

William & Mary Law Review

VOLUME 62

No. 2, 2020

FREE SPEECH, RATIONAL DELIBERATION, AND SOME TRUTHS ABOUT LIES

ALAN K. CHEN*

ABSTRACT

Could “fake news” have First Amendment value? This claim would seem to be almost frivolous given the potential for fake news to undermine two core functions of the freedom of speech—promoting democracy and facilitating the search for “truth,” as well as the corollary that to be valuable, speech must promote rational deliberation. Some would therefore claim that fake news should be classified as “no value” speech falling outside of the First Amendment’s reach. This Article argues somewhat counterintuitively that fake news has

* Professor of Law, University of Denver Sturm College of Law. I owe many thanks for the helpful comments and suggestions made by participants at workshop presentations of an earlier draft of this Article at Stanford Law School, the 2018 Yale Freedom of Expression Scholars Conference, and the CU/DU First Amendment Scholars Workshop, including Enrique Armijo, Rebecca Aviel, Jack Balkin, Derek Bambauer, Arthur Best, Ashutosh Bhagwat, Joseph Blocher, Vince Blasi, Clay Calvert, Caroline Mala Corbin, Sarah Haan, RonNell Andersen Jones, Sam Kamin, Heidi Kitrosser, Kate Klonick, Tamara Kuennen, Genevieve Lakier, Jonathan Manes, Justin Marceau, Seth Masket, Viva Moffat, David Pozen, Derigan Silver, Alexander Tsesis, Helen Norton, Scott Skinner-Thompson, Sidney Tarrow, James Weinstein, and Sonja West. I also greatly benefitted from outstanding research support from Diane Burkhart, Molly Kokesh, Laura Martinez, and Jennifer Regier.

value because speech doctrine should not be focused exclusively on the promotion of rational deliberation, but should also limit the state's ability to control the way we emotionally experience ideas, beliefs, and even facts. It claims that like art, music, religious expression, and other forms of human communication that do not facilitate rational deliberation in their audiences, fake news can promote a form of expressive experiential autonomy. It can allow individuals to experience individual self-realization and identity formation and also form cultural connections with like-minded people, advancing social cohesion. Drawing on First Amendment theory and on the fields of cognitive and social psychology and political science, this Article views consumers of fake news not simply as uninformed, gullible rubes, but as individuals seeking simultaneously to distinguish themselves through individualization or self-identification and to connect themselves through group association with a community of people with whom they share values. Understood in this way, this inquiry illustrates why the rational deliberation principle is incomplete because it does not explain much of what we ought to recognize as "speech." This more nuanced understanding of the way that fake news connects with much of its audience has implications for free speech theory, First Amendment doctrine, and policy-making options for addressing the potential harms of fake news. To be clear, this Article is not a defense of fake news or those who intentionally attempt to influence others' behavior by spreading false facts disguised as legitimate news. Thus, this Article concludes by explaining that while fake news should always be covered by the First Amendment, it should not always be protected.

TABLE OF CONTENTS

INTRODUCTION	360
I. THE “FAKE NEWS” PHENOMENON	366
A. <i>Defining Fake News</i>	366
B. <i>A Brief Chronology of Fake News</i>	368
C. <i>Anticipating Free Speech Concerns with Preliminary Attempts to Regulate Fake News</i>	376
II. FAKE NEWS, RATIONAL DELIBERATION, AND FIRST AMENDMENT COVERAGE	383
A. <i>Arguments Against First Amendment Coverage of Fake News</i>	383
B. <i>The Role of Rational Deliberation in Free Speech Theory</i>	391
III. THE POTENTIAL SPEECH VALUE OF FAKE NEWS.	394
A. <i>The Limits of Rational Deliberation as a Speech Principle</i>	395
B. <i>Fake News May Promote Self-Realization by Facilitating Expressive Experiential Autonomy</i>	402
C. <i>Fake News May Promote Social Cohesion</i>	411
IV. LIMITATIONS AND HOPES.	417
A. <i>Limitations</i>	417
B. <i>Noncensorship Proposals</i>	421
1. <i>Counterspeech</i>	421
2. <i>Technological and Platform-Based Solutions</i>	425
3. <i>Structural Changes to the Information Environment</i>	427
CONCLUSION	429

INTRODUCTION

Senator Daniel Patrick Moynihan famously once said, “Everyone is entitled to his own opinion but not to his own facts.”¹ This Article examines the extent to which the second half of this iconic bit of wisdom is valid. That is, it explores whether there are ways in which even so-called fake news may have some First Amendment value, particularly to its listeners, in ways that have previously gone unrecognized. If such mistruths do have some value, this has important theoretical, doctrinal, and policy implications. At the theoretical level, such a claim tests the boundaries of self-realization justifications for classifying types of communication as “speech” and invites comparisons to other forms of expression that might be valued not because they appeal to rational, cognitive processes but to emotional functions and experiences. From the doctrinal perspective, recognition of the possible value of fake news substantially complicates the already difficult constitutional challenges facing the potential regulation of such communication to safeguard our democracy from epistemic harm. And from a policy standpoint, understanding the ways that fake news provides value to some of its consumers could help explain why it is so pervasive and why direct censorship might be counterproductive—crucial perspectives for policymakers trying to study and devise solutions to counteract its negative effects.

The phenomenon of fake news stories in the United States is hardly new, extending back at least as far as the period of the American Revolution.² The possible influence of fake news continues to be salient in the wake of the 2016 U.S. presidential election and the foreground of the 2020 election, not to mention President Trump’s now commonplace invocation of the phrase to assail his critics in the mainstream media.³ Fake news seems to pervade every conceivable topic of public interest, from electoral politics to the

1. Steven R. Wiseman, *Introduction* to DANIEL PATRICK MOYNIHAN, DANIEL PATRICK MOYNIHAN: A PORTRAIT IN LETTERS OF AN AMERICAN VISIONARY 1, 2 (Steven R. Wiseman ed., 2010).

2. *See infra* notes 28-52 and accompanying text.

3. *See infra* notes 53-60 and accompanying text.

COVID-19 pandemic to voter fraud to climate change. Whether the problems associated with fake news are substantially worse now than they have been in the past, because of the emergence of social networking platforms and the inability or unwillingness of internet intermediaries to take control of or responsibility for content,⁴ is debatable.⁵ This Article remains agnostic on that point, which is not central to its analysis.

Despite widespread public outcry over the perceived problems of fake news, and, to a lesser extent, politicians' lies, and the instinctive desire to do "something" about the problem, meaningful regulatory proposals have been, thus far, rare.⁶ One reason for this may be that the First Amendment's Free Speech Clause likely represents a significant barrier to such efforts. State regulation of fake news dissemination would be inherently content-based, and therefore suspect under current doctrine, particularly since the Supreme Court has rejected the proposition that lies are categorically exempt from First Amendment protection.⁷ Although such constitutional protection disappears when the lies cause a legally cognizable harm, there remain numerous constitutional barriers to valid regulations, including concerns about vagueness, overbreadth, the government acting as the gatekeeper of truth, and the potential for weaponization of such laws to interfere with truthful speech.⁸ The focus of this Article, however, is not on such traditional First Amendment claims.

4. See Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1660 (2018) (observing that platforms have not yet played a significant role in determining the truth or falsity of content).

5. Recent studies have shown that the influence of fake news on the 2016 presidential election and other aspects of American politics has been vastly overestimated. See, e.g., Andrew Guess, Brendan Nyhan & Jason Reifler, *Selective Exposure to Misinformation: Evidence from the Consumption of Fake News During the 2016 U.S. Presidential Campaign* (Jan. 8, 2018), <https://www.semanticscholar.org/paper/Selective-exposure-to-misinformation%3A-Evidence-from-Guess-Nyhan/a795b451b3d38ca1d22a6075dbb0be4fc94b4000?p2df> [<https://perma.cc/M36J-EW63>].

6. See *infra* notes 75-84 and accompanying text.

7. See *United States v. Alvarez*, 567 U.S. 709, 721-22 (2012) (plurality opinion).

8. See *id.* at 719; see also *id.* at 734 (Breyer, J., concurring) ("[M]any statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. Those prohibitions, however ... limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims.").

To the general public, and even many academics, the proposition that laws restricting fake news violate the Free Speech Clause must seem absurd. If the constitutional guarantee of free speech means anything, surely it should embrace protection of the integrity of public discourse such that government restraints on verifiably false statements of fact should fall well outside the boundaries of what counts as speech. Thus, another claim supporting the legitimate regulation of fake news would be that, like obscenity,⁹ private defamation,¹⁰ and fighting words,¹¹ fake news is a category of expression that not only has little or no social value but also causes tangible, epistemic harm to society by denigrating or distorting public discourse and undermining democracy.¹² This argument, in turn, relates to a central claim that underlies much First Amendment theory—that speech’s value is primarily connected to its ability to facilitate rational deliberation in its audience, thus advancing the goals of promoting democracy and truth finding. To the extent that fake news undermines rational deliberation, it is seemingly antithetical to those foundational speech objectives and its regulation therefore ought not to be a concern of the First Amendment.

This Article addresses such claims by undertaking a broader inquiry. It uses fake news as a vehicle for exploring the limits of rational deliberation as an organizing principle for free speech law. While it is certainly not the first scholarly work to critically examine the role of rational deliberation under First Amendment law, what it shows is that even the democracy- and truth-promoting rationales for covering speech do not always and should not always rely solely on individuals’ capacity for rational deliberation. At the same time, this does not at all eliminate democracy or truth seeking as justifications for covering and protecting speech. Rather, this exploration of rational deliberation reveals the *incomplete* way that First

9. See *Miller v. California*, 413 U.S. 15, 36 (1973).

10. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985) (plurality opinion); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974).

11. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

12. Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies Under the First Amendment*, 89 U. COLO. L. REV. 655, 664, 677 (2018) (explaining that no-value speech is defined both with relation to the speech’s lack of value and its undisputed harmful effects).

Amendment law conceptualizes how individuals receive and experience different forms of expression.¹³

As a way of testing these ideas, this Article examines how they might be used to think about First Amendment law's application to regulatory responses to the perceived proliferation of fake news through social media platforms. This Article argues somewhat counterintuitively that fake news has social value because while it might not promote rational deliberation—indeed, it might *undermine* rational deliberation—free speech law should not be exclusively focused on the goal of promoting such deliberation. Free speech law should also protect people from government control of the way they emotionally or viscerally experience ideas and beliefs, and maybe even the facts that underlie those thoughts. Furthermore, in many instances, fake news also promotes social cohesion by building a cultural connection among individuals with certain belief systems. Governmental efforts to directly regulate or prohibit fake news thus may paradoxically promote some goals of free speech, while contravening others.

Thus, this Article disputes the premise that fake news has *no* intrinsic value. Rather, this category of speech might be understood to facilitate a type of listener self-realization that I call *expressive experiential autonomy*. Understood in this way, fake news might even be conceptualized in the same way the law understands religious self-realization, which is similarly premised on faith rather than historical fact. In addition, this approach compares consumers of fake news to listeners who value certain forms of nonverbal communication, such as abstract art and instrumental music, not because it promotes rational deliberation but because, like artistic expression, it “serves a community building function ... [and] simultaneously advances an autonomy-promoting function in its facilitation of individualized emotional expression and experience.”¹⁴ Finally, those who value fake news in this way might be communicating their connection not only by how it affects them but also in

13. For earlier work in which I similarly argue against a single, overarching theory justifying the freedom of expression, see MARK V. TUSHNET, ALAN K. CHEN & JOSEPH BLOCHER, *FREE SPEECH BEYOND WORDS: THE SURPRISING REACH OF THE FIRST AMENDMENT* 9 (2017).

14. Alan K. Chen, *Instrumental Music and the First Amendment*, 66 *HASTINGS L.J.* 381, 438 (2015). See generally TUSHNET ET AL., *supra* note 13.

signaling to others that they are part of the same community.¹⁵ Clicking “like” on or retweeting a fake news story on social media is its own powerful form of communication.¹⁶ On this view, fake news can be seen as a vehicle for the development of social cohesion among marginalized groups in our political structure that is based not on objective truths but on a worldview reliant more on faith and self-identification than on tangible reality.

Moreover, seeing fake news through this lens complicates the efforts of reformers even more than traditional First Amendment doctrine. This perspective views consumers of fake news not simply as uninformed, gullible rubes, but as individuals seeking simultaneously to distinguish themselves through individualization or self-identification and to form a group association with a community of people with whom they share values. But this understanding of fake news does not just expand our thinking about free speech; it may also help us to understand why fake news can be so effective. That, in turn, might help policymakers to understand the phenomenon and aid us in thinking about ways to address the conceded social harms caused by the proliferation of fake news.

To be clear, this is not a defense of fake news or those who intentionally attempt to influence others’ behavior by spreading false facts disguised as legitimate news. This Article concedes that fake news may work serious social harms, though perhaps takes a more muted view about the degree of this phenomenon.¹⁷ It also accepts that fake news might undermine rational deliberation in ways that are problematic. In other words, even if this Article persuasively argues that fake news is sufficiently valuable to be covered by the

15. Social media influences how we want to appear to our friends and the outside world. See, e.g., Seth Stephens-Davidowitz, Opinion, *Don't Let Facebook Make You Miserable*, N.Y. TIMES (May 6, 2017), <https://www.nytimes.com/2017/05/06/opinion/sunday/dont-let-facebook-make-you-miserable.html> [<https://perma.cc/F9PC-FWLH>].

16. *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) (“On the most basic level, clicking on the ‘like’ button literally causes to be published the statement that the [u]ser ‘likes’ something, which is itself a substantive statement. In the context of a political campaign’s Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance.”); *Campbell v. Reisch*, No. 2:18-CV-4129-BCW, 2019 WL 3856591, at *4-5 (W.D. Mo. Aug. 16, 2019) (finding plaintiff’s retweet was protected speech), *appeal docketed*, No. 19-2994 (8th Cir. Sept. 16, 2019).

17. See *supra* note 5.

First Amendment, there may be situations in which it is nonetheless not constitutionally *protected*.¹⁸

The exploration of this topic is developed in four parts. Part I begins by providing some definitional criteria for what counts as fake news, then surveys the history of fake news and attempts to address the problems such news creates. It then recounts a few of the fake news stories that were generated during and after the 2016 election cycle and articulates some of the legitimate second- and third-party harms that can result from widespread dissemination of fake news. It goes on to examine potential regulatory responses to fake news and the traditional First Amendment doctrinal barriers to the implementation of state-sponsored reforms. Part II provides an overview of the role of rational deliberation in free speech theory and how it relates to classifying what types of expression count as speech for First Amendment purposes. Because fake news might be said to undermine rational deliberation, this could be a persuasive premise for placing such expression outside the First Amendment's coverage. Part III then develops the claim that fake news, at least in some contexts and for some people, has First Amendment value that should not be completely discounted in evaluating the constitutionality and wisdom of proposed regulations. It suggests that fake news may actually promote *listener autonomy* in important and previously unrecognized ways by advancing salutary and social cohesion interests that enhance individual self-realization. This Part also explores why fake news can be such an effective form of communication, drawing in part on political science and cognitive and social psychology literature to illustrate its self-affirming effects. Finally, Part IV addresses important limitations on this Article's thesis and possible ways of responding to the problematic aspects of fake news while not undermining its potential value. Consistent with much First Amendment doctrine, these ideas include the promotion of more speech (or "counterspeech"), as well as legal and technological mechanisms that could mitigate the harms of fake news by promoting individual choice.

18. As Leslie Kendrick recently described it, "I am asking whether [speakers] have a *claim* against governmental interference—a claim that may or may not prevail." Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767, 1776 (2017).

