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Free Speech, Fake News, and Democracy

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I. PROTECTING FREE SPEECH VERSUS PROTECTING DEMOCRACY

It is widely assumed that freedom of speech is an essential feature of democracy.[1] In the American Constitutional system, the First Amendment expresses a fundamental protection that must be honored and applied if democracy is to be maintained as the most legitimate and justifiable form of government.[2] As

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[1] STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 1 (2008). *See also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948).

[2] "Indeed, the votes and statements of the Justices in *Guarnieri* indicate that all of the current Justices accept the basic premise that the First Amendment's Free Speech Clause is preeminently concerned with the democratic process, and that speech relevant to self-governance receives greater protection than other forms of speech." Ashutosh Bhagwat, *Details:*

emphasized in *Garrison v. Louisiana*, "speech concerning public affairs is more than self-expression; it is the essence of self-government."[3] Free speech and the accompanying protections of the media in the First Amendment allow citizens to inform themselves and deliberate about policy in a way that gives self-government its meaning and its effectiveness.

This is the relatively simple and basic story that students are taught as part of their primer on American government. And since freedom of speech is also hailed as a fundamental human right—embraced by a wide range of nations across the world—its centrality and significance are hard to overstate. [4] In application however, matters are not so simple.

Specific Facts and the First Amendment, 86 S. CAL. L. REV. 1, 35 (2012) (citing Borough of Duryea v. Guarnieri, 564 U.S. 379 (2011)).

[3] 379 U.S. 64, 74–75 (1964).

[4] *See* G.A. Res. 217 (III)A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, (Dec. 16, 1966); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. X, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); American Convention on Human Rights, art. XIII, Nov. 22, 1969, O.A.S.T.S No. 36, at 1, OEA/Ser. LJV/ 11.23 Doc. Rev. 2 (entered into force July 18, 1978); African [Banjul] Charter of Human and Peoples' Rights, art. IX, June 26, 1981, OAU Doc. CAB/ LEG/67/3/Rev.5.

Freedom of speech involves tradeoffs to weigh its value against the harms that speech can cause, and no country resolves these tradeoffs entirely in favor of protecting speech.[5] Even among advanced democracies that have agreed to treat speech as a fundamental right, there is significant disagreement about resolving these tradeoffs.[6] At the same time, what makes a democratic government more or less successful is itself a thorny and actively debated issue.

Recently, these debates have coalesced around the spread of "fake news"—false claims that have seemed to many commentators to undermine the effectiveness and value of democratic elections by flooding the environment with

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[5] *See* Tom Ginsburg, *Freedom of Expression Abroad: The State of Play*, *in* THE FREE SPEECH CENTURY 193 (Lee C. Bollinger & Geoffrey R. Stone ed., 2019).

[6] For example, consider the differing ways that tradeoffs are resolved in the regulation of hate speech. Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT'L L. 1, 11–12 (1996) (citing Universal Declaration of Human Rights, *supra* note 5, Articles 7, 29) ("the right to freedom of expression is subject to the restrictions found in the general limiting clause, Article 29, as well as in Article 7, which prohibits incitement to discrimination"). For the U.S. interpretation, *see* Snyder v. Phelps, 562 U.S. 443 (2011). For the European interpretations, *see* ARTICLE 19, Responding to "Hate Speech": Comparative Overview of Six EU Countries (2018).

disinformation.[7] For example, a poll by the Pew Research Center between February 19 and March 4, 2019 found that "made-up news" was identified by more Americans than terrorism, illegal immigration, racism, and sexism as "a very big problem in the country today."[8]

A recent *New York Times* op-ed, "Facebook Wins, Democracy Loses," detailed the events of the 2016 American presidential election and reflected on its ramifications for democracy.[9] Siva Vaidhyanathan describes it as follows:

> On Wednesday, Facebook revealed that hundreds of Russia-based accounts had run anti-Hillary Clinton ads precisely aimed at Facebook users whose demographic profiles implied a vulnerability to political propaganda…. The ads … were what the advertising industry calls "dark posts," seen only by a very specific audience,

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[7] The *Oxford English Dictionary* defines disinformation as, "The dissemination of deliberatively false information, esp. when supplied by a government or its agent to a foreign power or to the media, with the intention of influencing the policies or opinions of those who receive it; false information so supplied." "Disinformation, n.," OED Online (2019) (last visited Sept. 26, 2019).

[8] Amy Mitchell, Jeffrey Gottfried, Galen Stocking, Mason Walker & Sophia Fedeli, *Many Americans Say Made-Up News is a Critical Problem that Needs To Be Fixed*, PEW RESEARCH CENTER (June 2019), https://www.journalism.org/wp-content/uploads/sites/8/2019/06/PJ_2019.06.05_Misinformation_FINAL-1.pdf (last visited Sept. 30, 2019).

[9] Siva Vaidhyanathan, *Facebook Wins, Democracy Loses*, N.Y. TIMES (Sept. 8, 2017), https://www.nytimes.com/2017/09/08/opinion/facebook-wins-democracy-loses.html.

> obscured by the flow of posts within a Facebook News Feed and ephemeral….
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> The potential for abuse is vast. An ad could falsely accuse a candidate of the worst malfeasance a day before Election Day, and the victim would have no way of even knowing it happened. Ads could stoke ethnic hatred and no one could prepare or respond before serious harm occurs…. Unfortunately, the range of potential responses to this problem is limited. The First Amendment grants broad protections to publishers like Facebook….[10]

The author then draws the following "strong" conclusion about the impact of these practices on democracy: "We are in the midst of a worldwide, internet-based assault on *democracy* . . . In the twenty-first century social media information war, *faith in democracy is the first casualty*."[11]

Vaidhyanathan claims that the spread of false information produced an "assault" on democracy.[12] But exactly what notion of democracy underlies this claim? Before agreeing with his conclusion, we should ask for more details. How exactly is democracy assaulted? If there are such assaults, how do they relate to democratic goals? Finally, how exactly is free speech

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[10] *Id.*
[11] *Id.* (italics added).
[12] *Id.*

implicated in this "assault"? Does this assault indicate that speech protections are overly broad?

In another op-ed contribution to the *New York Times*, Zeynep Tufekci presented an additional example that may be helpful to begin answering these questions.[13] Tufekci describes a similar case in which a Facebook post featured outrageous claims about Hillary Clinton, such as the claim that Clinton had FBI agents murdered.[14] Let us assume that this egregious falsehood was posted at the behest of the Trump campaign, making it false speech during a campaign. Then let us imagine a new character, Arnold, and add further details to the story for purposes of illustration. Let Arnold be an American voter who read this post about Clinton's murders, believed the tale, and then concluded that Clinton would be a terrible president. Thus, Arnold changed his mind and voted for Donald Trump rather than Clinton.

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[13] Zeynep Tufecki, *Zuckerberg's Preposterous Defense of Facebook*, N.Y. TIMES (Sept. 29, 2017), https://www.nytimes.com/2017/09/29/opinion/mark-zuckerberg-facebook.html.
[14] *Id.*

Our case is one in which a falsehood is "told" to Arnold (among numerous others) by a campaign operative, and this falsehood influences his vote. How should a democratic government approach this kind of case? On the one hand, the traditional story described above, which emphasizes the importance of free speech for democracy, would seem to count against regulation of these false claims. On the other hand, these commentators seem to question that presumption and call for regulative action.[15] Two categories of action might be contemplated: One consists of attempts to eliminate or reduce these kinds of postings, especially on platforms with a multitudinous readership. A second would take punitive action against some actor(s)—either against the campaign purchaser of the Facebook ad or Facebook itself. In other words, action might be taken against one or both of these actors for creating and/or distributing "fake news." Assuming there is sufficient evidence to show that these events actually transpired, should the government make a criminal or civil case of it? Should there be

[15] By focusing on public, regulative action, we set aside questions of defamation, which would address whether Clinton or other parties could bring a private action against the Trump Campaign.

statutes that enable the state to take punitive action against false campaign speech in the (hypothetical) case in question?

Anyone who sides with regulation must concede that the First Amendment jurisprudence has been very resistant to the idea that the mere falsity of a conveyed message is grounds for taking action against a speaker. To take a few examples, in *United States v. Alvarez*,[16] the Court was careful to instruct that "falsity alone may not suffice to bring speech outside the First Amendment."[17] Similarly, anything recognizable as a conception of freedom of speech must entail a requirement that government, in its capacity as potential regulator, maintain a stance of evaluative neutrality vis-à-vis messages. As Justice Jackson expressed the point, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in matters of opinion . . . ."[18]

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[16] 567 U.S. 709 (2012).
[17] *Id.*at 709.
[18] W. Va., State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

Under a broad interpretation of this doctrine, a message to Facebook users that falsely asserts that Hillary Clinton murdered FBI agents is not grounds for legal action. As Harry Kalven, an esteemed legal theorist of his era, wrote: "the state is not to umpire the truth or falsity of doctrine; it is to remain neutral."[19] Under this view, freedom of speech protects speakers' rights to speak as they please, regardless of the truth or falsity of the message. People are not to be constrained from saying what they would like to say, i.e. from expressing their thoughts or opinions. In the present case, presumably, this interpretation implies that statutes are not legitimate (and must therefore be declared unconstitutional) when they seek to constrain based on content what speakers may say or may post in a public forum, such as Facebook. In other words, under this interpretation, the state may not determine whether particular assertions are true or false or take action against speakers who make false assertions.

