

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

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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 & Vinu 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: THEUPSHOT, (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.