I. THE “FAKE NEWS” PHENOMENON

The spread of fake news in the United States is hardly a new phenomenon. In fact, as explored below, this country has a long and storied history of fake news distributed to the public for specific goals. This Part begins by defining what constitutes fake news for purposes of this discussion. Next, it provides a brief overview of the history of fake news in the United States and the emergence of contemporary versions of fake news. It also touches on arguments about whether fake news is substantially more problematic in the age of the internet and social media. Finally, it examines some preliminary proposals to regulate fake news and why they would likely be unable to withstand traditional First Amendment scrutiny.

A. *Defining Fake News*

Perhaps no other aspect of the 2016 national election has been the focus of more reporting, editorializing, and debating than the role of lies in the context of the presidential campaign and beyond. Accusations of lying were directed at political candidates, mainstream news media, interest groups, and other individuals and organizations posting stories meant to be understood as legitimate news on various social media platforms.¹⁹ There has been such a dizzying variety of reported lies that it is hard to keep track of them, much less think about how to address them.

Thus, with the degree to which lies, fake news, and other falsehoods seem to permeate contemporary public discourse, it is critical at the outset to address the scope of what this Article calls “fake news.” Indeed, as discussed below, the definitional problem is one of the challenges that plagues potential regulatory initiatives.²⁰ Others have already observed the difficulty of delineating precisely what we mean when we talk about “fake news,” and indeed the meaning is highly contested.²¹

19. See *infra* notes 53-60 and accompanying text.

20. See *infra* notes 100-06 and accompanying text.

21. See, e.g., Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AMEND. L. REV. 232, 245 (2017) (“The term ‘fake news’ has no single definition because it refers to a wide

This Article defines fake news as the deliberate, public communication as truthful of a verifiably false and material statement of fact regarding a matter of public concern, in which the original source is an entity representing itself to be a legitimate journalistic enterprise or otherwise reliable source of news stories.²² Because the focus of this Article is on listeners or consumers of fake news, the speaker's specific objective is immaterial—it could be to influence an election or policy debate, to make a profit from generating click-based advertising revenue, or even to be provocative, mischievous, or entertaining. Furthermore, for that same reason, the discussion does not distinguish between the original source and the republication or recirculation of information from that source.

At the same time, the discussion brackets political lies told by candidates, their surrogates, or interest groups in the context of an electoral or ballot-initiative campaign.²³ It also sets aside for now the emerging problem of “deepfake” videos that involve visual and sometimes verbal depictions that represent an incident that has not actually occurred or words that have not been spoken by the alleged

variety of things.”); Claire Wardle, *Fake News. It's Complicated*, FIRST DRAFT (Feb. 16, 2017), <https://firstdraftnews.org/latest/fake-news-complicated/> [<https://perma.cc/QWQ2-XNNL>] (attempting to create a taxonomy of different types of speech that might be labeled as fake news).

22. This definition is not far off from what others have used. *See, e.g.*, High Representative of the Union for Foreign Affs. & Sec. Pol'y, *Action Plan Against Disinformation*, at 1, JOIN (2018) 36 final (Dec. 5, 2018), https://ec.europa.eu/commission/sites/beta-political/files/eu-communication-disinformation-euco-05122018_en.pdf [<https://perma.cc/776H-52D2>] (“Disinformation is understood as verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm.”); Clay Calvert & Austin Vining, *Filtering Fake News Through a Lens of Supreme Court Observations and Adages*, 16 FIRST AMEND. L. REV. 153, 158-59 (2017) (defining fake news “as encompassing only articles that suggest, by both their appearance and content, the conveyance of real news, but also knowingly include at least one material factual assertion that is empirically verifiable as false and that is not otherwise protected by the fair report privilege” (footnotes omitted)).

23. Even before the 2016 election, there had been increasing concerns about lies told by political candidates and interest groups at the state level, leading some jurisdictions to enact laws prohibiting lying in the context of campaigns for public office and ballot initiatives. *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 469-71 (6th Cir. 2016). The courts have typically invalidated these laws on First Amendment grounds. *See id.* at 472-76; 281 Care Comm. v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014). For an excellent discussion of the range of categories of political lies, see Catherine J. Ross, *Ministry of Truth: Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367 (2017).

speaker.²⁴ Although there is obviously some overlap between fake news and these first two categories of mistruths, they also raise conceptually distinct issues. This Article's definition of fake news also excludes news parodies ranging from *The Onion* to *The Daily Show*, which use comedic devices surrounding real news stories to promote social commentary.²⁵ Parodies are not only generally understood as such, but also are independently protected under the First Amendment.²⁶ Finally, this definition of fake news does not include the often politically motivated assertions by the President and other elected officials who have branded the mainstream media with the fake news epithet, apparently to undermine the media's credibility and blunt its criticism.²⁷

B. A Brief Chronology of Fake News

While some might believe fake news to be a product of modern times and social media, a quick survey shows that, as numerous others have recounted, fake news is hardly an invention of recent vintage.²⁸ Fabricated, sensationalistic, and exaggerated stories have been pervasive throughout Western societies for centuries. Robert Darnton traces a version of fake news back to the historian

24. See Bobby Chesney & Danielle Citron, *Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security*, 107 CALIF. L. REV. 1753, 1757 (2019). Facebook recently announced that it will ban videos that are altered by artificial intelligence to create deepfakes, though the ban will not extend to personally edited videos, parodies, or satire. David McCabe & Davey Alba, *Facebook Says It Will Ban "Deepfakes,"* N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/technology/facebook-says-it-will-ban-deepfakes.html> [<https://perma.cc/HUC4-T9GN>].

25. See, e.g., Alexandra Petri, Opinion, *The Hottest Gift This Holiday Season: Your Own Set of Facts!*, WASH. POST (Nov. 27, 2019, 10:42 AM), <https://www.washingtonpost.com/opinions/2019/11/27/hottest-gift-this-holiday-season-your-own-set-facts/> [<https://perma.cc/H9FL-HVP9>].

26. See *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 57 (1988).

27. Levi, *supra* note 21, at 233 n.2 (distinguishing what she calls "real" fake news ["intentionally fabricated misinformation"] from "fake" fake news, which she describes as use of the fake news label to discredit the mainstream press).

28. See Robert Darnton, *The True History of Fake News*, N.Y. REV. OF BOOKS (Feb. 13, 2017, 1:22 PM), <http://www.nybooks.com/daily/2017/02/13/the-true-history-of-fake-news/> [<https://perma.cc/D3UE-6K76>]; Jacob Soll, *The Long and Brutal History of Fake News*, POLITICO (Dec. 18, 2016), <https://www.politico.com/magazine/story/2016/12/fake-news-history-long-violent-214535> [<https://perma.cc/6AJT-BTPQ>]; David Uberti, *The Real History of Fake News*, COLUM. JOURNALISM REV. (Dec. 15, 2016), https://www.cjr.org/special_report/fake_news_history.php [<https://perma.cc/788Y-YMFJ>].

Procopius, who in the sixth century AD reportedly wrote false stories to damage the reputation of the Roman Emperor Justinian I.²⁹ Darton also recounts the efforts to influence a pontifical election in 1522 by a critic who wrote “wicked sonnets about all the candidates (except the favorite of his Medici patrons)” and posted them on the bust of a figure known as Pasquino in a public plaza in Rome.³⁰ This practice was copied by others and developed into something known as “pasquinade,” a “common genre of diffusing nasty news, most of it fake, about public figures.”³¹

Pasquinades, in turn, were followed in the seventeenth century “by a more popular genre, the ‘canard,’ a version of fake news that was hawked in the streets of Paris for the next two hundred years.”³² One of the highest-selling canards during the late 1700s reported that a monster with “the head of a Fury, wings like a bat, a gigantic body covered in scales, and a dragon-like tail” had been captured in Chile and was being brought to Spain.³³ Canards, which were frequently printed with engravings to enhance their legitimacy, were used to spread “intentionally fake political propaganda” about Marie Antoinette during the French Revolution.³⁴ As Darnton suggests, “Although its impact cannot be measured, it certainly contributed to the pathological hatred of the queen, which led to her execution.”³⁵ In eighteenth-century London, publications such as *The Morning Post* and *The Morning Herald* thrived by circulating collections of paragraph-length false news items.³⁶

Moving across the Atlantic, given the hallowed place of journalism in American media lore, many observers may be surprised that the professionalized, independent journalism industry is a relatively recent creation, emerging only after the onset of the twentieth century.³⁷ Indeed, in the United States, the Society of Professional

29. Darnton, *supra* note 28.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. JONATHAN M. LADD, *WHY AMERICANS HATE THE MEDIA AND HOW IT MATTERS* 6 (2012) (“The existence of an independent, powerful, widely respected news media establishment is an historical anomaly. Prior to the twentieth century, such an institution had never existed

Journalists was not founded until 1909, when it established a set of standards for professional journalism.³⁸ Some scholars attribute the move of professional journalists away from partisanship to the increasing availability of commercial advertising as a revenue source.³⁹

Prior to that, it was common for newspapers to be unabashedly partisan and to publish stories that their authors and readers were well aware were shaped by partisan leanings.⁴⁰ From the Founding Era until the twentieth century, fake news stories were prevalent in the United States.⁴¹ One early incident involved the circulation of false stories about George Washington.

Someone published pamphlets that included letters supposedly written by Washington to his family and describing that he was miserable during the revolutionary war and lamenting that the revolutionary war was a mistake. The fake news was very convincing, purportedly an excellent forgery of his writing style. Even George Washington admitted he was impressed with how well the letters mimicked his writing. Unfortunately, the letters were influential in persuading some members of the public that Washington was a British loyalist. The letters haunted him throughout his presidency and tarnished his reputation.⁴²

in American history.”).

38. See Carol A. Watson, *Information Literacy in a Fake/False News World: An Overview of the Characteristics of Fake News and Its Historical Development*, 46 INT’L J. LEGAL INFO. 93, 95 (2018); Jennifer Peebles, *History of the Society*, SOC’Y PROF’L JOURNALISTS, <https://www.spj.org/spjhistory.asp> [<https://perma.cc/E5J8-V5X8>]; see also LADD, *supra* note 37, at 6 (“The existence of an independent, powerful, widely respected news media establishment is an historical anomaly. Prior to the twentieth century, such an institution had never existed in American history.”).

39. Michael Schudson, *The Objectivity Norm in American Journalism*, 2 JOURNALISM 149, 150 (2001) (“Some authors would say that objectivity emerged at the point where newspaper proprietors saw opportunities for commercial success and were therefore willing to bid farewell to political party underwriters.”).

40. Richard Kaplan, *The Origins of Objectivity in American Journalism*, in THE ROUTLEDGE COMPANION TO NEWS AND JOURNALISM 25, 30 (Stuart Allan ed., 2010) (“Throughout the nineteenth century, American journalism was publicly and forthrightly partisan.”). There are, however, contested views on exactly when domestic journalism became professionalized and objectivity the norm. *Id.* at 25.

41. Zahr K. Said & Jessica Silbey, *Narrative Topoi in the Digital Age*, 68 J. LEGAL EDUC. 103, 110 (2018) (“Hoaxes, misinformation, rumors, gossip, and outright lies—passed off as facts, often for profit or political motive—are older than the diverse mass communication used to disseminate untruths in the modern era.”).

42. Watson, *supra* note 38, at 95.

Another of our nation's founders was a perpetrator of fake news. It has been reported that Benjamin Franklin published a fake newspaper in 1782 "that included frightening recounts of Indians mercilessly scalping the family members of colonists at the behest of King George III."⁴³ His intention in circulating the paper was allegedly to "stoke sentiment for the revolutionary war and provoke ire against Native Americans."⁴⁴ Newspapers during the Founding Era were so unreliable that Thomas Jefferson was prompted to write in 1807: "Nothing can now be believed which is seen in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle."⁴⁵ This cynical statement reflects that his opinions about the importance of a free press had changed dramatically.⁴⁶

Numerous fake news stories were circulated in the nineteenth century as well. In the 1830s, the *New York Sun* published a multi-part story falsely reporting that life had been discovered on the moon.⁴⁷ In another sensationalist example, the *New York Herald* published a lengthy article in 1874 about an escape of animals from the Central Park Zoo that resulted in dozens of deaths.⁴⁸ Despite the fact that the paper included an express statement that the story was not true, it sparked panic among New York residents who attempted to flee the city.⁴⁹ And although we might not generally place this incident in the category of fake news, Orson Welles's radio broadcast of *The War of the Worlds* was reportedly believed by a wide range of listeners, though that story in itself might be fake news.⁵⁰

Nor, despite popular sentiment, are conspiracy theories either new or on the rise. Political scientists Joseph E. Uscinski and Joseph M. Parent studied the prevalence of conspiracy theories in the United States by examining over one hundred years' worth of

43. *Id.*

44. *Id.*

45. Uberti, *supra* note 28.

46. Compare Jefferson's statement in a 1787 letter to Edward Carrington: "Were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter." THE YALE BOOK OF QUOTATIONS 393 (Fred R. Shapiro ed., 2006).

47. Uberti, *supra* note 28.

48. *Id.*; Watson, *supra* note 38, at 95.

49. Uberti, *supra* note 28.

50. Watson, *supra* note 38, at 95.

letters to the editors of newspapers.⁵¹ As one summary of their work reports,

[A]veraging out the short-term ups and downs, they conclude that the amount of “conspiracy talk” has remained constant since the nineteen-sixties and has actually declined since the eighteen-nineties: “We do not live in an age of conspiracy theories and have not for some time.” That we *believe* we do makes sense, since that sentiment, too, is a constant.⁵²

Returning to the 2016 presidential race, lies seemed to pervade the atmosphere of public discourse. During the campaign, Donald Trump made assertions that were not substantiated by any evidence, while simultaneously branding Hillary Clinton and others who impugned his reputation as liars.⁵³ Long before the 2016 campaign even began, Trump was one of the most vocal proponents of the falsehood that President Obama was not born in the United States, even after Obama produced a certified copy of his birth certificate.⁵⁴ Since the inauguration, President Trump and his aides have also made verifiably false statements of fact on relatively trivial matters, such as how many people attended his inauguration.⁵⁵

51. Elizabeth Kolbert, *What's New About Conspiracy Theories?*, NEW YORKER (Apr. 15, 2019), <https://www.newyorker.com/magazine/2019/04/22/whats-new-about-conspiracy-theories> [<https://perma.cc/JLQ5-8WGG>].

52. *Id.*; see also STEVEN PINKER, ENLIGHTENMENT NOW 375 (2018) (“Mendacity, truth-shading, conspiracy theories, extraordinary popular delusions, and the madness of crowds are as old as our species, but so is the conviction that some ideas are right and others are wrong.”).

53. Maggie Haberman, *Donald Trump Returns Fire, Calling Hillary Clinton a ‘World-Class Liar,’* N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/us/politics/trump-speech-clinton.html> [<https://perma.cc/CJM3-5P9B>]; Eli Stokols, *Donald Trump Faces His Fate*, POLITICO (Oct. 17, 2016, 2:33 PM), <https://www.politico.eu/article/donald-trump-faces-his-fate-presidential-campaign-debate/> [<https://perma.cc/544M-SFRZ>] (reporting on candidate Trump’s unsubstantiated statements that the election was “rigged”).

54. Eugene Kiely, *Trump Surrogates Spin ‘Birther’ Narrative*, FACTCHECK.ORG (Sept. 19, 2016), <http://www.factcheck.org/2016/09/trump-surrogates-spin-birther-narrative/> [<https://perma.cc/65QW-4NVK>].