The statements asserted or conveyed by these hypothetical speakers are examples of what nowadays is called

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[19] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 10 (1988).

"fake news."[20] There is no consensus about exactly what is meant by this expression, though.[21] At a minimum, a working definition should take fake news to refer to false statements made by people who do not actually believe what they assert, who may even actively disbelieve those statements. Thus, they are characteristically assertions intended to be *dis*information rather than genuine, or truthful, information. Is it appropriate for the First Amendment to preclude government from regulating the activity in question? That is, is it appropriate (within a democracy) for courts of law to protect the rights of speakers to intentionally engage in the spreading of fake news, as illustrated in our examples? If we assume that speakers are *always* within their First Amendment *rights* to say what is false, or say what

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[20] For a background on fake news, its production and recent trends, see Hunt Allcott and Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. OF ECON. PERSPECTIVES 211, 213–17 (2017).

[21] Edson C. Tandoc Jr., Zheng Wei Lim & Richard Ling, *Defining "Fake News,"* 6 DIGITAL JOURNALISM 137, 147 (2018). Several prominent definitions have been offered recently. Hunt Alcott and Matthew Gentzkow "define 'fake news' to be news articles that are intentionally and verifiably false, and could mislead readers." Hunt Alcott and Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 213 (2017). David Lazar, et al., define fake news as "fabricated information that mimics news media content in form but not in organizational process or intent." David M. J. Lazar, et al., *The Science of Fake News: Addressing Fake News Requires a Multidisciplinary Effort*, 359 SCI. 1094 (2018).

they believe to be false, it looks as though the constitutional protection of freedom of speech will exclude the creation and enforcement of government-based remedies against fake news of the kind we have just sketched.

Now, some citizens might be content with this upshot, or at least willing to accept it. Freedom of speech is so vital a component of democracy, they might say, that we should simply accept this consequence and live with it. The articles cited above indicate growing resistance to the idea that fake news is simply an unfortunate side effect to a consensus understanding of democratic free speech. In this article, we will focus on one element of this debate: regulation of false campaign speech.

While the constitutionality of such statutes is unclear, currently more than a dozen states have statutes prohibiting some form of false campaign speech.[22] For example, Wisconsin's

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[22] Staci Lieffring, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 MINN. L. REV. 1047, 1056 (2013). *See, e.g.*, ALASKA STAT. § 15.13.095(A) (2010); COLO. REV. STAT. § 1-13-109 (2012); FLA. STAT. ANN. § 104.271 (WEST 2008); LA. STAT. ANN. § 18:1463(C) (2011); MISS. CODE ANN. § 23-15-875 (2007); N.C. GEN. STAT. § 163-274(A)(8) (2011); N.D. CENT. CODE § 16.1-10-04 (2007); OR. REV. STAT. ANN. § 260.532 (WEST 2009); S.D. CODIFIED LAWS § 12-13-16 (SUPP. 2012); TENN. CODE ANN. § 2-19-142 (2003); UTAH CODE ANN. § 20A-11-1103 (WEST 2010); WASH. REV. CODE ANN. § 42.17A.335 (WEST 2012); W. VA. CODE ANN. § 3-8-11 (WEST 1995); WIS. STAT. ANN. § 12.05 (WEST 2004).

statute asserts, "No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election."[23]

False campaign speech is precisely a category into which fake news examples seem to fall when the speaker is directed by a campaign. The fact that so many states have passed statutes prohibiting false campaign speech lends further support to the notion that voters or representatives are concerned about the issue of fake news and were supportive of some regulation of false electoral assertions to protect the integrity of elections. Obviously, this kind of regulation departs from a simple, unqualified interpretation of the First Amendment, which would prohibit regulation of any speech in the public forum.[24] Affirming these statutes would assert that some speech in the public forum

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[23]WIS. STAT. ANN. § 12.05 (2018).

[24] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

imposes harm worthy of government action, even when weighed against the value of free speech in a democracy.

Of course, the Court need not concur with the pro-regulation policy vis-à-vis false campaign speech implied by these state statutes. It is distinctly possible that the Court would overturn some or all of these statutes if it reached that test.[25] For the moment, however, we are not interested in what the Supreme Court—or circuit courts—have decided or are likely to decide. Such questions will be addressed in Section IV. For now, it is sufficient to note that the existence of these statutes indicates a strong desire to consider regulation of fake news.

It is well past time to consider whether government regulation of false electoral speech or fake news can fit a justifiable interpretation of the First Amendment. That is, setting aside the prediction of whether the Court would in fact find these statutes constitutional, we ask whether they *ought* to be constitutional. No interpreters of the First Amendment contend

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[25] In fact, both Washington's and Minnesota's bans on false campaign speech were struck down by state and federal courts of appeals, respectively. Rickert v. State, Pub. Disclosure Comm'n, 168 P.3d 826, 827 (Wash. 2007); Wash. ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 693 (Wash. 1998); 281 Care Comm. v. Arneson, 638 F.3d 621, 635 (8th Cir. 2011), cert. denied, 2012 WL 2470100 (June 29, 2012).

that freedom of speech is guaranteed across the board, for all categories of speech, in all circumstances. That unqualified, or "purist," interpretation has never been endorsed by the Supreme Court.[26] Although the First Amendment says "Congress shall make no law. . . abridging the freedom of speech . . . .,"[27] this does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, nor does it give people full protection for everything they say.[28] In particular, there are exceptions for a few well-defined and narrowly limited categories of speech that allow for lesser protection against content regulation[29] including obscenity,[30] fighting words,[31] child pornography,[32] and defamation.[33] In short, the Court allows exceptions to the general principle of free speech. This exception should be extended to fake news and other campaign falsehoods.

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[26] STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA 463 (2008).
[27] U.S. CONST. AMEND. I.
[28] Gitlow v. New York, 268 U.S. 652, 666 (1925).
[29] *See* Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207, 214 (1993).
[30] Roth v. United States, 354 U.S. 476, 485 (1957).
[31] Chaplinsky v. New Hampshire, 315 U.S. 565, 571-72 (1942).
[32] New York v. Ferber, 458 U.S. 747, 760-61 (1982).
[33] Beauharnais v. Illinois, 343 U.S. 250, 266 (1952); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

In considering these matters, we might profitably reflect on examples of speech policy in other domains. In a recent article, Jeffrey Howard provides an instructive example concerning speech that advocates criminal conduct.[34] Howard reminds us that the U.S. Supreme Court insists that such speech should be protected, not suppressed or regulated.[35] In the case of *Brandenburg v Ohio*, the Court affirmed sweeping protection for such speech.[36] Except for emergency cases in which the speech will cause imminent harm, it must be protected. The upshot, under this ruling, is to protect criminal actions that many people would intuitively consider highly worthy of punitive action.[37]

Here are two (actual) examples that Howard considers. In 2015, a husband and wife in San Bernardino, California, shot and killed fourteen people. They were apparently inspired by exposure to the extreme cleric Anwar al-Awlaki, whose YouTube video advocated the duty to kill Americans. Under American law, al-Awlaki could not be convicted for his speech

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[34] Jeffrey W. Howard, *Dangerous Speech*, 47 PHIL. & PUB. AFF. 208 (2019).
[35] *Id.* at 209.
[36] *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).
[37] Howard, *supra* n. 35, at 209.

(which Howard labels "dangerous speech").[38] Similarly, in 2019, a man in Christchurch, New Zealand, entered two mosques and killed 51 people, having been radicalized by the Norwegian white supremacist, Anders Breivik, who himself had murdered seventy-seven people in 2012. Again, under American law, Breivik would not have been culpable for his inflammatory speech. Because websites and online videos inciting murder typically do not cause harm immediately, their suppression would be deemed an unconstitutional violation of the legal right to freedom of expression.[39]

This American perspective on "dangerous speech" is by no means universally shared, as Howard points out.[40] Indeed, it stands in sharp contrast with the law of the United Kingdom, where encouraging terrorism is itself deemed a crime. The British example, moreover, is emulated in most liberal democracies' treatment of dangerous speech.[41] If these countries are "right," the American judiciary must have this matter wrong.

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[38] *Id.* at 208.
[39] *Id.* at 209.
[40] *Id.* at 210.
[41] *Id.*

Of course, the central topic of our paper is not "dangerous" speech; it is "electoral" speech. More specifically, it is false electoral speech. The point remains, however, that it would be indefensibly narrow-minded to uncritically accept existing American legal practices without due reflection, especially in light of the important relation between accurate speech and democratic desiderata, as we shall argue in Section III.

II. FREE SPEECH AND DEMOCRATIC GOALS

As noted in Section I, freedom of speech is a core feature of democracy. But what makes it so valuable or so special? Why think that a strongly maintained system of free speech is an important component of a truly democratic system of government? Even if we take it as given that democracy is the most justifiable form of government, why does it follow that free speech is needed? And why should the free speech (or free expression) system take the specific form— and interpretation— that the First Amendment of the U.S. Constitution takes? Different answers to these questions have been offered by different writers. In this section and those that follow, we

examine some sample answers and see which—if any—offer compelling answers.

