however, did not appear to be Latino. Instead, they were closely associated conservative causes and therefore would have benefited from low Hispanic turnout because Hispanic voters have recently tended to vote against conservative candidates. But, unlike the classic example of deceptive election practices, the information in this advertisement did not interfere with the capacity of the targeted citizens to cast a ballot. It simply provided them with an alternative strategy to pursue their preferred outcomes. Accordingly, they could still translate their political attitudes into political action in meaningful ways.

Similarly, when evaluated by the standard of competence, the effect that misinformation like PizzaGate and other examples had on the outcome of the *presidential* election may be minimal because most of the people who consumed fake news used it to reinforce their pre-existing beliefs.³⁴ Just as opponents of Hillary Clinton were far more likely to encounter and believe news stories about PizzaGate, those who disliked Donald Trump were more likely to encounter and accept misinformation about him. It seems unlikely, therefore, that this misinformation interfered with the capacity of voters to connect their values with appropriate political participation.

III. CONCLUSION

The marketplace of ideas theory of the First Amendment identified government action as a primary threat to the free

³³ *Id.* at 75–79.

³⁴ Andrew Guess, Brendan Nyhan, & Jason Reifler, *Selective Exposure to Misinformation: Evidence From the Consumption of Fake News During the 2016 U.S. Presidential Campaign*, EUROPEAN RESEARCH COUNCIL (Jan. 9, 2018), <http://www.dartmouth.edu/~nyhan/fake-news-2016.pdf>; Amanda Taub, *The Real Story About Fake News Is Partisanship*, N.Y. TIMES: THE UPSHOT (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/upshot/the-real-story-about-fake-news-is-partisanship.html?mcubz=3>.

exchange of ideas.³⁵ But, as we have argued here, this classical approach rests on a set of psychological assumptions about how individuals process and store factual political information. New empirical research, discussed here, indicates that even factual information has an affective component that colors our understanding of the political world. While we may be able to part ways with the content of political misinformation, the affective dimension of such misinformation may often linger in ways that work against the promises of the marketplace of ideas.

But the existence of belief echoes should not support broad efforts to regulate political misinformation. Rather, as we outline in this Article, government efforts to regulate misinformation should only be allowed under the First Amendment when such regulation enables democratic competence and facilitates citizens' capacity to translate their values into political action. While this recommendation departs from the classical First Amendment model, which has been skeptical of any government interference, regulator efforts that enhance democratic competence do not pose the same risks as other types of intervention.

³⁵ SAM LEBOVIC, *FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA* 18 (2016).