55. Matt Ford, *Trump’s Press Secretary Falsely Claims: ‘Largest Audience Ever to Witness an Inauguration, Period,’* ATLANTIC (Jan. 21, 2017), <https://www.theatlantic.com/politics/archive/2017/01/inauguration-crowd-size/514058/> [<https://perma.cc/E8S8-JRDK>].

Another critical narrative about the 2016 election has to do not with the misrepresentations or falsehoods of public officials and their surrogates, but about factually false stories published and disseminated under the guise of actual news reporting. For example, speakers representing themselves as legitimate news publications posted objectively false stories reporting the fiery death of an FBI agent investigating Hillary Clinton,⁵⁶ the discovery of tens of thousands of fraudulent Clinton votes in an Ohio warehouse,⁵⁷ and the claim that the Comet Ping Pong pizza restaurant in Washington, D.C., was a front for a sex-slavery ring led by Clinton.⁵⁸ And Special Counsel Robert Mueller's investigation concluded, among other things, that the Russian government supported the production and dissemination of fake news to influence the outcome of the election.⁵⁹ These examples merely scratch the surface of questionable stories that were widely circulated. The phenomenon continued in the lead up to the 2020 election.⁶⁰

56. Nicky Woolf, *As Fake News Takes Over Facebook Feeds, Many Are Taking Satire as Fact*, GUARDIAN (Nov. 17, 2016, 3:52 PM), <https://www.theguardian.com/media/2016/nov/17/facebook-fake-news-satire> [<https://perma.cc/ANG6-9786>].

57. Scott Shane, *From Headline to Photograph, a Fake News Masterpiece*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/2017/01/18/us/fake-news-hillary-clinton-cameron-harris.html> [<https://perma.cc/K2DJ-G98G>].

58. Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns*, N.Y. TIMES (Dec. 5, 2016), <https://www.nytimes.com/2016/12/05/business/media/comet-ping-pong-pizza-shooting-fake-news-consequences.html> [<https://perma.cc/Z7EZ-89L8>].

59. 1 ROBERT S. MUELLER, III, U.S. DEP'T OF JUST., REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 22 (2019), <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/SJ9W-QBFW>]. I do not mean at all to suggest that lying is confined to conservative politicians or news purveyors, as President Bill Clinton's fateful and false proclamation ("I did not have sex with that woman") should make clear. *The Clinton Presidency: Gone with Lewinsky?*, L.A. SENTINEL, Sept. 23, 1998, at A1.

60. See Davey Alba, *2020 Campaigns Throw Their Hands Up on Disinformation*, N.Y. TIMES (Dec. 15, 2019), <https://www.nytimes.com/2019/12/15/technology/2020-campaigns-disinformation.html> [<https://perma.cc/FY3E-HJHM>]; McKay Coppins, *The Billion-Dollar Disinformation Campaign to Reelect the President*, ATLANTIC (Feb. 10, 2020, 2:30 PM), <https://www.theatlantic.com/magazine/archive/2020/03/the-2020-disinformation-war/605530/> [<https://perma.cc/3DJV-CRLK>]; Alexandra S. Levine, Nancy Scola, Steven Overly & Cristiano Lima, *Why the Fight Against Disinformation, Sham Accounts and Trolls Won't Be Any Easier in 2020*, POLITICO (Dec. 1, 2019, 6:49 AM), <https://www.politico.com/news/2019/12/01/fight-against-disinformation-2020-election-074422> [<https://perma.cc/7KPK-EDLN>]; see also Nina Jankowicz, Opinion, *The Only Way to Defend Against Russia's Information War*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/opinion/the-only-way-to-defend-against-russias-information-war.html> [<https://perma.cc/E8ZJ-CLHG>] (noting the role of "RT and Sputnik, Russia's state-funded foreign media networks," in spreading disinformation

Nor is the spread of fake news by any means limited to campaign-related speech. The spread of inaccurate reporting encompasses topics including voter fraud, climate change, genetically modified organism (GMO) food products, vaccinations, and fluoride in drinking water.⁶¹ Most recently, fake news stories have emerged in reporting about the COVID-19 pandemic and the Black Lives Matter movement.⁶² Such fake news not only affects public policy, which might ultimately yield an electoral impact, but also influences the thinking and private behavior of numerous people around the country. For example, such disinformation might cause parents not to vaccinate their children.⁶³

These examples also show that fake news is not limited to one end of the ideological spectrum. Studies show that both conservatives and liberals are equally susceptible to believing fake news stories.⁶⁴ Even though substantial amounts of empirical evidence contradict these facts, conservatives might tend to believe in disinformation about the prevalence of voter fraud⁶⁵ and the absence of evidence that climate change is caused by human activity,⁶⁶ while liberals might be more inclined to believe that GMO food is bad for

concerning American elections).

61. Philip Fernbach & Steven Sloman, Opinion, *Why We Believe Obvious Untruths*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/opinion/sunday/why-we-believe-obvious-untruths.html> [<https://perma.cc/W86H-FRCA>].

62. Daisuke Wakabayashi, Davey Alba & Marc Tracy, *Bill Gates, at Odds with Trump on Virus, Becomes a Right-Wing Target*, N.Y. TIMES (Apr. 17, 2020), <https://www.nytimes.com/2020/04/17/technology/bill-gates-virus-conspiracy-theories.html> [<https://perma.cc/6XG4-LLX6>]; Arijeta Lajka, Ali Swenson, Amanda Seitz & Beatrice Dupuy, *NOT REAL NEWS: Debunking False Stories About Black Lives Matter, George Floyd, Antifa*, ABC 7 CHI. (June 13, 2020), <https://abc7chicago.com/antifaprotest-black-lives-matter-lincoln-memorial/6246465/> [<https://perma.cc/7AA3-RNBL>].

63. See Fernbach & Sloman, *supra* note 61.

64. *Id.* (“[C]ollective delusion is not new, nor is it the sole province of the political right.”); Scott Barry Kaufman, *Liberals and Conservatives Are Both Susceptible to Fake News, but for Different Reasons*, SCI. AM.: BEAUTIFUL MINDS (Feb. 14, 2019), <https://blogs.scientificamerican.com/beautiful-minds/liberals-and-conservatives-are-both-susceptible-to-fake-news-but-for-different-reasons/> [<https://perma.cc/25PA-W2SL>].

65. See Angelo Fichera, *California Won't Register 'Illegal' Voters*, FACTCHECK.ORG (Aug. 28, 2019), <https://www.factcheck.org/2018/03/california-isnt-planning-to-automatically-register-undocumented-immigrants-to-vote/> [<https://perma.cc/A2QP-Z2XP>].

66. See Coral Davenport & Eric Lipton, *How G.O.P. Leaders Came to View Climate Change as Fake Science*, N.Y. TIMES (June 3, 2017), <https://www.nytimes.com/2017/06/03/us/politics/republican-leaders-climate-change.html> [<https://perma.cc/E853-KMGE>].

one's health⁶⁷ or that vaccinations cause autism.⁶⁸ Moreover, the topics of some fake news stories do not reflect an obvious ideological tilt, as in the not-insignificant group of Americans who not only believe fluoride in drinking water is harmful but also have persuaded seventy-four municipalities to ban it.⁶⁹

In the years since the 2016 election, commentators have debated whether fake news is a phenomenon that, although not new to this era, has been exacerbated by social media and other new technologies.⁷⁰ Unlike in earlier eras, stories represented as legitimate news can be spread around the world anonymously, instantaneously, and inexpensively with the click of a mouse.⁷¹ To many, these changed circumstances make fake news a more ominous threat to truth and democracy than ever before.⁷² Commentators who take this position

67. This tide may, however, be changing. See Jon Entine, *Why Liberal Americans Are Turning Against GMO Labeling*, FORBES (Aug. 25, 2014, 2:16 PM), <https://www.forbes.com/sites/jonentine/2014/08/25/why-liberal-americans-are-turning-against-gmo-labeling/#682be1d440d4> [<https://perma.cc/KWP7-5DK6>].

68. See Kimiko de Freytas-Tamura, *Bastion of Anti-Vaccine Fervor: Progressive Waldorf Schools*, N.Y. TIMES (June 13, 2019), <https://www.nytimes.com/2019/06/13/nyregion/measles-outbreak-new-york.html> [<https://perma.cc/7X2H-DZ49>]. The political valence of the anti-vaccination movement has become more complicated as more conservatives have started to believe the autism myth. See Arthur Allen, *How the Anti-Vaccine Movement Crept into the GOP Mainstream*, POLITICO (May 27, 2019, 8:19 AM), <https://www.politico.com/story/2019/05/27/anti-vaccine-republican-mainstream-1344955> [<https://perma.cc/PK5J-CZ3U>] (“Not all that long ago, the anti-vax movement was dominated by the granola-eating, pharma-distrusting left. Conservative opposition was centered among people who also tended to see water fluoridation as a communist plot.”).

69. Elizabeth Chuck, *Science Says Fluoride in Water Is Good for Kids. So Why Are These Towns Banning It?*, NBC NEWS (Oct. 17, 2018, 8:37 AM), <https://www.nbcnews.com/news/us-news/science-says-fluoride-water-good-kids-so-why-are-these-n920851> [<https://perma.cc/S66F-2ZSK>]. Though contemporary concerns about fluoride seem to defy an ideological valence, in the past there is evidence that Ku Klux Klan members feared fluoridation as a “plot[] against whites.” OSHA GRAY DAVIDSON, *THE BEST OF ENEMIES* 190 (2007).

70. See *supra* notes 4-5 and accompanying text.

71. See Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1651-52 (2015); see also Robinson Meyer, *The Grim Conclusions of the Largest-Ever Study of Fake News*, ATLANTIC (Mar. 8, 2018), <https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104/> [<https://perma.cc/B7XE-VX7K>] (reporting on an MIT study of Twitter that concluded that “[f]ake news and false rumors reach more people, penetrate deeper into the social network, and spread much faster than accurate stories”). Although on a different scale, in the 1830s, the wide availability of the “penny press” also made news available inexpensively to large numbers of readers. Daya Kishan Thussu, *Television News in the Era of Global Infotainment*, in *THE ROUTLEDGE COMPANION TO NEWS AND JOURNALISM*, *supra* note 40, at 362, 364.

72. See, e.g., Meyer, *supra* note 71.

argue that the proliferation of political mistruths has led us into a “post-truth” era that engenders serious epistemic and public-discourse harms.⁷³ The concern here is not only that people will be misled into believing false stories but also that they will begin to disbelieve *all* news, even from more traditionally reliable sources.⁷⁴

C. Anticipating Free Speech Concerns with Preliminary Attempts to Regulate Fake News

Even if the evidence does not all point in one direction, there is good reason to be concerned about the apparent proliferation of fake news. The foundation of democracy lies in the broad, unfettered dissemination of ideas and information as the basis for public discourse.⁷⁵ There may be no such thing as a false idea,⁷⁶ but facts are often objectively untrue and verifiable as such.⁷⁷ To the extent that individual listeners rely on false statements of fact in a way that changes their behavior, such statements can cause tangible, material harm, both to the listeners and to third parties.⁷⁸

It is not only the possibility of such harms that reformers rely on to justify calls for regulating fake news. Unlike other lies that might be conveyed to individuals or small groups, fake news can, similar to other harmful speech, be disseminated through social media platforms over the internet instantaneously, inexpensively, and anonymously.⁷⁹ Thus, whatever harm might be produced by a single lie can be spread at lightning pace around the globe.⁸⁰

73. See, e.g., Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 850-51, 866 (2018) (“We should not reflexively include fake news in the marketplace of ideas, even as a market failure.”).

74. Hannah Arendt, *Hannah Arendt: From an Interview*, N.Y. REV. OF BOOKS (Oct. 26, 1978), <https://www.nybooks.com/articles/1978/10/26/hannah-arendt-from-an-interview/> [<https://perma.cc/N9GH-YSKV>] (“If everybody always lies to you, the consequence is not that you believe the lies, but rather that nobody believes anything any longer.”); Mark Verstraete & Derek E. Bambauer, *Ecosystem of Distrust*, 16 FIRST AMEND. L. REV. 129 (2017).

75. See *infra* Part II.B.

76. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

77. Waldman, *supra* note 73, at 866.

78. See Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 187-99 (dividing harms into “second-party” [that is, listener] and “third-party” [that is, broader social] harms).

79. Tushnet, *supra* note 71, at 1651-62.

80. See *id.* at 1652-54.

These concerns have led to at least informal calls for regulation of fake news sites.⁸¹ Despite much noise about these concerns, however, few concrete legislative proposals have surfaced. One actual proposal arose in 2017, when a California legislator introduced a bill that would have made it “unlawful for a person to knowingly and willingly make, publish or circulate on an Internet Web site, or cause to be made, published, or circulated in any writing posted on an Internet Web site, a false or deceptive statement designed to influence” the result of a “ballot measure or election.”⁸² The legislator withdrew the bill after advocacy groups raised First Amendment concerns.⁸³ Other possible regulatory responses might include criminal laws prohibiting knowingly false statements of fact represented as being from a legitimate news source; authorization of civil damages actions against either the producers of fake news or social media networks to compensate those who can show that they were harmed by fake news; and injunctions requiring social media sites to take down proven fake news stories.⁸⁴

Recently, some scholars have attempted to think through the First Amendment barriers to regulating at least some forms of fake news. The premise of such analysis is that even if fake news is indeed covered by the Free Speech Clause, it may not always be protected.⁸⁵ While this is a valid statement in the abstract, this Article disagrees about where the lines should be properly drawn.⁸⁶ Professor Sunstein has suggested that while there are legitimate free speech concerns with such regulations, in some cases the

81. See, e.g., Christophe Deloire, *To Stop Fake News, Online Journalism Needs a Global Watchdog*, FOREIGN POL’Y (Nov. 6, 2019, 1:14 PM), <https://foreignpolicy.com/2019/11/06/to-stop-fake-news-online-journalism-needs-a-global-watchdog/> [https://perma.cc/7UHL-NE7X].

82. Andrew Blake, *California “Fake News” Bill Falters amid Free Speech Concerns*, WASH. TIMES (Mar. 29, 2017), <https://www.washingtontimes.com/news/2017/mar/29/california-fake-news-bill-falters-amid-free-speech/> [https://perma.cc/78EJ-892D].

83. *Id.*

84. For a compendium of international efforts to regulate fake news, see generally David Goldberg, *Responding to ‘Fake News’: Is There an Alternative to Law and Regulation?*, 47 SW. L. REV. 417, 421-26 (2018); GLOB. LEGAL RSCH. DIRECTORATE, LIBR. OF CONG., INITIATIVES TO CONQUER FAKE NEWS IN SELECTED COUNTRIES (2019), <https://permanent.fdlp.gov/gpo123737/counter-fake-news.pdf> [https://perma.cc/WHB7-5WU8].

85. Cass R. Sunstein, *Falsehoods and the First Amendment*, 33 HARV. J.L. & TECH. 388, 390 (2020).

86. See *infra* Part IV.A.

tangible harms caused by fake news outweigh any speech values.⁸⁷ He proposes the following rebuttable presumption: “*False statements are protected unless the government can show that allowing them will cause serious harm that cannot be avoided through a more speech-protective route.*”⁸⁸ In addition, Sunstein suggests that fake news that is also libelous might be subject to more regulation than the *New York Times Co. v. Sullivan* test might allow.⁸⁹ But even for nonlibelous false statements, he suggests that some restrictions might be upheld.