In their 2017 book, constitutional scholars Erwin Chemerinsky and Howard Gillman write as follows:

> Freedom of expression—which includes verbal and nonverbal behaviors that express a person's opinion, point of view, or identity—is considered a fundamental right within our political system. The Supreme Court has called it "the matrix, the indispensable condition, of nearly every other form of freedom" and has ruled that it occupies a "preferred place" in our constitutional scheme.[42]

Chemerinsky and Gillman acknowledge that there may be good reasons to limit speech. "[Speech] has been used to mock and bully, and to question the dignity of entire groups of people in ways that put them at risk. It has been used to objectify women, sexualize children. Speech can invade privacy or ruin a reputation … [and] threaten national security."[43] Nonetheless, they defend a preferred place for freedom of expression as

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[42] ERWIN CHEMERINSKY AND HOWARD GILLMAN, FREE SPEECH ON CAMPUS 22 (2017).
[43] *Id.* at 23.

essential for freedom of thought and essential for democratic self-governance.[44]

Their account of why freedom of speech is essential to democracy proceeds as follows:

> [F]reedom of speech is essential to democratic self-government because democracy presupposes that the people may freely receive information and opinion on matters of public interest and the actions of government officials. The act of voting still occurs in many autocratic societies where speech is severely limited and government officials punish people who criticize the government…. It is not the act of voting that creates a self-governing society but rather the people's ability to formulate and communicate their opinions about what decisions or policies will best advance the community's welfare.[45]

Surely the last statement is a bit too quick. Receipt and expression of communication is important but not itself *sufficient* to create a self-governing society. Voting matters! If nobody but a reigning dictator has the power to vote (or enact whatever laws they wish), then ordinary citizens might communicate until they are blue in the face without creating a democratic government. Democracy is established through institutions, where formal

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[44] *Id.*
[45] *Id.* at 25.

voting is critical. Suppose a vast bulk of the population is consigned to penitentiaries where they may communicate with each other but have no formal opportunity to execute their preferred plans or schemes. Communication can often be helpful, crucially so, but talk in itself will not suffice to influence government, democratic or otherwise, without institutions to implement this influence.

There are additional reasons why the power to communicate doesn't guarantee democracy. Suppose a group of citizens has the power to hack into their compatriots' devices, conveying radically misleading messages (as in the case of Arnold in Section I), and these messages are taken as true. Such widespread communication power used for deceitful ends would be seen by many to fall short of democracy because the vote does not truly represent the will of the people. Group X's power to misuse *or* misdirect group Y's communicative power can undercut the alleged democratic value of Y's communicative power. This is not to deny the importance of communication or information in helping to constitute a democracy, but a more

nuanced approach that identifies the democratic value at stake is necessary.

The same point holds for other popular approaches to democratic theory which assign great importance to information or knowledge. The oldest approach of this kind is the "marketplace of ideas" rationale for free speech.[46] This idea dates back to John Milton, who wrote, "Let her [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter."[47] In the twentieth century, Justice Oliver Wendell Holmes articulated the same idea as follows: "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[48] Let us evaluate its claim to centrality.

The rationale begins with the assumption that a democratic society aims to get the truth: the more truth the better. It then makes the claim that the best way for society to *get* the truth is to allow everyone to express his or her viewpoints to

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[46] *See generally* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 33 DUKE L.J. 1, 3 (1984).
[47] JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 45 (H.B. Cotterill ed., MacMillan & Co. 1959) (1644).
[48] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

others, keeping government out of the picture. Allegedly, this will allow everyone to defend their respective views, and all will profit.

The free-marketplace-of-ideas theory is arguably the most influential argument on behalf of freedom of speech, but is it true to say that such marketplaces are optimal systems for generating true beliefs?[49] Doubts can initially be raised by the fact that no controlled experiment has been conducted that attests to the superiority of a marketplace system in a social arena. In the absence of any careful formulation and controlled study of such systems, let us reflect on a few familiar existing systems that aim to generate true beliefs. In each case we may ask: Do experienced system designers, interested in the generation of true belief, choose a free-market structure, in which everyone may speak and no governmental or supervisory agency is allowed to interfere with their speech? Have these designers studied the truth-delivering properties of this system and found that its

[49] For a prominent formulation of doubt about the free marketplace of ideas argument, see FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY CH. 2 (1982). The line of skepticism developed in the current article is complementary to, but distinct from, Schauer's.

results are superior to those of competing systems, in which, for example, only designated individuals are allowed to speak?

What we will find is that it is quite common for "selective" or "restrictive" systems to be chosen in place of "open-to-all" systems. Even where system designers are intelligent and well-intentioned, they often choose "selective" systems as superior to completely open ones.

To illustrate this, consider some examples chosen from the legal realm. Courts commonly engage in highly selective procedures. Judges admit certain individuals to testify (i.e. to speak) before the jury, whereas other individuals are excluded from delivering any testimony in court. Two categories of people are most likely to be deemed appropriate to serve as courtroom witnesses: eye-witness testifiers and expert-witness testifiers.[50] In each type of witness, the judge allows suitable individuals to testify but disallows others, depending on their relevant qualifications.[51]

Although rules of evidence have been subject to change over time, the general practice of conferring testimonial roles to

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[50] FED. R. EVID. 602; FED. R. EVID. 702.
[51] FED. R. EVID. 602; FED. R. EVID. 702.

selected individuals and denying such roles to others based on their qualifications have persisted. They either must have suitable scientific knowledge[52] or have witnessed some event relevant to the case under litigation.[53] These standards are spelled out in appropriate rules of evidence (e.g., the "Federal Rules of Evidence"), which lay down rules that govern the system and considerations that should be weighed to determine if a witness should testify.[54] Nobody ever suggests that random people, who merely wish to opine on the case, are entitled to do so.

This is clearly not a free-marketplace-of-ideas system, yet it is one that is widely used and accepted despite the importance of true beliefs in the court system. Few complaints are heard from the general electorate that they are deprived of speech opportunities or that universal admissibility to speak in court would improve the system. This is a case in which the "open marketplace" for speech is a possible fact-seeking system that courts of law could adopt. But none have done so. Is it so clear

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[52] *See* Daubert v. Merrill Dow Pharms., 509 U.S. 579, 587–95 (1993); Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).
[53] FED. R. EVID. 602.
[54] *Id.*

that careful reflection on political debate would lead to very different results?

The courtroom case is one of many examples where the chosen system does not feature the practice of letting everyone speak as they please. Consider another example drawn from the law. The Securities and Exchange Commission restricts what people may say while selling stocks and bonds.[55] This provision helps buyers avoid being misled or deceived by sellers' claims. Such speech restrictions obviously depart from the assumption that a free market for speech, left to itself, would best generate true beliefs and avoid error. Once again, people who are knowledgeable about business dealings are apparently not persuaded that an unhindered speech market is the best way to generate truth. While the rhetoric alleges that the marketplace system is best, experienced system designers (or evaluators) evidently feel that constraints on certain types of speech lead to a more reliable system.

The issue raised here is continuous with the central issue posed in Section I. The First Amendment, under its orthodox

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[55] *See* 17 C.F.R. § 240.14c-6 (2019) (restricting "false or misleading statements").

interpretation, is strongly tilted toward protecting freedom of speech. Especially in political matters, even knowingly false statements may not be sufficient to incur government regulation.[56] Does this really promote democratic and truth-oriented upshots?

As has been pointed out by numerous scholars, any interpretation of the First Amendment must be constructed from its functions or purposes.[57] As Thomas Emerson argues, "Any study of the legal doctrines and institutions necessary to maintain an effective system of freedom of expression must be based upon the functions performed by the system in our society, the dynamics of its operation, and the general role of law and legal institutions in supporting it."[58]

Three major purposes have been proposed for the First Amendment.[59] The first proposal is *cognitive.* The First

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[56] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).
[57] *See*, *e.g.*, THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 5–9 (1970); ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 5 (2012).
[58] EMERSON, *supra* note 58, at 5.
[59] POST, *supra* note 58, at 6. For a survey of other justifications that have been offered for freedom of speech beyond the three major proposals, see

Amendment protection for speech is said to be "advancing knowledge and discovering truth."[60] It is the cognitive proposal that underlies the marketplace-of-ideas theory we have just questioned. The second proposal is that the purpose of the First Amendment is *ethical.* Here, the goal of the First Amendment is said to be "assuring individual *self-fulfillment*," so that every person can realize his or her "character and potentialities as a human being."[61] The third proposal is *political*. Here, the purpose of the First Amendment is said to be "facilitating the communicative processes necessary for successful democratic self-governance."[62]

Building off the ethical proposal, a popular idea behind freedom of speech goes under the label of "autonomy." Autonomy, or individual self-fulfillment, is the "principle that all persons ought to be accorded the equal dignity to fulfill their unique individual potential."[63] Emerson defended a central purpose of the First Amendment as "assuring individual self-

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Leslie Kendrick, *Another First Amendment*, 118 COLUM. L. REV. 2095, 2106–12 (2018).

[60] POST, *supra* note 58, at 6 (quoting Emerson, *supra* note 58, at 6).

[61] *Id.* (emphasis added).

[62] *Id.*

[63] *Id.* at 10.

fulfillment."[64] C. Edwin Baker, a prominent proponent of the autonomy conception, argued, "In making collective decisions, people should be as unrestrained as possible, not because this form of process necessarily leads to the wisest decisions, but because the process is an attempt to embody a fundamental value of liberty in the sphere of necessarily collective decisions . . . . Liberty, not democracy, is fundamental."[65]

Despite the appeal of autonomy as a fundamental value, it cannot sustain an interpretation of the First Amendment as the central purpose.[66] Autonomy can be manifested through any form of behavior, not merely communication, which undermines the privilege granted to speech in the First Amendment.[67] Robert Post convincingly dismisses the autonomy interpretation with the following argument:

> If the protection of autonomy were a fundamental goal of the First Amendment, all expression equally connected to the achievement of

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[64] EMERSON, *supra* note 58, at 6.
[65] C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 30 (1989).
[66] *See* T. M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541, 546 (2011) (arguing that "autonomy" is understood in too many different ways to capture the interests at stake in First Amendment protection).
[67] Post, *supra* note 58, at 10.