We could easily imagine a law, called the Dirty Tricks Act, that would target such falsehoods. It might say, for example, that speakers must pay a fine for knowingly spreading lies about candidates for public office; it might go further and target negligence as well. Analogues can be found in existing law, and they have sometimes been upheld.⁹⁰

Professor Sunstein relies on two lower court cases that were decided well before the Supreme Court’s decision in *United States v. Alvarez*,⁹¹ which he concedes complicates the analysis.⁹² In *Alvarez*, a plurality of the Supreme Court held that the First Amendment prohibits the state from regulating lies unless they result in a legally cognizable harm.⁹³ Still, Sunstein suggests that the scope of *Alvarez*’s harm requirement is opaque and that it is far from clear that a law banning false statements, intentionally

87. Sunstein, *supra* note 85, at 420-21.

88. *Id.* at 406.

89. *Id.* at 413-14.

90. *Id.* at 415 (footnotes omitted) (first citing *Pestak v. Ohio Elections Comm’n*, 926 F.2d 573 (9th Cir. 1991); and then citing *Tomei v. Finley*, 512 F. Supp. 695 (N.D. Ill. 1981)). Other scholars have recently proposed more narrow regulatory options for addressing deepfake videos, as opposed to fake news stories. See Rebecca Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. 1445, 1483-86 (2019); Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a “Post-Truth” World*, 64 ST. LOUIS U. L.J. 535 (2020). I touch on these proposals below, but reiterate here that I have bracketed the problem of deepfake videos for the purposes of this Article because I argue that those types of images raise fundamentally different issues than dissemination of other fake news stories.

91. 567 U.S. 709 (2012).

92. Sunstein, *supra* note 85, at 417.

93. 567 U.S. at 716-22.

spread, that have “an adverse effect on the democratic process,” would be unconstitutional.⁹⁴

If fake news were categorically not covered by the First Amendment, all of these proposals would be fine; if it is covered, regulatory measures would be subject to strict or intermediate judicial scrutiny under the Free Speech Clause because they would be overtly content-based.⁹⁵ Indeed, both in the United States and in other nations, the imposition of direct criminal or civil liability for creating and disseminating fake news has been met with skepticism because of the numerous free speech concerns.⁹⁶ These critiques are typically grounded in structural or procedural problems with such regulations, not on the basis that fake news has any intrinsic value.⁹⁷

For instance, there might be a compelling argument against regulating fake news drawn from negative theory justifications. Such claims base free speech protection not on the utility of the particular expression at issue, but on a deep skepticism about allowing the state to make determinations about what types of speech are acceptable.⁹⁸ Here, the liberty concern would be that placing the government in the role of arbiter of what is “true” and what is “fake” assumes a great deal of optimism that the government will act in the public interest rather than in its own interests. As Professor Stone once observed, a law that prohibited false statements of fact in the course of public debate is

94. Sunstein, *supra* note 85, at 21. I address the scope of the material harm requirement in Part IV.A.

95. *See, e.g., Alvarez*, 567 U.S. at 724 (describing the test for content-based restrictions on speech as the “most exacting scrutiny” (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994))).

96. *See* Dave Maass, *California Bill to Ban “Fake News” Would Be Disastrous for Political Speech*, ELEC. FRONTIER FOUND. (Mar. 27, 2017), <https://www.eff.org/deeplinks/2017/03/california-bill-ban-fake-news-would-be-disastrous-political-speech> [<https://perma.cc/KVM3-269X>] (criticizing on free speech grounds the proposed California law discussed above); JOINT DECLARATION ON FREEDOM OF EXPRESSION AND “FAKE NEWS”, DISINFORMATION AND PROPAGANDA, ORG. FOR SEC. AND CO-OPERATION IN EUR. (Mar. 3, 2017), <https://www.osce.org/files/f/documents/6/8/302796.pdf> [<https://perma.cc/XFM5-ZST4>] (“General prohibitions on the dissemination of information based on vague and ambiguous ideas, including ‘false news’ or ‘non-objective information’, are incompatible with international standards for restrictions on freedom of expression ... and should be abolished.”).

97. *See, e.g., Blake*, *supra* note 82.

98. *See, e.g., LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION?* 145 (2005).

invalid because of the danger of putting government in the position routinely to decide the truth or falsity of all statements in public debate. The point is not that government does not have a legitimate interest in protecting the quality of public debate. Surely it does. It is, rather, that there is great danger in authorizing government to involve itself in the process in this manner. This danger stems from the possible effect of partisanship affecting the process at every level. The very power to make such determinations invites abuse that could be profoundly destructive to public debate.⁹⁹

In the context of public discourse, this risk hardly seems worth the potential policy benefit.

Another such claim is a practical one. It simply may be too difficult to provide a workable legal definition of truth or falsity in the context of public discourse.¹⁰⁰ Lawmakers might focus on regulating only factual assertions that are objectively verifiable as false, which is harder than it sounds.¹⁰¹ Some factual assertions, such as “Obamacare will bankrupt the country” or “Trump will restore coal miners to their rightful place in the American economy” might be inflammatory political rhetoric, neither intended nor heard as literal fact. Even if every economist in the country testified that these statements could not possibly be true, there is reason to permit such rhetorical assertions in the context of campaigns and policy debates.¹⁰²

This type of law would also face inevitable challenges stemming from the nature of epistemology. In understanding why people so readily believe fake news, cognitive scientists Philip Fernbach and Steven Sloman have explained that in complex societies, knowledge is collective rather than individual. As they have observed,

99. Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 140.

100. See, e.g., Julie Mastrine, *Defining “Fake News” Is Harder than You’d Think*, OECD F. NETWORK (Aug. 13, 2019), <https://www.oecd-forum.org/posts/52249-defining-fake-news-is-harder-than-you-d-think> [<https://perma.cc/2UZU-32SS>].

101. See, e.g., GLOB. LEGAL RSCH. DIRECTORATE, LIBR. OF CONG., *supra* note 84, at 4-5 (noting that Argentina has proposed to regulate fake news through the creation of a “Commission for the Verification of Fake News,” which would check the facts on which stories are based to ensure they are truthful).

102. Maass, *supra* note 96 (objecting that the proposed California fake news bill seemed potentially to encompass “hyperbole, exaggeration, [and] poetic license”).

Most of what you “know”—most of what anyone knows—about any topic is a placeholder for information stored elsewhere, in a long-forgotten textbook or in some expert’s head.

One consequence of the fact that knowledge is distributed this way is that being part of a community of knowledge can make people feel as if they understand things they don’t.¹⁰³

If knowledge and “truth” are understood in this way, it is difficult to imagine a law that could coherently address fake news given the numerous available sources of knowledge and the complexity of how we know what we “know.”

A closely related problem to the definitional challenges is that restrictions on fake news are likely to be unconstitutionally vague, failing to put speakers on notice of what types of statements are prohibited.¹⁰⁴ For example, if a law prohibits “misleading” information, would an exaggerated characterization of an actual event violate it? What about fake news that relies on other information sources? Similarly, fake news regulations run the risk of violating First Amendment overbreadth principles by sweeping within their reach too much truthful speech, or at least things that are not unquestionably false.¹⁰⁵ The vagueness and overbreadth concerns may also lead to the risk of selective enforcement; placing the government in charge of prosecuting political liars implicates problems that should be self-evident. Vague or overbroad fake news laws may also lead speakers who want to convey truthful facts to censor themselves out of fear that they might be prosecuted or sued, creating a chilling effect of great magnitude.¹⁰⁶ If truthful speech is suppressed in the service of regulating fake news, any rational deliberation justification is undermined.

These concerns mirror those that the Supreme Court has used to conclude that other types of false factual statements must be covered and protected by the First Amendment.¹⁰⁷ The prime

103. Fernbach & Sloman, *supra* note 61. This opinion piece is based on the work reported in the authors’ book, *THE KNOWLEDGE ILLUSION* (2017).

104. See *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012) (outlining the vagueness doctrine).

105. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (describing the overbreadth doctrine).

106. See *Fox Television Stations*, 567 U.S. at 253-54.

107. See, e.g., *United States v. Alvarez*, 567 U.S. 709, 722-23 (2012) (assuming that the Act

examples come from cases involving defamation of public officials or public figures. *New York Times Co. v. Sullivan* imposed stringent limitations on state tort liability for public defamation, not because defamatory statements have value but because of the very real concern that unrestricted civil litigation under defamation law may seriously chill speech.¹⁰⁸ In other words, the falsehoods in that context are protected not because they have value, but as a prophylaxis against censorship of the truth.¹⁰⁹

Yet another problem with fake news or political news regulations is the possibility that they might be weaponized by political actors to go after opponents or mainstream media outlets, accusing them (falsely) of lying in a manner that will both undermine their credibility and require them to expend resources defending against the allegations.¹¹⁰ In this case, the cure may be worse than the disease. The lower federal courts that have addressed state laws prohibiting political lies have invalidated them on precisely this ground.¹¹¹

Finally, there are certain practical barriers to attempting to regulate fake news. To the extent there is evidence that sources of such disinformation are frequently located outside of the United States, there are obvious problems associated with extraterritorial enforcement. The primary way to address such speech domestically would have to be to target platforms or impose restrictions on individuals who recirculate false information originating from foreign sources, which would generate its own independent First Amendment and policy challenges.¹¹²

prohibiting false statements “would not apply to, say, a theatrical performance,” but explaining that upholding the Act would “give government a broad censorial power,” the mere existence of which would “cast[] a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom”).

108. 376 U.S. 254, 279 (1964).

109. Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1449 (2015).

110. See, e.g., Blake, *supra* note 82 (describing concerns that the California fake news bill would have led to similar results); Maass, *supra* note 96 (same). For consideration of procedural measures to minimize the risk of such weaponization, see Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451, 480-84 (2020).

111. See, e.g., 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014).

112. See Alan K. Chen, *Free Speech and the Confluence of National Security and Internet Exceptionalism*, 86 FORDHAM L. REV. 379, 389 (2017) (noting a similar problem with

II. FAKE NEWS, RATIONAL DELIBERATION, AND FIRST AMENDMENT COVERAGE

Given these doctrinal and practical impediments to addressing fake news, one might argue that the more direct route to allowing government regulation would be to classify such speech as “no-value” speech, which would result in relaxed constitutional constraints. Such a claim would thread together two aspects of First Amendment doctrine—first, that speech that has no value should not be of any concern to the Free Speech Clause, and second, that fake news has no value because it undermines, rather than promotes, rational deliberation. Speech that is not even covered by the First Amendment is, *ipso facto*, not constitutionally protected, opening the door to its regulation or banishment. This Part explores how those arguments might look, but in Part III, this Article explains that, while at first glance these arguments have some curb appeal, they do not hold up under a more sophisticated understanding of how people formulate knowledge, even knowledge based on false facts, and how such knowledge has its own meaning and value to at least some consumers of fake news.

A. Arguments Against First Amendment Coverage of Fake News

One of the signature developments of the First Amendment’s first century was the Supreme Court’s broadening of the types of expressive activity that qualify as speech.¹¹³ Other doctrinal changes were, of course, also critical, including abandonment of the notion that the Free Speech Clause only prohibits prior restraints and the development of responses to the regulation of communication through new platforms that were made possible by technological

regulating internet terrorist propaganda from overseas sources).

113. I accept the conventional view that modern free speech doctrine did not really exist until the early twentieth century, when the Supreme Court addressed the constitutionality of federal prosecutions brought under the Espionage Act of 1917 and the Sedition Act of 1918. See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919). But see David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 519-20 (1981) (arguing that this conventional view has led to “a distorted view of the social and intellectual history of the First Amendment”).

innovation.¹¹⁴ Yet, even with those latter adaptations, it is the movement beyond core written or spoken political speech that has created the capacious First Amendment with which we are now familiar.¹¹⁵

Over this same period, legal scholars have attempted to provide coherent theoretical explanations of First Amendment doctrine by mapping some order onto these varied decisions.¹¹⁶ These efforts have been enormously useful in enhancing our collective understanding of free speech theory and law. Yet, like other approaches to uniform constitutional theory, unifying theories about why the Constitution protects expression are ultimately unsuccessful or incomplete.¹¹⁷

Surprisingly, it is only relatively recently that legal scholars have turned their attention to the “coverage question”—the drawing of boundaries between expression that is covered by the First Amendment and the enormous amount of human communication that is not.¹¹⁸ Indeed, the coverage question continues to perplex us with regard to forms of expression as ancient as civilization, such as art, music, and dance, as well as modes of communication made possible only because of rapid changes in digital computer technology, such as virtual reality and artificial intelligence.¹¹⁹ Drawing these lines is an enterprise surprisingly fraught with previously unrecognized

114. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 849 (1997) (internet); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 626 (1994) (cable television); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 369-70 (1969) (radio broadcasting); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952) (motion pictures).

115. See *infra* notes 122-30 and accompanying text.

116. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1773 (2004) (describing the boundaries of the First Amendment as being set by “the words ‘freedom of speech’”).

117. See TUSHNET ET AL., *supra* note 13, at 5-9.

118. See *id.* at 2-3; Schauer, *supra* note 116, at 1766-69; Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—An Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073, 1083-88 (2017) (tracing the development of the coverage/protection distinction in First Amendment case law). As Professor Schauer has observed, “It would be somewhat more accurate to describe the First Amendment itself as an exception to the general principle that the policy about communication, including the policy about controlling communication, may be made in a non-constitutionalized way without the intervention of courts or constitutional argumentation.” Frederick Schauer, *The Speech of Law and the Law of Speech*, 49 ARK. L. REV. 687, 697 (1997).

119. See, e.g., Marc Jonathan Blitz, *The Freedom of 3D Thought: The First Amendment in Virtual Reality*, 30 CARDOZO L. REV. 1141 (2008).

complexity, yet also critical to addressing many contemporary speech controversies.

As Frederick Schauer described it just over a decade ago,

[T]he question whether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed. This inattention to the boundaries of the First Amendment does not make the question any less important, however, and a comprehensive examination of this long-neglected dimension of the First Amendment is well overdue.¹²⁰

He further explained that the lack of attention to the coverage question did not in any way reduce its importance to understanding First Amendment analysis:

[T]he boundaries of the First Amendment, far more than the doctrine lying within those boundaries, turn out to be a function of a complex and seemingly serendipitous array of factors that cannot be (or at least have not been) reduced to or explained by legal doctrine or by the background philosophical ideas and ideals of the First Amendment. If it is true that more of the First Amendment is explained by its boundaries than we have previously thought, it may also be the case that less of the First Amendment can be explained by the tools of legal and constitutional analysis than we have formerly recognized.¹²¹

Coverage issues are not merely theoretical. On multiple occasions in the past decades, the Supreme Court has addressed important questions about whether some categories of expression should fall completely outside of the First Amendment's concern. Among other things, the Court has considered whether regulation of flag burning,¹²² cross burning,¹²³ public display of profanities,¹²⁴ violent video games,¹²⁵ lies about having military honors,¹²⁶ depictions of animal

120. Schauer, *supra* note 116, at 1767 (footnote omitted).

121. *Id.* at 1768.

122. *Texas v. Johnson*, 491 U.S. 397, 399 (1989).

123. *R. A. V. v. City of St. Paul*, 505 U.S. 377, 396 (1992).

124. *Cohen v. California*, 403 U.S. 15, 26 (1971).

125. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 788 (2011).

126. *United States v. Alvarez*, 567 U.S. 709, 714-15 (2012).

cruelty,¹²⁷ non-obscene sexual expression,¹²⁸ and offensive protests outside a private funeral¹²⁹ trigger the concerns that animate the Free Speech Clause. In each case, it rejected the notion that the First Amendment is not relevant to such forms of expression.¹³⁰

While Americans value free speech in the abstract,¹³¹ the impulse to regulate expression is so commonplace that it cuts across a wide range of social contexts and comes from all points on the political spectrum.¹³² Thus, free speech controversies repeatedly find themselves intertwined with contemporary political and public policy battles.¹³³ Coverage (or rather, noncoverage) claims are therefore likely to continue to wend their way to the Court in the coming decade. It would not be surprising if the Court were soon to consider whether regulation of the following actions count as “speech”: lies told in political campaigns;¹³⁴ citizen audiovisual recording of events on public¹³⁵ and private property,¹³⁶ including recordings

127. *United States v. Stevens*, 559 U.S. 460, 464-66 (2010).

128. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994).

129. *Snyder v. Phelps*, 562 U.S. 443, 447 (2011).

130. In doing so, the Court claimed it does not engage in any sort of cost-benefit analysis, but instead exempts only those categories of speech that have historically been found to be beyond the concerns of the Free Speech Clause. *Stevens*, 559 U.S. at 471-72. This claim has been persuasively challenged as neither normatively desirable nor historically accurate. *See Genevieve Lakier, The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2177-79 (2015) (observing that neither the Supreme Court nor other federal or state courts in the pre-New Deal period recognized categories of low-value speech on a routine basis).

131. *See* Richard Wike & Katie Simmons, *Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech*, PEW RSCH. CTR. 4 (Nov. 18, 2015), <https://www.pewresearch.org/global/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech/> [<https://perma.cc/9ZSW-GZAF>].

132. *See id.* at 19 (showing significant majority support for regulation of certain kinds of public speech globally); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 272 (1991) (noting the prevalence of the argument that racist speech should be regulated).

133. *See, e.g.*, Post, *supra* note 132.

134. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 151-52 (2014); 281 Care Comm. v. Arneson, 638 F.3d 621, 625 (8th Cir. 2011).

135. *ACLU v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

136. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1199-1200 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom.* *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018). The author discloses that he served as plaintiffs' counsel in this case.

taken from automated drones;¹³⁷ and de minimis forms of trespass to collect environmental data.¹³⁸

The forms of human communication to which we apply the constitutional label of “speech” are wildly varied, making the task of putting some sort of order onto First Amendment doctrine an unenviable task. While, as stated earlier, these efforts have been helpful, perhaps more attention should be directed at speech from the bottom up rather than the top down. By examining the social practice and context of different types of speech and conceptualizing what and how they communicate, we can come to a better understanding of why and when the First Amendment ought to attach, and when the Constitution should protect against government interference.

In some areas of First Amendment law, the Supreme Court has determined that entire categories of expression are simply not covered by, and therefore irrelevant to, the Free Speech Clause. This is most commonly associated with *Chaplinsky v. New Hampshire*, in which the Court held that “fighting words” are not a form of speech worthy of the First Amendment’s attention.¹³⁹ In these cases, the Court has advanced a functional rationale for exiling these forms of speech from the Constitution’s coverage. In *Chaplinsky*, the Court

said that these speech forms “are no essential part of any exposition of ideas” and have “slight social value as a step to truth.” While *Chaplinsky* is widely understood as the “no value” speech case, it stands for more than that. What has been widely ignored by most commentators is *Chaplinsky’s* conclusion that certain forms of speech are excluded from the First Amendment not only because they have little or no value, but also because “*any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*” Thus, a careful reading of *Chaplinsky* reveals that the Court is engaging in a

137. Margot Kaminski, *Drones and Newsgathering at the NTSB*, CONCURRING OPINIONS (May 9, 2014), <https://web.archive.org/web/20140514230523/http://www.concurringopinions.com/archives/2014/05/drones-and-newsgathering-at-the-ntsb.html> [https://perma.cc/7KP8-Z4CL].

138. *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1191-92 (10th Cir. 2017).

139. 315 U.S. 568, 571-72 (1942).

sort of categorical balancing that weighs the speech's value against its social costs.¹⁴⁰

Unlike other content-based regulations, laws that regulate no-value speech are not subject to any type of heightened scrutiny. By defining these categories as nonspeech for constitutional purposes, the Court permits government regulation of this kind of speech with virtually no judicial review standard.¹⁴¹

Although the argument that lies categorically have no speech value has now been foreclosed by the Supreme Court's decision in *United States v. Alvarez*, that decision and other precedents suggest that lies that cause cognizable harm might still not be covered by the First Amendment.¹⁴² Employing the same methodology that it has used in other no-value speech cases, the Court could determine that fake news has no value because it is "no essential part of any exposition of ideas" and has "slight social value as a step to truth."¹⁴³ By definition, fake news does nothing to convey ideas or beliefs, and therefore does not advance public discourse in any meaningful way.¹⁴⁴ As the Supreme Court said, "False statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas, and they cause damage to an individual's reputation that cannot easily be repaired by counter-speech, however persuasive or effective."¹⁴⁵

Not only might fake news be viewed as having no value, it might also be seen as antispeech because it *undermines* public discourse by perpetuating false statements of fact. Calls to regulate fake news and campaign lies suggest that, like other categories of lying, false statements in this context cause, or potentially cause, tangible

140. Chen & Marceau, *supra* note 12, at 664 (footnotes omitted).

141. Presumably, there might be some sort of rational basis review of government regulations of such categories of speech, though it would likely be under the Fourteenth Amendment's Due Process Clause rather than the First Amendment.

142. 567 U.S. 709, 719 (2012); *see also* Chen & Marceau, *supra* note 109, at 1492-1501 (collecting cases).

143. *Chaplinsky*, 315 U.S. at 572.

144. David S. Han, *Conspiracy Theories and the Marketplace of Facts*, 16 FIRST AMEND. L. REV. 178, 184 (2017) ("[I]n most situations where the truth of a factual matter is patently clear, false statements produce little or no social value.").

145. *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

social harm.¹⁴⁶ This, in turn, factors into the coverage question because the no-value speech cases also turn on the presumptive harms that such expression causes, justifying the regulation of certain categories of speech to serve “the social interest in order and morality.”¹⁴⁷ First, because fake news relies on intentionally false factual premises, it distorts the truth in the marketplace of ideas. Second, if speech protection is designed to promote rational deliberation, it need not concern itself with lies in the political context, which undermine rather than promote deliberation in the same way as other falsehoods. Fake news is antithetical to the concept of rational deliberation for exactly the reason that “high value lies” are protected.¹⁴⁸ It may lead to deliberation that is rational on its own terms, but only because the listener does not have a complete and accurate set of facts.

Parallels may be drawn to current First Amendment doctrine, which holds that fraud¹⁴⁹ and misleading commercial speech¹⁵⁰ are not covered by the First Amendment because they are viewed as having little value and causing third-party harm. The defrauded party may make a rational decision in turning money over to the liar, but one that is based on a false set of background facts. That is not the type of rational deliberation that the First Amendment is designed to promote.

In addition to the claim that such speech has no value, fake news may also cause harm both to listeners and, more broadly, the public at large. With respect to listeners, fake news might cause harm in the sense that it deprives the listener of agency. That is, fake news can deprive listeners of their will through deception (in a manner similar to commercial fraud).¹⁵¹ A related form of second-party harm occurs when the listener directly alters her conduct in response to

146. See Michael C. Dorf & Sidney G. Tarrow, *Stings and Scams: “Fake News,” the First Amendment, and the New Activist Journalism*, 20 U. PA. J. CONST. L. 1, 10 (2017) (noting that “scams,” defined as “the propagation of opinions and purported statements of fact that rest on false information,” are generally protected, whereas “stings,” which operate like undercover investigations, may not be).

147. *Chaplinsky*, 315 U.S. at 572.

148. See Chen & Marceau, *supra* note 109.

149. *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003).

150. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 563 (1980).

151. For thoughtful considerations of such theories in the context of lies, see SISSELA BOK, LYING (1978); SEANA VALENTINE SHIFFRIN, SPEECH MATTERS (2014).

the lie. In the fraud context, that would mean spending money the listener would not otherwise invest. In the political context, it might mean that the listener casts a vote in a different way than she otherwise would have, or campaigns for or protests against a particular candidate or cause based on a false understanding of the relevant background facts.

Fake news might also cause third-party or broad social harms. The most obvious claim is one that we have heard frequently—that the outcome of a national election might have been different in the absence of fake news.¹⁵² Furthermore, if fake news is later revealed as such, the public's faith in the electoral system, the legislative process, and the mainstream news media might be substantially undermined, resulting in overbroad skepticism or perhaps in disenchantment and disengagement with the political system. Finally, third-party harms might be even more concrete, as in the case of the owners and patrons of the Comet Ping Pong pizza restaurant, who were endangered when a consumer of fake news (who believed the restaurant was a front for a sex-slavery ring led by Hillary Clinton) fired an AR-15 rifle.¹⁵³

The only conceivable public discourse value of fake news lies in its potential to attract other speakers to dispute its accuracy. It is sometimes said that the expression of false ideas or statements serves the instrumental value of promoting truth because such speech is likely to generate intense and vocal opposition, thus leading to a rich discourse that will help society seek truth.¹⁵⁴ The same might be argued about false statements of fact. Fake news should, in theory, generate counterspeech in droves, thus correcting any misperceptions that might have resulted. This has not been a mainstream argument for protecting false fact statements, however. For there is reason to believe that counterspeech might not

152. Of course, such claims are notoriously difficult to prove because so many factors may influence voting. See Nate Silver, *How Much Did Russian Interference Affect the 2016 Election?*, FIVETHIRTYEIGHT (Feb. 16, 2018, 6:26 PM), <https://fivethirtyeight.com/features/how-much-did-russian-interference-affect-the-2016-election> [<https://perma.cc/9GLA-LSZA>].

153. Kang & Goldman, *supra* note 58.

154. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (“Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’” (quoting JOHN STUART MILL, *ON LIBERTY* 15 (Oxford: Blackwell 1947))).

be as effective a reaction if there are imbalances in the ability to reach the audience that hears the falsehood or if the reactions to the falsehoods are so rapid that there is insufficient time to address them through discourse.¹⁵⁵ As the adage goes, “A lie will go round the world while truth is pulling its boots on.”¹⁵⁶

B. The Role of Rational Deliberation in Free Speech Theory

If fake news causes legally cognizable or material *speech* harms, it is because it disrupts important norms about public discourse and undermines the ability of the marketplace of ideas to function in the idealized manner that First Amendment theory presupposes. That marketplace, in turn, relies on speech to promote rational deliberation in American society. Traditional rationales for the constitutional protection of speech, to which we now turn, match nicely with this model.

In an effort to provide some coherence to First Amendment law, legal scholars and philosophers have engaged each other with competing and complementary theories about why and when the Constitution should protect speech. It is safe to say that the theories that have captured the imagination of the majority of scholars, and of the Supreme Court, posit that speech must be protected as a means to promote democratic self-governance¹⁵⁷ and, relatedly, but

155. See *infra* Part IV.B.1.

156. THE YALE BOOK OF QUOTATIONS, *supra* note 46, at 615. A variation on this saying is, “A Lie would travel from Maine to Georgia while Truth was getting on his boots.” Anna Gonzalez & David Schulz, *Helping Truth with Its Boots: Accreditation as an Antidote to Fake News*, 127 YALE L.J.F. 315, 315 (2017). Interestingly, given the topic of this Article, the quote is frequently falsely attributed to Mark Twain. Niraj Chokshi, *That Wasn't Mark Twain: How a Misquotation Is Born*, N.Y. TIMES (Apr. 26, 2017), <https://www.nytimes.com/2017/04/26/books/famous-misquotations.html> [<https://perma.cc/EV74-KG7T>].

157. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 75 (1948); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971); see also RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992) (“The ‘marketplace of ideas’ is perhaps the most powerful metaphor in the free speech tradition.”); Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 28 (2004) (“Probably the most important theoretical approach to freedom of speech in the twentieth century has argued that freedom of speech is valuable because it preserves and promotes democracy and democratic self-government.”). For an argument that the First Amendment can be seen to advance a broader conception of “cultural democracy,” see Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1054 (2016).

more broadly, to facilitate the elusive search for truth.¹⁵⁸ To be sure, these are not the only theories touted by commentators. Unregulated speech is also said to allow for individual autonomy through self-realization¹⁵⁹ and to promote the development of a tolerant society.¹⁶⁰

The democracy and truth rationales for free speech protection are instrumental. They value speech not intrinsically, but as a means to the end of superior public discourse about democratic processes and other matters about which we collectively seek truth. As such, they rely heavily on the premise that expressive liberty promotes rational deliberation about these important and varied matters.¹⁶¹ That is not to say that there is actually a perfect democratic or other conceptual truth out there but that the *process* of seeking that truth is socially valuable.¹⁶² Speech that promotes rational deliberation is therefore most highly valued and lies at the center of both the democracy and truth-seeking speech theories.¹⁶³ Rational deliberation is also strongly rooted in the Supreme Court's focus in

158. See JOHN STUART MILL, ON LIBERTY 33-39 (2d ed. 1859) (arguing robust discussion and argument leads to fuller perception of truth); see also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”). For an intriguing and completely original argument that free speech theory could be advanced under a framework in which the goal of the First Amendment is understood not to rely on “truth” per se but on knowledge, or “justified true belief,” see Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 443-44 (2019) (emphasis added).

159. See Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204, 217-18 (1972).

160. LEE C. BOLLINGER, *THE TOLERANT SOCIETY* (1986). Finally, negative speech theorists claim that free speech doctrine should be focused on whether the government's motives for regulating any particular category of speech are legitimate or suspect. See, e.g., ALEXANDER, *supra* note 98, at 131 (criticizing autonomy maximization theories for failing to account for government's interest in balancing protected rights against each other).

161. See generally ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 145-47 (1995); Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 838 (“The assumption that citizens are rational is deeply embedded in democratic theory.”); Frederick Schauer, *Free Speech and the Assumption of Rationality*, 36 VAND. L. REV. 199 (1983) (book review).

162. William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 3-4 (1995).

163. It is certainly no surprise, therefore, that during the brief revival of civic republicanism in legal scholarship in the late twentieth century, much attention was paid to speech as a means to facilitate rational deliberation. See, e.g., Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CALIF. L. REV. 267, 269 (1991).

some cases on the idea that in order for speech to be relevant to the First Amendment, it must appeal to the listener's cognitive reasoning processes.¹⁶⁴

Conversely, speech that does not promote rational deliberation is sometimes said to not be worth protecting because it fails to serve democracy or truth-seeking objectives. For example, some scholars argue that regulation of "hate speech" is less worrisome than regulation of other forms of expression because hate speech may generate anger or other emotional responses that overcome the ability of the listener to engage in rational deliberation.¹⁶⁵ Consider defamation, under which the publication of false statements of fact that harm another's reputation is viewed as having limited value under the First Amendment.¹⁶⁶ Even if the defamation plaintiff is a public official or public figure, the speech is not covered if the speaker acted with actual malice or reckless disregard for the truth.¹⁶⁷ Here, rational deliberation works differently in a way that will become important to our discussion later. The listener may actually rationally conclude that the information provided to her reduces the esteem in which she may have previously held the defamed person. But this deliberation is based on a false set of premises, which undermines the value of the speech.

In its highest and best form, rational deliberation is an essential corollary of both the truth-finding and democracy-promoting rationales of the First Amendment. Among those who write about free speech theory, Professor Robert Post is probably the most prominent proponent of the rational deliberation model. Because Professor Post's focus has long been on the democracy-promoting justification for free speech law, he emphasizes the protection of conditions that facilitate public discourse, to which the capacity for rational deliberation is essential.¹⁶⁸ Accordingly, he writes that rational deliberation "entails consideration and evaluation of the various

164. See *Spence v. Washington*, 418 U.S. 405, 409-11 (1974).

165. See Post, *supra* note 132, at 275; Bradley A. Appleman, Comment, *Hate Speech: A Comparison of the Approaches Taken by the United States and Germany*, 14 WIS. INT'L L.J. 422, 438 (1996).

166. See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-61 (1985).

167. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).