> individual self-fulfillment would be accorded equal First Amendment value. But this is emphatically not the case. Much speech that may be of great importance to the autonomy of individual speakers receives no First Amendment coverage at all.[68]

A specific example of this point concerns the regulation of speech by state employees:

> First Amendment coverage materializes only when employee speech is about a matter "of public concern," because only such speech is "entitled to special protection." First Amendment doctrine attributes no constitutional significance to the importance that such speech may bear to the autonomy or self-fulfillment of an employee.[69]

This serves as a counterexample to the autonomy interpretation because expression ought to have the same value to autonomy whether it is about a matter of public concern or not.[70] Special treatment for matters of public concern implies that autonomy is not the primary purpose of the First Amendment.

The political purpose of the First Amendment has been most closely associated with prominent theorists Alexander

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[68] *Id.* at 10–11.
[69] *Id.* at 11–12.
[70] "Both freedom of political speech and freedom of other speech embody the same value—respect for individual liberty." Baker, *supra* note 57, at 31. Baker unconvincingly attributes the apparent focus on political speech in First Amendment case law to pragmatic considerations, rather than a justified emphasis on political speech. *Id.* at 33–36.

Meiklejohn[71] and Robert Bork.[72] Meiklejohn and Bork each offer a version of a principle where First Amendment coverage does not extend to the autonomy interests of speakers but rather protects the rights of voters to receive information. Thus, Meiklejohn and Bork concur that political considerations provide the basis for First Amendment interpretation. However, Post extends the political or democratic conception in a fruitful way. Successful self-government requires not only that voters can influence political decisions, but also that voters share a "warranted conviction that they are engaged in the process of deciding their own fate."[73] The First Amendment does not only extend to explicitly political subjects, as Bork argued,[74] but also to literary, artistic, and scientific expression.[75] Therefore, Bork

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[71] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948), *in* POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960).
[72] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).
[73] Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1523 (1997) (reviewing OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1966)).
[74] Bork, *supra* note 64, at 28.
[75] Miller v. California, 413 U.S. 15, 22–23 (1973).

and Meiklejohn's principle does not correspond with well-entrenched principles of First Amendment law.[76]

Post argues that these early theorists of free speech and democracy fell short because they underestimated the nature of democracy.[77] Rather than a conception of majoritarian rule focused entirely on decision-making power, democracy rests on the value of self-government, the notion that those subject to the law should experience themselves as coauthors of that law.[78] Constitutional democracies instantiate this value by ensuring that governments are responsive and subordinate to public opinion, and the First Amendment plays a necessary role by visibly guaranteeing everyone the possibility to influence public opinion.[79]

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[76] Post, *supra* note 58, at 16–17.
[77] *Id.* For a critical account of the democratic theories of the First Amendment under these early theorists' more limited conceptions of democracy, *see* Baker, *supra* note 66, at 25–37.
[78] Meiklejohn moved partially toward support for this view of democracy, extending First Amendment protection to the arts, sciences, and humanities as part of the range of communication from which the voter derives knowledge. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256–57. *See also* Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221.
[79] Post, *supra* note 58, at 17.

Post's extension of the political principle interpretation does not end at the need to tolerate all views. "It follows from this analysis that First Amendment coverage should extend to all efforts deemed normatively necessary for influencing public opinion."[80] Understanding Post's perspective depends on appreciating the role that truth must play in a defensible conception of legitimate authority. Post is unpersuaded that a broad interpretation of First Amendment protections can apply to all areas of speech because an interpretation that is indifferent to true and false content does not live up to the standard of *knowledge*—which implies truth according to philosophical consensus—and knowledge is normatively necessary for informed public opinion.[81] This leads Post to the following explanation:

> If content and viewpoint neutrality is the cornerstone of the Supreme Court's First Amendment jurisprudence, the production of expert knowledge rests on quite different foundations. It depends upon the continuous exercise of peer judgment to distinguish meritorious from specious opinions. Expert knowledge requires exactly what normal First

[80] *Id.* at 18.
[81] *Id.* at 7–9.

> Amendment doctrine prohibits. "The First Amendment … 'as a general matter … means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'"[82]

A broad interpretation that applied content-neutral First Amendment protection to disciplinary standards would undermine the foundations of expert knowledge.

> To put the matter simply, if "the First Amendment recognizes no such thing as a 'false' idea," then it cannot sustain, or even tolerate, the disciplinary practices necessary to produce expert knowledge. The creation of expert knowledge requires practices that seek to separate true ideas from false ones. A scientific journal bound by First Amendment doctrine, and thus disabled from making necessary editorial judgments about the justification and truth of submissions, could not long survive.[83]

This leaves an apparent paradox at the heart of a theory attaching a political purpose to the First Amendment. To see themselves as coauthors of the laws that govern them, Americans should see the speech of all persons treated with toleration and equality, not decreed from higher authorities, but to ensure that public opinion is founded on truth and knowledge, disciplines

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[82] *Id.* at 9 (quoting Nev. Comm'n on Ethics v. Carrigan, 131 S. Ct. 2343, 2347 (2011)).
[83] *Id.* at 9.

must be given the latitude to distinguish reliable beliefs from unreliable beliefs, a process that depends crucially on expert authority.[84]

Post calls these two values "democratic legitimation" and "democratic competence." "Democratic legitimation" is the function the First Amendment plays when it allows citizens to see themselves as coauthors of the government and the law.[85] "Democratic competence" is the "cognitive empowerment of persons within the public discourse, which in part depends on their access to disciplinary knowledge."[86] It captures those institutions that are necessary for the formation of public opinion, including disciplinary authority to determine which views constitute true knowledge before those ideas contribute to the formation of public opinion. As argued by democratic theorist John Dewey, "genuinely public policy cannot be

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[84] *Id.* at 29–34.
[85] *Id.* at 33-34. A similar emphasis on democratic legitimacy can be found in James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 498–500 (2011). On the other hand, Steven Shiffrin rejects the value of self-government outright, adopting a far more limited conception of democracy that denies legitimacy is possible on a large scale. Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 562 (2011).
[86] Post, *supra* note 58, at 33–34.

generated unless it be informed by knowledge, and this knowledge does not exist except when there is systematic, thorough, and well-equipped search and record."[87] A government that manipulates disciplinary knowledge sets the terms of its own legitimacy by undermining the capacity of the public to form autonomous views critical of state policy.[88]

Post solves the apparent paradox between legitimation, requiring broad protection necessary for tolerating all views, and competence, requiring restrictive disciplinary authority, by separating realms.[89] Both values are always present, but for Post, within the public discourse, democratic legitimation is lexically supreme—leading to expansive protections of public speech – while outside the public discourse, there is more latitude to prioritize democratic competence by allowing disciplines latitude to police knowledge.[90]

In ensuing sections, we will concur broadly with Post's definition of values, adopting a political conception of the First Amendment and likewise distinguishing between values in

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[87] JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 177–79 (1927).
[88] Post, *supra* note 58, at 33.
[89] *Id.* at 34.
[90] *Id.* at 34.

democratic legitimation and democratic competence. We will, however, disagree with his prioritization of these values. For Post, within the public discourse, democratic legitimation is always more important than democratic competence.[91] In other words, it is more important within the public discourse to tolerate all views equally than to ensure competent and true knowledge. Thus, Post would not support regulation of fake news within the public discourse or within campaigns.

We disagree with Post's prioritization and will provide a basis for regulation of false campaign speech to protect electoral integrity in the modern speech environment.[92] We will argue that the presence of rampant false campaign speech undermines the faith of the citizens in the soundness of the election results and in the soundness of the democracy. Thus, false campaign speech is analogous to perjury, and we will defend the necessity and appropriateness of regulation. Post's dichotomy between the public discourse (where there cannot be speech regulation) and knowledge generating disciplines and institutions (where there

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[91] *Id.*
[92] *See infra* Part V.

can be speech regulation) is unsustainable, and regulation of false campaign speech may be defended under free speech values.

This is, for now, just a sketch. Before building on that sketch, it is worth pausing over a different approach to speech theory that is more widely endorsed and would also protect a very wide range of speech and expression.

III. DEMOCRACY, VOTING, AND DISINFORMATION

In Section I, we encountered the problem of how a broad interpretation of the First Amendment can be compatible with a commitment to democracy when the election environment is bombarded with fake news. Given the strong protection that the First Amendment confers on political speech,[93] how can a legal-political system that aspires to be a leading democracy deal successfully with the case—discussed in Section I—of fake news interference in an American election? It seems to open a wide door to discursive encroachment on voter decision-making that (in our hypothetical case) could easily lead to an undermining of voter influence and an inability of voters to ensure (or even make

[93] "We have long recognized that not all speech is of equal First Amendment importance. It is speech on *matters of public concern that is at the heart of the First Amendment's protection.*" Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 758–59 (1985) (internal quotations omitted) (emphasis added).

it probable) that elections reflect the intentions of the voters. In other words, if democracy is open to pervasive campaigns of disinformation, this may well undermine a significant part of the value that we expect voting to deliver.

Let us begin with a simple model of the aim and structure of representative democracy. This model is formulated by Alvin Goldman (the lead author of this article) in his book, *Knowledge in a Social World* (1999).[94]

Representative democracies feature a division of labor. Ordinary citizens are not expected to devise or execute the best political means to their political ends. That is what representatives are hired to do. Ordinary citizens have the job of selecting officials who will do the best job of achieving their political ends.

What should we assume about a citizen's goals or ends? These may range from egoistic to altruistic ends of many varieties. The result of a candidate being elected and holding office for a given term, let us suppose, is a large combination of

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[94] ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 315–48 (1999).

(politically related) outcomes. Call any such combination of outcomes an "outcome set." Each possible outcome might be conceptualized as some economic or societal state of affairs, such as the unemployment level, the cost of living, the availability of healthcare, educational opportunities, etc.

Continuing with the Goldman model,[95] assume that each voter has a (tacit) preference ordering over the outcome-sets that might occur. For each pair of possible outcome-sets, a voter either (tacitly) prefers the first outcome-set to the second, prefers the second to the first, or is indifferent between the two. Given a few additional assumptions, we can then draw some general conclusions about how voters will decide to cast their votes.

First, assume that all electoral races have exactly two candidates.[96] Then a voter who plans to vote in a race featuring candidates C and C* would first want to compare the outcome-set that would occur if C were elected to the outcome-set that would occur if C* were elected. If voter V judges (believes) that the outcome-set that would be generated by C would be superior from her perspective to the outcome-set that would be generated

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[95] *Id.*
[96] For further detail on this scenario, *see id.* at 320–25.

by C*, then V would vote for candidate C. And if V judges that the outcome-set that would be generated by C* would be preferable from her perspective to the outcome-set generated by C, then V would vote for C*.[97]

Given these relations, the crucial question for V to consider is: Which of these two candidates, if elected, would generate a better outcome-set than the other? Call this the "Core Voter Question." To have a determinate answer, however, the question must be relativized to a specified voter and his preference ordering. Obviously, each voter who poses the question poses a different question than the other voters pose, because each references his or her own preference-ordering. For analogous reasons, which answers are the true, or correct, answers to their person-relative questions will differ from voter to voter. For example, the answer "candidate C would be better" might be true for one voter while "candidate C* would be better" might be true for another voter.[98]

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[97] Ties are ignored in the interest of simplicity.

[98] Since the truth value of these types of statements depends on the ensuing outcome-sets that transpire, which in turn depend on actions taken by the

We now ask how an individual voter's choice of a candidate affects that voter's goal satisfaction, and, more generally, how the choices of the many voters affect the welfare—or "success"—of the electorate as a whole. Relatedly, we ask how the larger electorate's success in selecting the "correct" candidates—"correct" from their point of view—bears on the *democratic* "quality" of the political transaction.

We can call the answer to such a question "Core Voter Knowledge."[99] The term "knowledge" is used here in a weak sense in which it means simply "true belief" (whether or not the belief is justified). Thus, if voter V believes that the proposition "Jones is the best candidate [for me]," then this belief will be true as long as Jones would indeed generate an outcome-set that is superior to that of the other candidate (as judged by V's preference ordering). Of course, merely guessing will not reliably generate a high proportion of accurate Core Voter Beliefs. But

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winning candidate plus actions taken by other political (and non-political) "players," one might wonder whether there is any robust truth of the matter at the time that a voter casts his or her ballot. However, we are presupposing a deterministic framework which presumes that (given a specific set of electoral votes, etc.) there will be a very complex set of ensuing events that fix a determinate truth value (given the preference orderings of the voter in question).

[99] GOLDMAN, *supra* note 95, at 323.

well-formed background beliefs may succeed in promoting a high percentage of Core Voter Knowledge.[100]

Now let us return to the case of Arnold and the anti-Hillary Clinton ad on Facebook, falsely claiming that Clinton had FBI agents killed. Let us say that Arnold and many others read the posted ad and believe its contents.[101] They therefore revise their beliefs about the value of the outcome-set that would result from Clinton's being elected compared with the value of the outcome-set of Trump being elected. In the language of our model, these revised beliefs impact their Core Voter Knowledge––their beliefs about which candidate will bring about a better outcome-set, by their own lights.

With these changes of belief, those voters now favor Trump over Clinton and vote accordingly, changing their answer to the Core Voter Question. Hence, many of these voters (including Arnold) cast their votes for Trump, where those votes

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[100] *Id.* at 325.

[101] We will address whether this assumption is reasonable in Section V, where we offer three reasons to believe that enough voters will believe false campaign speech to undermine the integrity of the election process. See, infra, sec. V.

are actually inaccurate assessments of the comparative merits (or demerits) of what would ensue if Trump were elected (as compared with what would ensue if Clinton were elected), a decrease in Core Voter Knowledge.[102]

Turning to the real world now—which is not far removed from the world we have been describing—there is ample evidence from Special Counsel Robert Mueller's inquiry that massive disinformation campaigns occurred and that the disinformation may have swung the result of the 2016 Presidential election.[103] While it is difficult to say in such a complex system if those campaigns actually turned this election, it is easier to determine that there is good reason for us, and *for fellow voters*, to believe this decrease in Core Voter Knowledge impacted the integrity of the election results. This pervasive disinformation gives citizens reason to doubt themselves as genuine coauthors of their government, which is to say they have reason to doubt the legitimacy of the election results.[104]

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[102] Goldman, *supra* note 95, at 328.
[103] *See generally* KATHLEEN HALL JAMIESON, CYBERWAR (2018); ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, VOL. I (2019).
[104] *See* Post, *supra* note 58, at 17.

Many citizens would say that this doubt has indeed been a "loss" or a "harm" suffered by American democracy, even setting aside the anti-democratic inclinations of the Trump administration. An ill-gotten win, or even the perception of such a win, is a defeat for democracy because it undermines the result's status as the collective will of the democratic process. Although not identical to one in which an election has been manipulated directly through a corrupt process, a similar doubt is produced when citizens cannot trust that their own vote or their fellow citizens' votes are free from systematic distortion.

The medium by which our hypothetical Arnold was attacked shares with its real counterpart the same pathway to influence: *disinformation*. Disinformation is false information that is intended to mislead the hearer, as opposed to misinformation, which is merely false.[105] We have just argued that disinformation, when directed to voters, can harm a democracy by undermining the real or perceived legitimacy of its institutions. Our central question then is whether this harm to

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[105] *Disinformation*, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1991).

legitimacy is serious enough to be met by government action to deter such disinformation.

Thus far, there seems to be no movement within the federal government or judicial system to enact or prepare for such a step. But there are signs that ordinary people, and players engaged in various sectors of the media, sense the need and appropriateness of taking action. In July 2018, Facebook announced that it would begin removing false information that could lead to people being physically harmed.[106] This was largely a response to episodes in Sri Lanka, Myanmar, and India, in which rumors that spread on Facebook led to real world attacks on ethnic minorities.[107] To be sure, physical harm is not the same as electoral harm, but many American citizens would say that the political harm suffered also rises to a sufficient degree that action is warranted. We should not forget that more than a dozen American states have adopted statutes that allow for actions to be taken against false campaign speech.[108]

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[106] Sheera Frenkel, *Facebook to Remove Misinformation That Leads to Violence*, N.Y. TIMES (July 18, 2018), https://www.nytimes.com/2018/07/18/technology/facebook-to-remove-misinformation-that-leads-to-violence.html.
[107] *Id.*
[108] *See*, *supra*, n. 23.

The focus then turns to the Supreme Court, which ultimately must uphold these statutes under the First Amendment if they are to be enforced. Are there any grounds to interpret such a regulation as fitting the purpose of the First Amendment? We must ask whether there are any grounds to interpret such a regulation as fitting the purpose of the First Amendment.

IV. FALSE CAMPAIGN SPEECH AND THE CONSTITUTION

The stakes are high when a democracy moves to regulate false campaign speech. On one hand, "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[109] On the other hand, concerns about political legitimacy are at their most poignant when they impact the vote, the mechanism through which voters exert democratic voice. The importance of these democratic ends has been acknowledged by the Court as limiting the protection of the First Amendment. "That speech is used as a tool for political ends does not automatically bring it under the protective mantle

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[109] Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government . . ."[110] The question then is how to reconcile these competing aims—protection of the value of free speech during a campaign against the harm that a known lie or falsehood can do to the legitimacy and premises of democratic government.

"[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[111] This demands that content-based restrictions—where regulation of false campaign speech is a content-based restriction—are "presumed invalid" so that the "Government bears the burden of showing their constitutionality."[112] Presumptive invalidity follows the tradition of broad First Amendment protections against content based regulation absent specific categories of lesser protections established by the Court, such as incitement,

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[110] Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
[111] Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002) (internal quotations omitted) (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 65 (1983)).
[112] Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 660 (2004).

obscenity, defamation, "fighting words," child pornography, fraud, true threats, and imminent threats.[113]

A. False Statements and United States v. Alvarez

Any consideration of laws regulating false campaign speech and fake news must consider carefully the recent case *United States v. Alvarez*.[114] In *Alvarez*, the respondent appealed his conviction under the Stolen Valor Act,[115] which made it a crime to falsely claim receipt of military medals, with an enhanced penalty for false claiming the Congressional Medal of Honor, as Alvarez had claimed.[116] *Alvarez* is particularly pertinent to our inquiry because it was a content-based regulation of false speech, where the respondent told an intended, undisputed lie regarding his service history.