168. POST, *supra* note 161, at 184-85; Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 480 (1997).

positions made possible by the space of critical interaction.”¹⁶⁹ But Post also acknowledges what he calls the “paradox of public discourse”: the freedom to engage in deliberation requires the protection of both norms of civility and a society of openness, and the latter embodies “a constitutional commitment to critical interaction [that] prevents the law from articulating and sustaining a common respect for the civility rules.”¹⁷⁰

III. THE POTENTIAL SPEECH VALUE OF FAKE NEWS

*“A few months ago I told the American people that I did not trade arms for hostages.... My heart and my best intentions still tell me that is true, but the facts and evidence tell me it is not.”*¹⁷¹

As described above, it is virtually axiomatic in public discussions of fake news that such expression undermines rational deliberation, thereby rendering fake news not only valueless but also affirmatively harmful in public discourse. The search for truth and the aspirations of democratic governance are impeded when people are misinformed about the very factual premises of public discourse. Fake news has the tendency to undermine deliberation, rather than promote it.¹⁷² It both deprives listeners of agency and works a broader epistemic harm to society. In this view, regulation of fake news can be seen as a way of correcting a market failure in the marketplace for truth. Because rational deliberation has such a

169. POST, *supra* note 161, at 146; *see also* Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1117-18 (2016) (“[S]peech is widely associated in our culture with rationality.”). Professor Post’s privileging of public discourse in speech theory is in tension with “his tolerance for incivility.” *Id.* at 1117.

170. POST, *supra* note 161, at 147; *see also* Gregory P. Magarian, *Religious Argument, Free Speech Theory, and Democratic Dynamism*, 86 NOTRE DAME L. REV. 119, 160-61 (2011).

171. Lou Cannon, *Reagan Acknowledges Arms-for-Hostages Swap*, WASH. POST (Mar. 5, 1987), <https://www.washingtonpost.com/archive/politics/1987/03/05/reagan-acknowledges-arms-for-hostages-swap/7a5cd7cc-a112-4283-94bd-7f730ad81901/> [<https://perma.cc/3E38-3NQL>] (quoting President Reagan’s response to the report of a review board that investigated Iran-Contra).

172. “In brief, the marketplace of ideas theory does not support protecting fake news.... Disseminating fake news does not foster the type of rational debate or discussion that moves toward an ever closer truth.” Clay Calvert, Stephanie McNeff, Austin Vining & Sebastian Zarate, *Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine*, 86 U. CIN. L. REV. 99, 128 (2018) (footnote omitted).

strong hold on First Amendment theory,¹⁷³ and because other forms of falsehoods are regulated for precisely this reason,¹⁷⁴ these justifications for regulating fake news seem compelling.

There are multiple flaws with this generalization. First, many scholars have made meaningful critiques of rational deliberation as an organizing principle for free speech.¹⁷⁵ Second, even if rational deliberation is a laudable and achievable objective, the First Amendment's coverage of speech serves values other than promoting democracy or the search for truth through facilitating rational deliberation. Speech can also have value because it appeals not to the rational—not to one's cognitive processes—but to one's self-realization and identity as a human being.¹⁷⁶ There are numerous examples of speech that is both covered and protected by the First Amendment because it facilitates emotional or spiritual experiences and promotes one's self-identity and place in the world, notwithstanding the "irrationality" of those feelings. Finally, fake news can promote a form of social cohesion or cultural connection with like-minded people that mirrors types of speech that advance such values in other contexts, including nationalism, religious affiliation, and other portals of human connection.¹⁷⁷ These arguments are all developed in the following Sections.

A. The Limits of Rational Deliberation as a Speech Principle

The rational deliberation principle has a meaningful hold on much free speech theory and doctrine, but it is deeply flawed. First, extensive political science research shows that rational deliberation is based on a view of the electoral and public policy discourse that is not descriptively accurate.¹⁷⁸ Second, it is also incomplete; it does

173. See *supra* Part II.B.

174. See *supra* notes 149-50 and accompanying text.

175. See *infra* Part III.A.

176. See C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 253-54 (2011); Redish, *supra* note 159, at 593-94; *infra* Part III.B.

177. See *infra* Part III.C.

178. For an excellent discussion that elaborates on the role of rational processing in the context of press audiences, see RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 WASH. U. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3588625## [<https://perma.cc/Y4RT-XV4R>].

not explain, for instance, much of what we consider to be speech—for example, abstract art or instrumental music.

A long-standing critique of the rational deliberation principle is that it does not comport with how speech and reasoning work, which also undermines the truth-seeking justification of free speech.¹⁷⁹ Recall the previous discussion about the traditional First Amendment concerns about state regulation of fake news.¹⁸⁰ There are at least two fundamental problems with thinking about fake news as undermining rational deliberation. First, the concept of “truth” in political discourse is difficult to cabin. This relates to the prior discussion of vagueness,¹⁸¹ but it is also more than that. One of the most trenchant critiques of rational deliberation was developed by Stanley Ingber in a widely cited article from a generation ago.¹⁸² He begins by disputing the idea that there is any such thing as objective truth. As he wrote:

Although the assumption of the existence of objective truth is crucial to classic marketplace theory, almost no one believes in objective truth today. Historians, for example, first determine what type of historical data to seek and then determine the relevance of the data they find. Thus, history is founded on the selective perception of historians rather than on any objective historical truth. The same can be said for the pursuit of truth in any academic, scientific, or professional discipline. *The “truth” of a theory depends on its ability to explain a phenomenon to the judging individual’s satisfaction and on its aesthetic appeal to that individual. Today’s truth, consequently, may become tomorrow’s superstition.*¹⁸³

Rather than producing some chimerical truth or protecting dissidents, he argued, the First Amendment operates to entrench the

179. See Blocher, *supra* note 158, at 451-56.

180. See *supra* Part I.C.

181. See *supra* notes 104-09 and accompanying text.

182. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1.

183. *Id.* at 25 (emphasis added) (footnotes omitted); see also PINKER, *supra* note 52, at 9 (noting that what an educated English person in 1600 would have believed to be true [witches can cause storms at sea; a murder victim “will bleed in the presence of the murderer”] no educated person would have believed just a century and a third later).

status quo because the government “predisposes the individual to accept some perspectives rather than others.”¹⁸⁴

Ingber goes on to suggest that rejection of the objective truth model should also draw into question other marketplace assumptions, including the premise that people consume speech and process their thinking in a rational way.¹⁸⁵ Similarly, as Professor Frederick Schauer has noted, placing one’s faith in the truth model “requires a substantial degree of faith in pervasive human rationality and an almost willful disregard of the masses of scientific and marketing research to the contrary.”¹⁸⁶ Ingber goes on to observe that some First Amendment doctrine allows suppression of speech because it does not promote rational discourse, but rather surpasses the “bounds of persuasion.”¹⁸⁷ For example, he points out that legal rules such as the fighting words doctrine seem to allow the government “to limit irrational responses to communications by controlling the form in which such messages are presented.”¹⁸⁸ This wrongly assumes, however, that people can distinguish “between a message’s substance and the distortion caused by its form and focus.”¹⁸⁹

Ultimately, Ingber argues that the rational deliberation model fails to account for the persuasive power of emotional, rather than rational, appeals through speech:

As Professor C. Edwin Baker has recognized, emotional appeals, whether rational or not, are highly potent: “subconscious’ repressions, phobias, or desires influence people’s assimilation of messages; and, most obviously, stimulus-response mechanisms and selective attention and retention processes influence understanding or perspectives.” These processes, coupled with the phenomenon of cognitive dissonance, insulate individuals from messages inconsistent with those perspectives that further

184. Ingber, *supra* note 182, at 28; *see also id.* at 48 (“The marketplace of ideas is more myth than reality. In practice, communications flowing into the market largely reflect conventional political, economic, and social points of view.” (footnote omitted)). *But see* Lidsky, *supra* note 161, at 835-49 (arguing that even taking into account the greater understanding of the way we process information from behavioral economics and cognitive psychology, the rationality ideal should not be discarded).

185. Ingber, *supra* note 182, at 31-32.

186. Frederick Schauer, *Facts and the First Amendment*, 57 UCLAL REV. 897, 909 (2010).

187. Ingber, *supra* note 182, at 33.

188. *Id.* at 32.

189. *Id.* at 31.

their perceived self-interests. *Marketplace outcomes therefore are determined more by the packaging of the message and the psychological predispositions of the listeners than by any rational process. Consequently, the market model's reliance on public rationality is, at best, misplaced.*¹⁹⁰

Building on Ingber's critique, and notwithstanding the Meiklejohnian ideal,¹⁹¹ not all decisions about politics and elections rely on either objective factual truth or rational deliberation. Rational deliberation hypothesizes a high-functioning democracy in which people may be persuaded by fact and reason: an almost utopian, Enlightenment ideal that some commentators refer to as the "folk theory" of democracy.¹⁹² But studies show numerous flaws in this premise. As Professors Achen and Bartels observe, "[A] substantial body of scholarly work demonstrat[es] that most democratic citizens are uninterested in politics, poorly informed, and unwilling or unable to convey coherent policy preferences through 'issue voting.'"¹⁹³ From this perspective, one limit to the rational deliberation theory is an information problem. "[T]he problem is not that voters are necessarily irrational, but that most voters have very little real information, even about crucially important aspects of national political life."¹⁹⁴ The information they do have may be of uncertain provenance. As Professors Fernbach and Sloman note, "People fail to distinguish what they know from what others know because it is often impossible to draw sharp boundaries between what knowledge resides in our heads and what resides elsewhere."¹⁹⁵

But that is not the only problem. Much evidence shows that people make decisions about everything from how to cast their votes

190. *Id.* at 35-36 (emphasis added) (footnotes omitted). Ingber makes other important arguments about the distortion of the marketplace through the power of government to control information that depart from this Article's focus. *See id.* at 36-48.

191. *See supra* note 157 and accompanying text.

192. *See, e.g.*, CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS* 277 (2016) ("In the folk theory of democracy, objective facts about the political world transcend whatever disagreements arise from our differing moral commitments.").

193. *Id.* at 14. Of course, this is a descriptive, not normative, account. Scholars who study voting behavior do not think these findings are desirable.

194. *Id.* at 284.

195. Fernbach & Sloman, *supra* note 61.

to which television set to buy based on a combination of reasons that are not fully rational. Most political science studies argue that party affiliation is the single most important factor in determining how individuals cast their votes in elections; in the same manner that consumers have brand loyalty to Apple or IBM, people frequently vote simply on party lines.¹⁹⁶ One might initially respond that basing voting decisions on party affiliation can itself be a form of rational behavior, in that the voter chooses to associate herself with a party because its platform most closely matches her views.¹⁹⁷ But that does not appear to be the case either. Professor Gabriel S. Lenz has found

surprisingly little evidence that voters judge politicians on their policy stances. They rarely shift their votes to politicians who agree with them—even when a policy issue has just become highly prominent, even when politicians take clear and distinct stances on the issue, and even when voters know these stances. Instead, I usually find the reverse: *voters first decide they like a politician for other reasons, then adopt his or her policy views.*¹⁹⁸

Again, we might even construe this as rational behavior given the resources that must be invested to stay informed about a wide range of public policy issues, but that is not the type of rational deliberation the First Amendment is supposed to facilitate. In a particularly dismal description of these phenomena, Achen and Bartels suggest that “[m]ost of the time, voting behavior merely reaffirms voters’ partisan and group identities. They do not rethink their fundamental political commitments with every election cycle.... They sound like they are thinking, and they feel like they are thinking. We all do.”¹⁹⁹

Understood from this perspective, laws regulating fake news may be but failed attempts to force people to behave rationally in a universe that is full of irrationality. Note that this is slightly different

196. ACHEN & BARTELS, *supra* note 192, at 294.

197. *See id.* at 267-68.

198. GABRIEL S. LENZ, FOLLOW THE LEADER? 3 (2012) (emphasis added). *But see id.* at 7 (noting that some researchers believe democracy more closely resembles an ideal in which voters behave rationally by voting for politicians who promote policies they agree with).

199. ACHEN & BARTELS, *supra* note 192, at 294.

from the market failure problem. Proposals to regulate fake news implicitly assume that it is invalid, or is at least suboptimal, for voters to make a decision based on things other than fact, such as emotion, instinct, passion, or any number of other nonrational factors.²⁰⁰ But the latter factors may, on the ground, have a greater impact on voting and other behavior than the rational deliberation model assumes.

Another critique of rational deliberation theory is that it is substantially underinclusive because it does not account for a lot of communicative activity that is, or should be, unequivocally counted as speech. Such a failing presents serious problems for rational deliberation as a goal for the First Amendment. Rational deliberation explains nothing about why expression that appeals to things *other* than cognitive reasoning counts as speech.

As mentioned above, an alternate or supplemental free speech theory focuses not on expression as a means to a functioning democracy or the search for truth, but on the speech's capability to promote individual self-realization.²⁰¹ This autonomy-based theory of free speech, as described by Professor Redish,

can be interpreted to refer either to development of the individual's powers and abilities—an individual “realizes” his or her full potential—or to the individual's control of his or her own destiny through making life-affecting decisions—an individual “realizes” the goals in life that he or she has set. In using the term, I intend to include both interpretations.²⁰²

The self-realization theory is much more effective than either democracy-promotion or truth-seeking in explaining why certain types of nonverbal, or verbal but meaningless, expression—such as abstract art, instrumental music, and nonsense—are covered by the First Amendment. Indeed, complete reliance on the rational deliberation principle would suggest that they are not. As I have

200. One response to this suggestion might be that those factors themselves suggest rational decision-making. Rational deliberation as it relates to policy preferences need not be limited to pure questions of fact.

201. See *supra* note 176 and accompanying text.

202. Redish, *supra* note 159, at 593.

suggested elsewhere, there are good reasons for the First Amendment's coverage of, for example, music:

Perhaps the most intuitive argument for music's expressive value is its ability to *evoke noncognitive responses* in listeners, as well as in its composers and performers. That is, completely dissociated from titles, linguistic signals, and other forms of art, instrumental music can be expressive in important ways that elicit emotional and spiritual responses. The emotional claim therefore perhaps presents the cleanest analytical argument for categorizing purely instrumental music as a form of constitutionally protected expression.²⁰³

Thus, wordless music can promote in both the “speaker” and listener a type of pure emotional experience that fulfills one's human potential, rather than a cognitive one.²⁰⁴

Though presumed to be speech, instrumental music bears almost none of the features of human communication that we ordinarily associate with the First Amendment. First, and perhaps most obviously, instrumental music conveys no particularized, or even general, “message” that we could understand as speech.²⁰⁵ It conveys no fact, no idea, no tangible insight. Moreover, from the perspective of the listener, instrumental music elicits no specific cognitive response and does not necessarily stimulate rational deliberation.

Similar arguments can be made that nonrepresentational art, which also does not appeal to cognitive functioning or reason, therefore does not promote rational deliberation either. Finally, actual verbal expression that represents nonsense, such as the absurd phrase “BONG HiTS 4 JESUS,”²⁰⁶ can be construed as speech, but certainly cannot be understood as promoting rational deliberation. Even expression that inspires cognitive processing and thereby affects thought can sometimes reach the mind in ways that are not related to rationality. To the extent some forms of entertainment,

203. See TUSHNET ET AL., *supra* note 13, at 60 (emphasis added).

204. *Id.* at 60-65.

205. *Id.* at 65.

206. See *Morse v. Frederick*, 551 U.S. 393, 397 (2007). For a discussion of nonsense as speech, see TUSHNET ET AL., *supra* note 13, at 119-32; see also Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1425-26 (2014).

such as movies, are speech, it is because they can inspire fear, sadness, laughter, and other emotional experiences, either coextensively with or independent of rational thinking.