Citing numerous precedential cases suggesting that false statements have no value and hence no First Amendment protection, the Government argued that the Stolen Valor Act

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[113] *See*, *supra*, n. 30–34.
[114] 567 U.S. 709 (2012).
[115] 18 U.S.C. § 704 (2018).
[116] *Alvarez*, 567 U.S. at 714.

should be upheld.[117] For instance, the Court has stated that "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas. . . ."[118] Furthermore, false statements "are not protected by the First Amendment in the same manner as truthful statements."[119] "Spreading false information in and of itself carries no First Amendment credentials,"[120] and "there is no constitutional value in false statements of fact."[121]

Nonetheless, Justice Kennedy, speaking for a plurality of four Justices with two concurring, rejected the argument that false speech should be in a general category that is presumptively unprotected.[122] Kennedy identified three features that speak against a falsehood as a category. First, each precedent case featured a "legally cognizable harm"[123] associated with the false statement. While falsity was not irrelevant to those decisions, it did not support a categorical rule that false statements receive no

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[117] *Id.* at 709.
[118] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).
[119] Brown v. Hartlage, 456 U.S. 45, 60 (1982).
[120] Herbert v. Lando, 441 U.S. 153, 171 (1979).
[121] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).
[122] *Alvarez*, 567 U.S. at 722.
[123] *Id.* at 719.

First Amendment protection.[124] Second, following *New York Times Co. v. Sullivan*,[125] the "Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood."[126] Thus, a high mens rea standard of "actual malice," entailing knowledge or reckless disregard, must accompany a false statement.[127] Third, the statute must be narrowly tailored to a legitimate government interest.[128] The Stolen Valor Act was not sufficiently narrowly tailored to meet this standard.[129]

These restrictions reflect Kennedy's application of a strict scrutiny standard. In his concurrence, Justice Breyer joins with the plurality's invalidation of the Stolen Valor Act, but does so under a lower level of intermediate scrutiny.[130] This disagreement leaves some window of uncertainty as to the level of scrutiny that should apply to a regulation of false campaign

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[124] *Id.* at 719.
[125] 376 U.S. 254 (1964).
[126] *Alvarez*, 567 U.S. at 719 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).
[127] *Sullivan*, 376 U.S. at 270–80.
[128] *Alvarez*, 567 U.S. at 725.
[129] *Id.* at 728–29.
[130] *Id.* at 730 (Breyer, J., concurring).

speech. In *281 Care Comm. v. Arneson*,[131] the Eighth Circuit applied *Alvarez* to review the Minnesota Fair Campaign Practices Act[132]—a statute banning false campaign speech[133]—and applied a strict scrutiny standard, ruling that Breyer's intermediate scrutiny would not apply to a statute banning false campaign speech.[134] Because political speech occupies the core of the protection of the First Amendment, whereas *Alvarez* applied only to false, non-political speech, strict scrutiny was the appropriate standard.[135] While this issue remains contestable, we will proceed assuming strict scrutiny will apply.

While *Alvarez* did not rule directly on false campaign speech, numerous commentators have argued that it puts those statutes in constitutional peril. "The result of Alvarez is that laws regulating false campaign speech are in even more constitutional trouble than they were before, and any attempts to regulate such speech will have to be narrow, targeted, and careful in their

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[131] 766 F.3d 774 (8th Cir. 2014).
[132] MINN. STAT. § 211B.06 (2018), *invalidated by* 281 Care Comm. v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014).
[133] *See* Lieffring, *supra* note 23, at 1059.
[134] *Arneson*, 766 F.3d at 784.
[135] *See* Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 680 (2017).

choice of remedies."[136] These concerns reflect the difficulty of meeting the strict scrutiny standard presumably applied to false campaign speech in a political election.

B. Legally Cognizable Harm

Alvarez presents a difficulty for false campaign speech laws because it disallows the identification of false speech as a category for less protection. The plurality distinguishes precedent cases indicating lesser protection for false statements because they featured "some other legally cognizable harm associated with a false statement."[137] It is important here to carefully consider the examples used to establish this distinction. One form of false speech that can unquestionably be regulated is perjury. In distinguishing, Kennedy states,

> It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony 'is at war with justice' because it can cause a court to render a 'judgment not resting on truth.' *In re Michael*, 326 U.S. 224, 227 (1945). Perjury undermines the function and

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[136] Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 56 (2013). *See also* Lieffring, *supra* note 23, at 1061, 1076; Timmer, *supra* note 130, at 681–82.
[137] *Alvarez*, 567 U.S. at 719.

> province of the law and threatens the integrity of judgments that are the basis of the legal system.[138]

The legally cognizable harm present in perjury but lacking in *Alvarez* is that perjury *undermines the function of the law* and *threatens the integrity* of the institution. This is precisely the type of concern we identified in Section III, where we argued that disinformation undermines the function of elections in legitimating the government and threatens the integrity of the electoral institution. If such a harm is cognizable in perjury, then it must also be cognizable in false campaign speech.

Similarly, the plurality finds that statutes banning false representation of oneself as speaking on behalf of the government to "protect the integrity of Government processes, quite apart from merely restricting false speech."[139] Such statutes protect the good repute and dignity of government service, setting aside whatever financial or property loss may result.[140] Again, this example shows that mere falsity is being distinguished from cases where the false speech undermines the function and integrity of the process. Where false campaign

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[138] *Id.* at 720–21 (citing United States v. Dunnigan, 507 U.S. 87, 97 (1993)).
[139] *Id.* at 721.
[140] United States v. Lepowitch, 318 U.S. 702, 704 (1943).

speech and disinformation undermine the electoral process, the distinction in *Alvarez* does not speak against it.

C. Actual Malice

A second challenge is to show that false campaign speech exhibits "actual malice," a standard that has limited action on false claims since *New York Times Co. v. Sullivan* in 1964.[141] Recognizing that incorrect statements are inevitable in a healthy political debate, *Sullivan* protects some false speech to carve out "breathing space" for political discourse to survive.[142] Thus, to bring a libel action against critics of a public official, it must be demonstrated that the critic exhibited "actual malice," with knowledge that the statement is false or with reckless disregard to its falsity.[143] Any lesser standard would have a chilling effect on protected speech because would-be critics would fear the expense and difficulty of demonstrating the truth of the criticism.[144]

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[141] 376 U.S. 254 (1964).
[142] *Id.* at 271–72.
[143] *Id.* at 279–80; Lee Goldman, *False Campaign Advertising and the Actual Malice Standard*, 82 TUL. L. REV. 889, 900 (2008).
[144] *Sullivan*, 376 U.S. at 279.

The actual malice standard, extended to false campaign speech in dicta in *Brown v. Hartlage*, is an exacting standard.[145] It is not enough to show ill will, gross negligence, or reliance on biased testimony.[146] Rather, it must be shown that the defendant made a false statement with a "high degree of awareness of . . . probable falsity."[147] This standard presents a serious evidentiary burden on any prosecutor seeking to convict under a false campaign speech statute.

Some doubt remains that the actual malice standard will be extended to false campaign speech. Lee Goldman argues that *Brown* is weak precedent that does not reflect subsequent reasoning of the Court. Where in *Brown*, the Court recognized the State's interest in regulating the electoral process as "legitimate," recent cases have taken a stronger position.[148] In *McConnell v. FEC*, the Court stated, "the electoral process is the very 'means through which a free society democratically translates political speech into concrete governmental

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[145] 456 U.S. 45, 61 (1982); Goldman, *supra* note 138, at 902–04.
[146] Goldman, *supra* note 138, at 905.
[147] St. Amant v. Thompson, 390 U.S. 727, 731 (1968).
[148] Goldman, *supra* note 138, at 907.

action.'"[149] Under this more significant constitutional interest, there is "no place for a strong presumption against constitutionality, of the sort often thought to accompany the words 'strict scrutiny.'"[150] Goldman argues instead that a balancing standard is more appropriate, which would be accompanied by a lower mens rea standard.[151] We flag this argument here, though our position remains viable if actual malice is applied.

D. Narrow Tailoring

The level of scrutiny determines the extent that regulations must be tailored to meet a compelling government interest. The intermediate scrutiny contemplated by the concurrence in *Alvarez* requires a "fit between statutory ends and means."[152] This level of scrutiny takes "account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's

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[149] 540 U.S. 93, 137 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).
[150] *Id.*
[151] Goldman, *supra* note 138, at 907–09.
[152] United States v. Alvarez, 567 U.S. 709, 730 (2012) (Breyer, J., concurring).

countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so."[153] In contrast, strict scrutiny "requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[154] Each of these standards shares the element of a compelling government interest, with the distinction being how narrowly the regulations must be tailored to achieve that interest.

The outline of a compelling interest in electoral integrity has been recognized by the Court.[155] In *Eu v. San Francisco Democratic Central Committee*, the Court found "a compelling interest in preserving the integrity of its election process."[156] In *Crawford v. Marion Cnty. Election Bd.*, the Court found an independent interest in "public confidence in the integrity of the electoral process."[157] The Court has also found that an interest in preventing fraud and libel "carries special weight during election campaigns when false statements, if credited, may have serious

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[153] *Id.*
[154] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).
[155] Timmer, *supra* note 130, at 680.
[156] 489 U.S. at 231.
[157] 553 U.S. 181, 197 (2008).

adverse consequences for the public at large."[158] Citing *Eu*, the Court concluded, "a State has a compelling interest in protecting voters from confusion and undue influence."[159]

This compelling interest is not enough on its own. For a regulation of false campaign speech to survive strict scrutiny, the government must show that the restriction is "actually necessary" to achieve this compelling government interest.[160] Actual necessity requires the government to demonstrate three things. First, there must be a "direct causal link between the restriction imposed and the injury to be prevented."[161] Overturning the Stolen Valor Act, the Court noted that the government pointed to "no evidence" to establish this causal connection.[162] Second, it must show why "counterspeech would not suffice to achieve its interest."[163] Third, it must show that

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[158] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 349 (1995).
[159] Burson v. Freeman, 504 U.S. 191, 199 (1992) (citing Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S 214, 228–29 (1989)).
[160] United States v. Alvarez, 567 U.S. 709, 725 (2012) (quoting Brown v. Entm't Merchs. Ass'n., 564 U.S. 786, 799 (2011)).
[161] *Id.*
[162] *Id.* at 726.
[163] *Id.*

regulating speech is "the least restrictive means among available, effective alternatives."[164]

We will not offer exact language for a statute regulating false campaign speech to meet the strict demands of narrow tailoring. We will have to leave that task for a later day and authors with more expertise in constitutional law.[165] We can, however, offer evidence to demonstrate a causal connection between false campaign speech and harm to electoral integrity, the compelling government interest at hand. This, we hope, will provide defenders of statutes regulating false campaign speech with one arrow in their quiver to make the case.

Before turning to that argument, we will provide an overview of the state of the law, as we understand it. We began emphasizing that the Court interprets the First Amendment in its "fullest and most urgent application" when considering speech in the course of a political election. This urgency has led the Court to look on regulation of false speech with a great deal of skepticism, and this skepticism shines through when we see how

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[164] *Id.* at 729 (quoting *Ashcroft*, 535 U.S. at 666).
[165] *See generally* Lieffring, *supra* note 23, at 1070-76 (offering one analysis of the steps necessary for a statute to meet narrow tailoring).

strictly it scrutinizes any regulation of false speech. *Alvarez* makes clear that false speech alone will not be recognized as a category of speech deserving lesser protection, but regulation of false campaign speech is not only about falsity. False campaign speech threatens the integrity of the election process and the perception thereof, both of which have been acknowledged by the Court as legitimate government interests. Neither of these interests was at stake in *Alvarez*.[166] Nonetheless, it is still reasonably likely that the Court will impose strict scrutiny on laws regulating false campaign speech, which requires a showing of cognizable harm, actual malice, and narrow tailoring. Given the skepticism of the Court, this is a tough case on all counts, but we hope to demonstrate that a cognizable harm to a legitimate government interest occurs in the presence of false campaign speech, an important step toward defending regulation.

V. FAKE NEWS UNDERMINES DEMOCRATIC COMPETENCE

Our task in Section V is to provide evidence that regulation of fake news and false campaign speech is "actually

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[166] *See supra* Section IV.A.

necessary" to meet the compelling government interest recognized in *Eu* of preserving the integrity of the election process. Recall from *Alvarez* that the government must show three things to demonstrate that a regulation of speech is "actually necessary" to achieve a compelling government interest.[167] First, there must be a direct causal link between the restriction on speech and the injury to be prevented. Second, the government must show that counter-speech would not suffice to achieve the interest. Third, regulating speech must be the least restrictive means to prevent injury to the compelling interest.[168]

A. A Direct Causal Link

In Section III, we introduced a framework where a voter, Arnold, hears a piece of fake news and changes his vote on that basis, and we argued that such a result should be seen as a harm to democracy.[169] For the sake of demonstration, we postulated without argument that Arnold was influenced by a particular piece of fake news. Here, we ask whether there is good reason to

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[167] United States v. Alvarez, 567 U.S. 709, 725 (2012) (quoting Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799 (2011)).
[168] *Id.* at 729 (quoting Ashcroft v. Am. Civil Liberties Union, 535 U.S. 656, 666 (2004)).
[169] *See supra* Section III.

believe that sufficient voters will in fact land in Arnold's position, influenced by false campaign speech to alter their vote. This would establish the causal link between false campaign speech and a harm to electoral integrity. There are three reasons why we might believe that voters will believe false statements of fact when they are offered in the context of a campaign.

Since Scottish philosopher Thomas Reid offered reliance on the testimony of others as a first principle in his studies of human knowledge, philosophers have recognized that reliance on others is a natural human propensity.[170] Acceptance of testimony is fundamental because it necessarily predates reason and judgment. A child would perish for lack of knowledge if he did not have a natural predisposition to believe in the truth of his teacher's statements.

Modern philosophers have added to this natural propensity to argue that it is justified to grant prima facie authority to others. As Tyler Burge argues, "Acceptance underlies language acquisition. Lacking language, one could not

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[170] THOMAS REID, ESSAYS ON THE INTELLECTUAL POWERS OF MAN 601 (1785).

engage in rational, deliberative activity, much less the primary forms of human social cooperation."[171] Because reliance underlies rationality and judgment, and since we must trust the veracity of our own judgment to avoid radical skepticism, we are required as a matter of consistency to grant prima facie authority to the word and testimony of others.[172] In short, it is natural and justified to believe the word of others absent good reason not to do so.

Prima facie or fundamental authority can be overridden by contrary factors, such as evidence about the trustworthiness of the speaker, which we will address shortly.[173] However, the fundamental role that reliance plays in human reason gives us reason to believe that people will continue to trust testimony. Reid wisely observes this continuing tendency to trust others:

> But when our faculties ripen, we find reason to check that propensity to yield to testimony and to authority, which was so necessary and so natural in the first period of life. . . . Yet, I believe, to the

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[171] Tyler Burge, *Content Preservation*, 102 PHIL. REV. 457, 468 (1993).
[172] Richard Foley, *Egoism in Epistemology*, SOCIALIZING EPISTEMOLOGY: THE SOCIAL DIMENSIONS OF KNOWLEDGE 53, 63 (Frederick F. Schmitt ed., 1994).
[173] *See generally* Burge, *supra* note 166, at 467 ("Justification in acquiring beliefs from others may be glossed, to a first approximation, by this principle: A person is entitled to accept as true something that is presented as true and that is intelligible to him, unless there are stronger reasons not to do so.") (emphasis omitted).

> end of life, most men are more apt to go into this extreme than into the contrary; and the natural propensity still retains some force.[174]

The second reason we may expect voters to be influenced by false campaign speech is that the speaker frequently has more information than the voter. Whereas the first reason argued that voters are predisposed and justified to grant fundamental authority to testimony, this reason argues that they have good reason to grant derivative authority to others. Derivative authority follows from reasons to consider the speaker reliable.[175] The information imbalance between a voter who has little time to inform herself on politics and the political or media speaker is often profound. This imbalance gives the voter reason to trust the veracity of a piece of false campaign speech.

For a skeptical reader, the first two reasons may be unconvincing. Surely, voters must know that political operatives have built-in incentives to deceive, and these incentives should cause voters to doubt the fundamental and derivative authority entailed by the first two reasons. Expecting voters to take an

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[174] REID, *supra* note 165, at 601.
[175] Foley, *supra* note 167, at 55.

unbiased and dispassionate view of the evidence surrounding a piece of fake news or false campaign speech would ignore a whole literature suggesting that voters view evidence through the prism of their preexisting ideological affiliation.

As shown in the seminal study by Lord, Ross, and Lepper, people tend to take evidence that confirms their prior beliefs at face value, while subjecting evidence that disconfirms prior beliefs to intense critical evaluation.[176] This result was extended by Ditto and Lopez, who found that less information is required and less cognitive processing is devoted to reach conclusions that we favor as opposed to conclusions we disfavor.[177] This lack of skepticism for confirming evidence is not a consequence of the intelligence of the listener. In fact, some evidence suggests that more intelligent listeners marshal that intelligence to craft better explanations for the positions they

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[176] Charles G. Lord, Lee Ross, & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).
[177] Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 579 (1992).

otherwise desire to believe.[178] A product of these effects is that balanced information increases polarization along political lines.

Recent work indicates that the impact of party identity is growing, such that party identity is as strong a predictor of discriminatory feelings as race.[179] Stanford University political scientist Shanto Iyengar describes these effects on the tendency to believe fake news: "If I'm a rabid Trump voter and I don't know much about public affairs, and I see something about some scandal about Hillary Clinton's aides being involved in an assassination attempt, or that story about the pope endorsing Trump, then I'd be inclined to believe it."[180] Where false campaign speech follows prior beliefs or the party beliefs, voters will be inclined to lend credence to it rather than look on it skeptically. An analysis by economists Hunt Allcott and Matthew Gentzkow shows that "Democrats and Republicans

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[178] Russell Golman, David Hagmann & George Loewenstein, *Information Avoidance*, 55 J. ECON. LITERATURE 96, 102 (2017); Dan M. Kahan, et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732, 734 (2012).
[179] Shanto Iyengar & Sean J. Westwood, *Fear and Loathing across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 703–04 (2015).
[180] Amanda Taub, *The Real Story About Fake News Is Partisanship*, N.Y. TIMES (Jan. 11, 2017), https://www.nytimes.com/2017/01/11/upshot/the-real-story-about-fake-news-is-partisanship.html.

are both about 15 percent more likely to believe ideologically aligned headlines."[181]

We argue that these three reasons, (1) a natural tendency to rely on others, (2) an information imbalance between voter and a campaign speaker, and (3) a well-established tendency for voters to accept as true evidence that confirms their ideological beliefs, jointly give justification to believe that many voters will be swayed by claims in fake news. This corresponds with recent analyses that suggest that 75 percent of Americans who see fake news believe it.[182] Therefore, fake news and false campaign speech are causally linked to a cognizable harm to the integrity of the election process. Following the framework laid out in Section III, we argue that fake news and false campaign speech gives voters reason to doubt that elections represent the coauthorship of the people, thereby undermining democratic legitimacy.