My primary point here is that rational deliberation as a goal of free speech does not do the work necessary to clarify the boundaries between protected expression and nonspeech. Rational deliberation has value in thinking about speech and its protection, but its substantial underinclusiveness is a critical shortcoming. The following Sections explore whether the self-realization theory can be affirmatively invoked to support the idea that fake news has free speech value in its capacity to meaningfully promote both individual identity and social cohesion.

B. Fake News May Promote Self-Realization by Facilitating Expressive Experiential Autonomy

A second, crucial issue in thinking about fake news regulation as justifiable on the ground that it undermines rational deliberation is that fake news may have speech value independent of its ability to promote such deliberation. Human communication is far more complex and varied than the rational deliberation model presupposes. An increasing number of legal scholars have argued that free speech doctrine cannot be fully explained by a single, unified theory, but that multiple theories, sometimes varying by context, may be necessary to understand the complex map of the law.²⁰⁷ As argued throughout this Section, the democracy-promoting and truth-seeking goals of the First Amendment fail to explain much of what we value as speech and other models might be understood to reflect the value that fake news might provide to its listeners.

Consider what we know about how fake news operates and how people consume it. Setting aside the question of the speaker's motivation, whether it be to earn money through web clicks or to influence the outcome of an election, the audience for fake news may in important ways be self-determined. That is, fake news in many cases is directed at an audience that is predisposed to consume it or

207. TUSHNET ET AL., *supra* note 13, at 8-9. This is in no way limited to free speech law but also extends to other aspects of constitutional theory. See generally Andrew Jordan, *Constitutional Anti-Theory*, 107 GEO. L.J. 1515 (2019).

may even seek it out. Critics of the fake news phenomenon have suggested that such speech is harmful because it allows people to remain in their “filter bubbles,” which is damaging to the ideal of open public discourse.²⁰⁸ Given the nature of individual news consumption, however, it is hard to figure out how to address this issue. The phenomena of selective exposure and confirmation bias suggest that people choose news outlets or pursue and read stories because those stories are likely to be consistent with their preconceived worldviews.²⁰⁹ “If reason is designed to generate sound judgments, then it’s hard to conceive of a more serious design flaw than confirmation bias.”²¹⁰ There are serious barriers to addressing this problem; it would surely violate the First Amendment and perhaps other aspects of the Constitution to compel individuals to follow news sources and consume information chosen by others.

Lots of what we value as speech has to do with the ability to process thought, belief, and emotion that may not necessarily be rational, but is nonetheless critical to the ability to define ourselves. In its own social context, fake news may not be that different from other forms of communication that we value even though they do not involve truth in the literal sense. What if fake news, like art, music, and other forms of nonpropositional expression, promotes valuable internal, noncognitive experiences? Not all important brain functioning or processing of communication is cognitive, and such communication can promote senses of happiness, sadness, anger, wonder, and a range of other emotions.²¹¹ In this sense, fake news might have value to its listeners in some of the same ways that music does. Indeed, a consumer of fake news might even

208. Mostafa M. El-Bermawy, *Your Filter Bubble Is Destroying Democracy*, WIRED (Nov. 18, 2016, 5:45 AM), <https://www.wired.com/2016/11/filter-bubble-destroying-democracy/> [<https://perma.cc/6VM9-SNHV>]. Filter bubbles were much less likely to exist when people got most of their information from traditional speech intermediaries such as the three major television networks and large, national newspapers.

209. FARHAD MANJOO, *TRUE ENOUGH* 30 (2008); Kevin Quealy, *We Avoid News We Don't Like. Some Trump-Era Evidence*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/interactive/2017/02/21/upshot/how-readers-react-to-political-news-they-dont-like-they-ignore-it.html> [<https://perma.cc/48Q6-SUEE>].

210. Elizabeth Kolbert, *Why Facts Don't Change Our Minds*, NEW YORKER (Feb. 20, 2017), <https://www.newyorker.com/magazine/2017/02/27/why-facts-dont-change-our-minds> [<https://perma.cc/8U4N-LN4R>].

211. TUSHNET ET AL., *supra* note 13, at 60-65.

recognize that such stories feed her sense of emotional fulfillment, and may even be “music to my ears.”

It is indisputable that art, music, and other forms of nonverbal communication count as “speech” for First Amendment purposes.²¹² But how can the freedom of speech protect things that are, quite literally, not speech? Turning to the self-realization theory, I have previously written that instrumental music must be considered to be speech in part because it has the power to convey cultural, religious, nationalistic, and other social values, and promote emotional expression and experience in its composers, performers, and listeners.²¹³ Indeed, as a social practice, music may be even more powerful than overt, verbal expression in specific instances.²¹⁴

The emotional power of speech falls neatly within the autonomy or self-realization justification for constitutional protection. As Edwin Baker wrote, “A person’s autonomy might reasonably be conceived as her capacity to pursue successfully the life she endorses—self-authored at least in the sense that, no matter how her image of a meaningful life originates, she now can endorse that life for reasons that she accepts.”²¹⁵

Fake news may operate in ways similar to art and music in that it might unlock a certain way of viewing or experiencing the world. It may be opening up a false or artificial world, but the regulation of fake news could be conceptualized in a manner not that different from censoring art, or video games, or virtual reality experiences, all of which might create or inspire a different or alternative worldview. Understood in this way, lies actually have some social value, not just in a utilitarian sense by promoting other public good but also by enhancing individuals’ ability and freedom to internally experience self-realization.²¹⁶

212. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos. Inc.*, 515 U.S. 557, 569 (1995) (observing, though without elaboration, that the First Amendment “unquestionably shield[s] the painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll”).

213. TUSHNET ET AL., *supra* note 13, at 66.

214. *Id.* at 52-54.

215. Baker, *supra* note 176, at 253.

216. See Redish, *supra* note 159, at 593. Of course, even if this view is valid, that does not address the possible harms caused by fake news. As I will address in the last Section, perhaps there are better ways to address such harms without directly interfering with the personal appeal of fake news.

We can look as far back as John Stuart Mill to see that this is not a new phenomenon and that individual emotional experience with speech may be more powerful than reason.

So long as an opinion is strongly rooted in the feelings, it gains rather than loses in stability by having a preponderating weight of argument against it. For if it were accepted as a result of argument, the refutation of the argument might shake the solidity of the conviction; but when it rests solely on feeling, the worse it fares in argumentative contest, the more persuaded its adherents are that their feeling must have some deeper ground, which the arguments do not reach; and while the feeling remains, it is always throwing up fresh entrenchment of argument to repair any breach made in the old.²¹⁷

If the notion that fake news might promote expressive experiential autonomy seems counterintuitive, consider the comparison to the emotional power of religious expression to its audiences. The latter is another powerful example of the type of speech that is indisputably of substantial social value but may not always lead to rational deliberation in the traditional sense to the extent that it is based on faith and values that are not grounded in fact. These thoughts, feelings, beliefs, and experiences may be rational on their own terms, but are not rational in the way that we think about that term under speech theory. Similarly, speech about profound moral questions (whether from a religious perspective or not), such as the meaning of existence or how to define life, involve important expressions of principles that do not necessarily rely on rationality and cannot be said to be either true or false.

Some hints of this type of thinking about speech can be found in Justice Breyer's concurring opinion in *United States v. Alvarez*, the Court's decision invalidating the Stolen Valor Act, which made it a federal crime to lie about having been awarded military honors.²¹⁸ Breyer noted at one point that lies sometimes serve valuable social functions, such as "in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice,

217. JOHN STUART MILL, *The Subjection of Women*, in THREE ESSAYS BY JOHN STUART MILL 425, 427 (Oxford Univ. Press 1912) (1869).

218. 567 U.S. 709, 713, 715-16 (2012).

provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger."²¹⁹ He also worried about the regulation of lying in the context of broad, theological or philosophical thinking, noting the substantial danger in permitting the government to act as an arbiter of truth in those contexts.

As the dissent points out, "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny.²²⁰

This suggests a special concern with how the government might define what a lie means within these fields, because in many instances those are areas in which what is true is either highly debatable, unverifiable, or subject only to considerations of faith and value. Thus, when we talk about promoting religious deliberation through speech, we may not necessarily mean rational deliberation in the ordinary sense of that phrase.

Yet another context in which to explore this way of thinking about fake news is in cases that have addressed whether there are free speech rights for people who represent themselves as fortune-tellers and who charge money for their services. This has caught the attention of some legal scholars who think about lying and the First Amendment,²²¹ and has been the subject of some litigation in the lower courts.²²² Some have claimed (mostly unsuccessfully) that fortune-tellers should be exempt from fraud laws and other government regulation because they are engaged in speech.²²³ In response

219. *Id.* at 733 (Breyer, J., concurring).

220. *Id.* at 731-32 (citation omitted).

221. *See, e.g.*, Catherine J. Ross, *Incredible Lies*, 89 U. COLO. L. REV. 377, 383-400 (2018); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1272-73 (1983); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1111-12 (2006).

222. *See, e.g.*, *Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013).

223. *Id.* at 565-70.

to these claims, the government has argued that the speech is false and therefore falls outside the scope of the First Amendment.²²⁴ The fortune-tellers have claimed that their services are comparable to those of a spiritual adviser or religious counselor, and that such expression occurs in the context of a social relationship in which the listeners understand that fortune-telling is predictive speech.²²⁵

Noting that many people sincerely believe that they have the power to tell the future, courts have concluded that such expression is not necessarily exempt from First Amendment coverage on the ground that it is false.²²⁶ As the Fourth Circuit held, “If, as the County contended at oral argument, all predictive speech were inherently deceptive, most religious prophecy, financial prognostication, and medical diagnosis would fall outside the scope of constitutional protection.”²²⁷

One might distinguish the fortune-teller situation from fake news on the ground that, like purchasers of the *National Enquirer* or other tabloid news publications, customers of fortune-tellers knowingly enter into a social relationship in which they either want to be lied to or suspend disbelief for the purpose of entertainment or emotional sustenance. Moreover, even in cases in which the customer knows the fortune-teller’s speech to be false, she may wish to experience the lie because it provides some form of emotional or even spiritual comfort, as in the case of the fortune-teller conveying the “news” that a departed loved one is at peace. In the same way, consumers of fake news may seek it out for entertainment, or may believe the facts conveyed because they make them feel better about their place in the universe.

By comparing fake news and fortune-telling to Mozart, Pollack, and religious expression, this Article does not mean to in any way diminish the latter. Rather, it fully considers whether serious arguments exist to defend the former on grounds of what I call expressive experiential autonomy. None of these forms of expression involve fact-driven speech or communication designed to convey a

224. *Id.*

225. *Id.*

226. *Id.* at 567.

227. *Id.* at 566 (citing *Nefedro v. Montgomery County*, 996 A.2d 850, 858 (Md. 2010)). Interestingly, the fortune-teller in that case provided evidence about a wide range of inspiration for her work, including “music, music, music!” *Id.* at 564.

message that appeals to cognitive reasoning. They also, therefore, do not rely on the rational deliberation principle. We might value these expressions under the First Amendment not because they promote rational deliberation, but because they produce some other kind of experience that we understand as experiential autonomy.

There is substantial support for this understanding of the personal emotional experience with expression found in disciplines other than law, including political science and social and cognitive psychology research. We can learn much from these experts who closely study partisanship, communication, and disinformation campaigns. Turning again to political scientists Achen and Bartels, we find support not only for the irrationality of voter behavior but also for the role of emotional attachment to parties and how that influences belief. Their studies “find that partisan loyalties strongly color citizens’ views about candidates, issues, and even ‘objective’ facts. Citizens’ political preferences and beliefs are constructed from *emotional* or cognitive commitments whose real bases lie elsewhere.”²²⁸ Similarly, an extensive study of Twitter by scientists at MIT concluded that fake news is more frequently retweeted in part because “fake news evokes much more emotion than the average tweet.... Fake tweets tended to elicit words associated with surprise and disgust, while accurate tweets summoned words associated with sadness and trust.”²²⁹

This understanding of the manner in which people experience fake news also seems to be reflected in the work of psychologists, who study the ways in which human communication is processed. First, the well-known concept of confirmation bias suggests that people will gravitate toward news sources and candidates whose expression is consistent with their own worldviews.

Research indicates that both offline and online, people tend to discuss politics with like-minded others. Similarly, they tend to select like-minded media sources. This is not surprising given that theory and empirical research in cognitive psychology suggest that all of us are prone to “confirmation bias”—the bias to selectively search for, believe, and confirm that which we

228. ACHEN & BARTELS, *supra* note 192, at 269 (emphasis added).

229. Meyer, *supra* note 71.

already think we know. This includes searching for evidence that confirms our preexisting beliefs.²³⁰

Furthermore, both theoretical claims and empirical evidence exist to demonstrate individuals' tendency toward what social psychologists call "shared reality." Here, "*reality* refers to people's subjective perception of something as being real and truthful, not to whether something can be corroborated as real or truthful from an external (scientific) perspective."²³¹ The motives for listeners to adapt to shared reality are, in part, epistemic.²³² Here, epistemic motives mean not the goal of knowledge per se but "the need to achieve a valid and reliable understanding of the world."²³³

An understanding of fake news as a form of valuable expression and social experience may also lead us back to considering whether other forms of human communication might be recognized as speech. In the same way that art or fake news communicates in a manner unconnected to rational deliberation, so might other forms of expression. One form of communication that has been subject to this debate is pornography. While Professor Schauer has argued that depictions of sexually explicit acts or images should not count as speech for First Amendment purposes because they do not appeal to cognitive processes,²³⁴ others have questioned whether the emotional and experiential aspects of such expression suggest that it has speech value.²³⁵

230. Toni M. Massaro & Robin Stryker, *Freedom of Speech, Liberal Democracy, and Emerging Evidence on Civility and Effective Democratic Engagement*, 54 ARIZ. L. REV. 375, 414 (2012) (footnotes omitted); see also Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 673 (2006).

231. Gerald Echterhoff, E. Tory Higgins & John M. Levine, *Shared Reality: Experiencing Commonality with Others' Inner States About the World*, 4 PERSPS. ON PSYCH. SCI. 496, 497-98 (2009).

232. *Id.* at 500. They are also relational. See *infra* note 244 and accompanying text.

233. Echterhoff et al., *supra* note 231, at 500.

234. Frederick Schauer, *Speech and "Speech"—Obscenity and "Obscenity": An Exercise in the Interpretation of Constitutional Language*, 67 GEO. L.J. 899, 923 (1979); see also Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 591 ("[P]ornography is 'low-value' speech, entitled to less protection from government control than most forms of speech.").

235. Chen, *supra* note 14, at 440-41.

Or, consider other forms of communication that stimulate brain functioning in noncognitive manners. In a recent column, Richard Friedman examined how mathematical equations are experienced.²³⁶ He reported about a neuroscience study that examined mathematicians' brains while they were thinking about a range of equations.²³⁷ While, of course, equations can promote purely cognitive functioning, the study found something quite different.

The researchers found a strong correlation between finding an equation beautiful and activation of the medial orbitofrontal cortex, a region of the prefrontal cortex just behind the eyes. This is the same area that has been shown to light up when people find music or art beautiful, so it seems to be a common neural signature of aesthetic experience.²³⁸

As I have suggested in prior work, neuroscience may provide a clue to how we experience nonverbal stimulation through the arts as well.²³⁹ Moreover, not all of us experience the same forms of expression in an identical manner. Numerous musical artists from Duke Ellington to the pop singer Pharrell Williams are reported to have a condition known as synesthesia.²⁴⁰ Though there are different types, the pop star Lorde has “sound-to-color synesthesia—when she hears certain notes and sounds, corresponding colors appear—and she describes making music in intensely visual terms.”²⁴¹ Perhaps we can gain additional insights about a wide range of nonverbal communication through other studies of such neurological phenomena.