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[181] Alcott & Gentzkow, *supra* note 22, at 213.
[182] Craig Silverman & Jeremy Singer-Vine, *Most Americans Who See Fake News Believe It, New Survey Says*, BUZZFEED NEWS (Dec. 6, 2016), https://www.buzzfeednews.com/article/craigsilverman/fake-news-survey (last visited Sept. 30, 2019).

Of course, in a cacophonous election campaign, it would be impossible in only the most unusual circumstances to show that a campaign statement or fake news item exactly caused the election result to flip, or for voters to lose faith in the legitimacy of the election results. It is impossible to isolate a counterfactual. This will always leave room for a dogmatic interlocutor to deny the evidence of a causal link. We submit that these reasons jointly give strong evidence of a causal link.

B. Counterspeech Would Not Suffice

The second requirement in showing "actual necessity" echoes Justice Brandeis's famous concurrence in *Whitney v. California*.[183] "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[184] The influence of this dictum has created a presumption in favor of solving speech harms through more speech where possible, rather than a restriction of speech. *Alvarez* embeds that presumption in the standard to meet "actual

[183] Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring).
[184] *Id.* at 377.

necessity" by requiring the government to show that more speech could not solve the specific issue.[185]

Legal scholar Tim Wu has convincingly argued against more speech as a solution to modern harms surrounding fake news.[186] The Brandeis solution assumes a world in which listeners are under conditions of informational scarcity. In an environment of informational scarcity, listeners are assumed to have the time and interest necessary to consume available information, and censorship—especially by the government—is the relevant factor for keeping ideas away from the public.[187] Wu argues that these conditions no longer apply in a digital age where fake news has become increasingly prevalent.[188] Listeners now have more information than they could possibly consume, and it is not the information that is scarce, but rather the attention of listeners.[189]

Recent research demonstrates that the problem is even deeper than Wu may suggest. After investigating 126,000

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[185] United States v. Alvarez, 567 U.S. 709, 725-26 (2012).
[186] Tim Wu, *Is the First Amendment Obsolete?* (Colum. Pub. L., Research Paper No. 14-573, 2017), https://ssrn.com/abstract=3096337.
[187] *Id.* at 6.
[188] *Id.*
[189] *Id.* at 7.

verified true and false stories tweeted more than 4.5 million times by approximately 3 million people, researchers Soroush Vosoughi, Deb Roy, and Sinan Aral found that false political rumors "diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information."[190] Psychological research demonstrates that hostile rumors are shared to (1) coordinate attention and action against the target group and (2) signal willingness to engage in conflict escalation.[191] Under these conditions, the sharer is less concerned with the truth value of the rumor, and the hostile rumor is akin to a rallying cry.[192] In a political context, psychologists Michael Bang Petersen, Mathias Osmundsen, and Kevin Arceneaux show that political rumors are motivated by a desire to show chaos and tear down the political system as such, rather than to help one particular candidate.[193]

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[190] Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146, 1147 (2018).
[191] Michael Bang Petersen, Mathias Osmundsen & Kevin Arceneaux, A "Need for Chaos" and the Sharing of Hostile Political Rumors in Advanced Democracies 4 (Sept. 1, 2018) (unpublished manuscript) (on file with authors), https://psyarxiv.com/6m4ts/ (last visited Sept. 30, 2019).
[192] *Id.*
[193] *Id.* at 30–31.

Under these conditions, it is more effective for those seeking to censor sound criticism to flood the environment with false or misleading speech in sufficient volume to drown out the offensive criticism and undermine confidence in the system. This flooding has the effect of distracting the public and changing the subject rather than silencing the opposition. Even the Chinese and Russian governments have moved toward flooding tactics.[194] The Chinese government fabricates an estimated 448 million social media comments each year.[195] To argue that more speech would solve the harms to election integrity associated with fake news and false campaign speech is to misunderstand the speech environment in which they arise.

C. Regulating speech is the least restrictive means

The third requirement to show "actual necessity" is that other, less restrictive, means could not be used to address the legitimate interest.[196] The possibility of less restrictive means is also undermined by Wu's argument cited above. Where fake

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[194] Wu, *supra* note 182, at 15.
[195] Gary King, Jennifer Pan & Margaret E. Roberts, *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument*, 111 AM. POL. SCI. REV. 484, 484 (2017).
[196] United States v. Alvarez, 567 U.S. 709, 729 (2012) (citing Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 666 (2004)).

news and false campaign speech are generated to garner attention in a saturated market, silencing that speech *is* the least restrictive means to address the threat to election integrity. Other means to mitigate this effect might task the government with directly vetting information or establishing a bureau of information. These would be more restrictive means than the regulation of campaign speech that we have addressed here.

It is worth noting that some features of our argument make it less susceptible to government abuse than other measures that may protect electoral integrity. By linking false campaign speech and fake news to the integrity of the election process, we are not asking the government or the courts to directly determine where and when one particular election may have been swayed by one particular piece of false campaign speech. We argue that the government has a legitimate interest in regulating false campaign speech because it has a tendency to harm democratic competence and democratic legitimation. False campaign speech harms democratic competence by making it less likely that elections reflect the informed will of the people. It harms democratic legitimation by undermining the

faith that citizens should have that the electoral results represent informed co-authorship.

Under this framing, we are asking courts to evaluate the veracity of factual statements and to apply a mens rea standard of actual malice, two judgments that should be justiciable in a court of law. We are not asking courts to regulate opinions or adjudicate "reasonable" claims, such as judgments that would put courts in a position fraught with potential for politically motivated abuse. Instead, we argue that this understanding of the constitutional role of regulation of false campaign speech does not leave the law open to unmanageable abuse.

Interpreted in the proper way, we submit that regulation of false campaign speech can and should be seen as "actually necessary" under the First Amendment. This interpretation would meet the goals of democratic competence and democratic legitimation underlying a compelling government interest in electoral integrity. As we noted in Section IV, we do not see our role as providing exact language that can pass constitutional muster, but with sufficiently careful crafting, regulation of false campaign speech should fit into a modern interpretation of the First Amendment. To meet the challenges of running a

successful democracy in the digital age, our constitutional protections must reflect a modern understanding of electoral tactics.

VI. CONCLUSORY REMARKS AND STEPS FORWARD

We have approached the issue of fake news in democracy through the lens of state statutes barring false campaign speech—statutes whose constitutionality has been further thrown into doubt by the recent case *United States v. Alvarez*.[197] While *Alvarez* established that false speech is not a category deserving of lower First Amendment protection, we have argued that false campaign speech is not merely false speech, but also imperils a compelling interest in electoral integrity. In this way, false campaign speech is more closely analogous to laws barring perjury than a law barring lies about the Medal of Honor.

We do not argue for regulation of false campaign speech from the perspective of skeptics in the value of free speech or free press. Rather, we see regulation of fake news in the modern environment as consonant with traditional interests of strong

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[197] *Alvarez*, 567 U.S. 709.

advocates of free speech. The compelling interest in question – preserving the integrity of the election process – has been acknowledged by a Court fiercely protective of free political expression. Protecting this interest makes possible democratic self-government in exactly the way that fierce defenders of First Amendment protections since Meiklejohn have advocated.[198] In particular, we follow Post in emphasizing the importance that speech regulation can have in securing democratic competence for the purposes of ensuring that voters see the results of an election as the legitimate co-authorship of the people.[199]

In grounding our argument in the democratic interests underlying the First Amendment, we hope to sketch a path for regulation of fake news beyond the false campaign speech laws addressed here. In a modern information environment, a future Joseph McCarthy will not suppress dissent through direct censorship of speech,[200] but instead by flooding the environment with false speech to confuse the issue and "troll" armies to intimidate the speaker. We join Wu in arguing that First

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[198] Meiklejohn, *supra* note 72.
[199] Post, *supra* note 58, at 95–96.
[200] *See generally* Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387 (2005).

Amendment law must adapt to this environment to protect the important interests underlying free speech or risk being rendered obsolete.[201]

Democracy loses in the presence of fake news. It loses in the competence of its elections and in the ability of its people to see its elections as the result of honest and informed deliberation of the citizens. To address this loss, we must move beyond the sloganeering that advocates free speech values only through unreflective, blanket protection of all political speech. Moreover, a dogmatic adherence to the Brandeis solution of "more speech" must confront modern evidence that there is often little reason to believe that more speech can prevent harms to electoral integrity. There are, of course, possibilities for abuse in specific formulations, but we express our value for free speech and robust public deliberation, not by shrinking from these debates into dogmatic principles, but by weighing the values carefully and reaching reasonable regulations.

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[201] Wu, *supra* note 182, at 17–19.