If fake news paradoxically has this value because it promotes expressive experiential autonomy, it is more difficult to suggest that it could be prohibited or otherwise regulated, independent of the

236. Richard A. Friedman, Opinion, *The World's Most Beautiful Mathematical Equation*, N.Y. TIMES (Apr. 15, 2017), <https://www.nytimes.com/2017/04/15/opinion/sunday/the-worlds-most-beautiful-mathematical-equation.html> [<https://perma.cc/9P8V-E67V>].

237. *Id.*

238. *Id.*

239. TUSHNET ET AL., *supra* note 13, at 64-65.

240. Ryan Dombal, *What the Hell Is Synesthesia and Why Does Every Musician Seem to Have It?*, PITCHFORK (Jan. 31, 2014), <https://pitchfork.com/thepitch/229-what-the-hell-is-synesthesia-and-why-does-every-musician-seem-to-have-it/> [<https://perma.cc/N2RE-LFAA>].

241. Jonah Weiner, *The Return of Lorde*, N.Y. TIMES MAG. (Apr. 12, 2017), <https://www.nytimes.com/2017/04/12/magazine/the-return-of-lorde.html> [<https://perma.cc/G4A8-47XY>].

structural or procedural concerns offered by traditional free speech theory. Understood in this way, fake news may be conceived of as expression that promotes deliberative autonomy, not in the sense of rational deliberation, but because it may provoke and capture ineffable feelings.

C. Fake News May Promote Social Cohesion

A separate but related claim is that to some extent, consumers' connection and relationship to a particular fake news purveyor and to each other may be an important and valuable form of social cohesion. Understood in this way, fake news has both internal and external social value. Typically, when a person clicks "like" or retransmits a social media message, she both signals her affiliation with the content of that message and identifies herself as a member of a group that shares some common worldview or value structure. After all, a less pejorative word for "filter bubble" might be community.²⁴²

Other types of communication that we commonly understand to be speech under the First Amendment share this value. Return to the example of instrumental music: in addition to the facilitation of emotional experience, such expression can also serve a social-cohesion function. "[I]n music's expression of culture, it serves important social functions by connecting people within and between different communities, and its recognition as a form of speech ensures that government efforts to establish a cultural orthodoxy, like attempts to create a political or religious orthodoxy, are thwarted."²⁴³

Again, this understanding of the social cohesion function of fake news is supported by political science and psychology research. The research on shared realities, discussed above, reflects that relational motives are furthered by fake news because "[s]hared realities with others are attractive because they allow individuals to experience a more valid and reliable view of the world and to obtain or maintain a sense of connectedness and belonging."²⁴⁴ This is consistent

242. See El-Bermawy, *supra* note 208.

243. TUSHNET ET AL., *supra* note 13, at 66.

244. Echterhoff et al., *supra* note 231, at 500; see also Amanda Taub & Brendan Nyhan,

with the idea that people consume fake news to further their sense of community. It also may help explain why fake news is not only effective but also may be valuable to its consumers without regard to objective truth.

Political parties may be the most strongly identifiable affinity group that reflects this type of community. Indeed, research shows that partisanship affects how people consume information and what they believe. Achen and Bartels concluded “that citizens’ perceptions of parties’ policy stands and their own policy views are significantly colored by their party preferences. Even on purely factual questions *with clear right answers*, citizens are sometimes willing to believe the opposite if it makes them feel better about their partisanship and vote choices.”²⁴⁵

One can observe this type of social cohesion in communities that view institutions with distrust and that hold a heavy anti-elitism bias. It is not uncommon to read or hear derisive remarks about consumers of fake news as ignorant rubes, or worse.²⁴⁶ Rather than encouraging people to be more discriminating about information sources, this kind of characterization may in fact provoke a defensive community-building reaction, simply reinforcing the community’s worldview. Furthermore, as we have seen, these views may not be caused by just ignorance but by powerful forces such as partisanship.²⁴⁷ As one observer noted, “Sharing [fake news] on social media is a way to show public support for one’s partisan

Why People Continue to Believe Objectively False Things, N.Y. TIMES (Mar. 22, 2017), <https://www.nytimes.com/2017/03/22/upshot/why-objectively-false-things-continue-to-be-believed.html> [<https://perma.cc/GT2M-SN4L>].

245. ACHEN & BARTELS, *supra* note 192, at 17 (emphasis added).

246. See 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> [<https://perma.cc/8JRG-G7MR>] (“Consider the thinly disguised sneer in most articles and editorials about so-called fake news. The very phrase implies that the people who read and spread the kind of false political stories that swirled online during the election campaign must either be too dumb to realize they’re being duped or too dishonest to care that they’re spreading lies. But the fake-news phenomenon is not the result of personal failings. And it is not limited to one end of the political spectrum. Rather, Americans’ deep bias against the political party they oppose is so strong that it acts as a kind of partisan prism for facts, refracting a different reality to Republicans than to Democrats.”).

247. *Id.*

team—roughly the equivalent of painting your face with team colors on game day.”²⁴⁸

Several phenomena identified by behavioral economists and cognitive and social psychology researchers provide some empirical support for the idea that fake news promotes social cohesion. First, there is the tendency for people to engage in “motivated reasoning” or “motivated cognition,” which nudges them toward processing information in a way that satisfies objectives other than learning or discovery of truth.²⁴⁹ These concepts are closely related to the idea of “expressive rationality,” which holds that views “arise from individuals’ tendency to form beliefs that signal their membership in and loyalty to identity-defining cultural groups.”²⁵⁰ In conjunction with the current discussion, one scholar has observed that “[p]eople affirm or deny [their] beliefs to express not what they *know* but who they *are*.”²⁵¹ A second phenomenon is the use of heuristics—shortcuts in the reasoning process that frequently lead people to biased conclusions that do not comport with the truth outcomes they would likely reach with unlimited time and resources.²⁵² The more we learn about varying influences on cognitive reasoning, the harder it becomes to rely on the role of speech in promoting truth-finding.

248. *Id.*; see also Jane R. Bambauer, Saura Masconale & Simone M. Sepe, *The Nonrandom Walk of Knowledge*, 37 SOC. PHIL. & POL’Y (forthcoming 2020) (manuscript at 1) (on file with author) (“[T]he emergent camps of entrenched beliefs are not (necessarily) caused by any failing in human rationality or by the schemes of a manipulative corporation; they are caused by the influence our individual pursuits of friendship and camaraderie have over the course of gathering evidence.”).

249. Dan M. Kahan, *The Supreme Court, 2010 Term-Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19-20 (2011); see also PINKER, *supra* note 52, at 353; Michael Thaler, *The “Fake News” Effect: Experimentally Identifying Motivated Reasoning Using Trust in News* (May 27, 2020) (unpublished manuscript), https://scholar.harvard.edu/files/mthaler/files/mthaler_fake-news-effect_full.pdf [<https://perma.cc/YUY9-5MLG>].

250. Dan M. Kahan & Keith E. Stanovich, *Rationality and Belief in Human Evolution* (Annenberg Pub. Pol’y Ctr., Working Paper No. 5, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838668 [<https://perma.cc/CS6F-ERVF>].

251. PINKER, *supra* note 52, at 357; see also Jones & Sun, *supra* note 178, at 23 (“Recent research suggests that one of the primary goals of motivated reasoning is the expression and protection of group identity—such as one’s cultural or political identity.”).

252. See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011) (explaining judgment heuristics); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124 (1974).

Moreover, the more marginalized the group is or perceives itself to be, the more powerful the cohesive effect of fake news stories that bind its members together as a community. As Professor David Han wrote, “[C]onspiracy theories thus tend to be attractive to the politically powerless—those seeking ‘an explanation for the hidden and seemingly mysterious workings of political power.’”²⁵³ He continues:

To such adherents, patent falsity is, in fact, the central *allure* of these theories: the fact that the theories so directly reject what is obviously true to society at large fits an underlying ideological belief that society must wake up and challenge all of our trusted authorities—including any “truths” pronounced from such authorities—lest our apathy relegate us to the role of helpless and manipulable pawns.²⁵⁴

Another sign that fake news performs a social cohesion function comes from the words of adherents to different social movements. Their distrust of the government and other institutions runs deep and may lead them to believe at least some misinformation.²⁵⁵ Members of the gun-rights movement, for example, though they may have legitimate policy interests justifying their resistance to regulation, may also be driven in part by a notion that the government is not just trying to limit their access to firearms but is trying to take away their way of life.

Then-NRA Executive Vice President J. Warren Cassidy once remarked, “You would get a far better understanding of the NRA if you approached us as if you were approaching one of the great religions of the world.” Religions start with an assertion that cannot be proved: Jesus rising from the dead; Moses shoeless before the burning bush; Joseph Smith translating the Book of Mormon; the Koran as God’s revelation.

253. Han, *supra* note 144, at 191 (quoting Lyrrisa Barnett Lidsky, *Where’s the Harm? Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1100 (2008)).

254. *Id.*

255. Or, sometimes, their leaders may actually be in the government, relying on their loyalty to disrupt other institutions. See Sidney Tarrow, *Rhythms of Resistance: The Anti-Trumpian Moment in a Cycle of Contention*, in *THE RESISTANCE: THE DAWN OF THE ANTI-TRUMP OPPOSITION MOVEMENT* 187, 192-93 (David S. Meyer & Sidney Tarrow eds., 2018).

Many in this country have seized upon the absolute God-given right to bear arms without any restraints of government as their primary devotion.²⁵⁶

Similar sentiments can be seen in modern believers in a flat earth,²⁵⁷ astrology,²⁵⁸ and witches.²⁵⁹

Nor is there a particular ideological valence to this social cohesion function. Professor Bhagwat makes this point nicely, in arguing for a more holistic view of the distinct rights within the First Amendment.

Rational discourse is certainly (at least ideally) a part of our system of self-governance, but it is just a part. Associations can bond citizens on profoundly emotional terms such as love of nature (the Sierra Club) or guns (the NRA), with no need for rational explanation. And assemblies often send profoundly emotional messages of joy or rage, with little attempt at rationality. Antiwar rallies are not like debate club meetings. And while Martin Luther King, Jr. was a profoundly thoughtful man, nobody believes that the effectiveness of the civil rights protests he led stemmed only or primarily from rational arguments as to the justness of their cause. Indeed, sometimes, as arguably with Occupy and Donald Trump rallies, the *only* message sent by an assembly is one of rage, and demand for largely undefined

256. G. Wilson Gunn Jr., Letter to the Editor, *Gundamentalism Is the Religion of the United States*, WASH. POST (May 19, 2019, 6:42 PM), https://www.washingtonpost.com/opinions/gundamentalism-is-the-religion-of-the-united-states/2019/05/19/c5ff56bc-7805-11e9-a7bf-c8a43b84ee31_story.html [<https://perma.cc/F6QA-KD7K>]. But do not just take the word of the gun-rights movement's critics; this view is shared by its proponents. See Kristi Noem, *Noem: Protecting Our Way of Life*, ARGUS LEADER (Feb. 1, 2019, 1:55 PM), <https://www.argusleader.com/story/news/dell-rapids/2019/02/01/noemprotecting-our-way-life/2745875002/> [<https://perma.cc/UCH5-4M58>] (“[T]he right to bear arms isn’t just an abstract right. It’s our way of life.”).

257. Graham Ambrose, *These Coloradans Say Earth Is Flat. And Gravity’s a Hoax. Now, They’re Being Persecuted*, DENV. POST (July 7, 2017, 3:44 PM), <https://www.denverpost.com/2017/07/07/colorado-earth-flat-gravity-hoax/> [<https://perma.cc/GYC7-A4KD>].

258. See Christine Smallwood, *Astrology in the Age of Uncertainty*, NEW YORKER (Oct. 21, 2019), <https://www.newyorker.com/magazine/2019/10/28/astrology-in-the-age-of-uncertainty> [<https://perma.cc/B8VF-992P>].

259. See Jessica Bennett, *When Did Everybody Become a Witch?*, N.Y. TIMES (Oct. 24, 2019), <https://www.nytimes.com/2019/10/24/books/peak-witch.html> [<https://perma.cc/XL7Q-WGU5>].

change. This is not discourse or deliberation, but it is surely a part of our democracy.²⁶⁰

Though writing about corporate speech, Professor Greenfield confirms the value of group association and ties it to autonomy: “[H]umans often exercise their autonomy and gain fulfillment by organizing in groups. We join the National Rifle Association, Planned Parenthood, and the Boy Scouts.... Groups are the mechanism by which people exercise their autonomy.”²⁶¹

Social cohesion is also built through common forms of communication. Belief, endorsement, or reposting of fake news serves a powerful signaling function about one’s belief system or worldview. Such signaling allows people with a common worldview to identify with each other and reinforce their own beliefs, even if those beliefs are centered around false facts. Signaling can be a powerful identifier and it is unquestionably a form of expression that has value in communicating one’s views and inviting others with those views to join the same communities.²⁶² As one historian described, “[W]hereas the truth is universal, fictions tend to be local. Consequently if we want to distinguish our tribe from foreigners, a fictional story will serve as a far better identity marker than a true story.”²⁶³

Of course, this type of tribalism has costs as well as value. Critics of fake news are justifiably concerned about insularity and filter bubbles. Furthermore, such cohesion can bring together groups that might facilitate more tangibly harmful conduct, such as idiosyncratic religious cults or white supremacist groups. In the final Part, this Article turns to some limits on its thesis and possible ways to address the problems caused by fake news while remaining sensitive to the potential value to its consumers.

260. Bhagwat, *supra* note 169, at 1118.

261. KENT GREENFIELD, CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT) 120 (2018) (footnote omitted).

262. PINKER, *supra* note 52, at 359 (“While some of the conspiracy theorists may be genuinely misinformed, most express these beliefs for the purpose of performance rather than truth: they are trying to antagonize liberals and display solidarity with their blood brothers.”). Viewed through this lens, spreading fake news might even be viewed as a form of “performative utterance.” See J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 6 (1962).

263. Yuval Noah Harari, Opinion, *Why Fiction Trumps Truth*, N.Y. TIMES (May 24, 2019), <https://www.nytimes.com/2019/05/24/opinion/why-fiction-trumps-truth.html> [<https://perma.cc/4GER-M3TX>].

IV. LIMITATIONS AND HOPES

None of this is to say that fake news is not a problem or that it is not capable in many circumstances of causing serious harms. Furthermore, even if the claim that fake news has some First Amendment value to its willing consumers prevails, it also can be argued that the corresponding harms to public discourse outweigh such value. Thus, this Part concludes the Article with a discussion of two points. First, it articulates important limitations on my thesis that fake news has some self-realization value, such that regulation may sometimes be both necessary and constitutionally valid because the harms outweigh those values. Even then, thoughtful approaches to addressing such harms are critical. Accordingly, this Part concludes by discussing some such approaches, short of imposing criminal penalties or civil damages on liars.

A. *Limitations*

To conclude that fake news has some First Amendment value, and that we should consider such value in determining appropriate responses to its apparent proliferation, is not to say that every false statement about public affairs is constitutionally protected. Recall that *United States v. Alvarez* held that government can regulate certain false statements of fact that cause legally cognizable harm.²⁶⁴

Identifying what cognizable harms are sufficient to overcome the speech interest, however, is not as simple as it seems. First, despite pervasive discussions about fake news in the mainstream media and on social media, there is a reasonable level of dispute about the extent of the problem. Indeed, some evidence suggests that our fears may be overstated. One study claims, for example, that the audience for fake news is quite small in proportion to the audience for real news—on the order of a one-to-ten ratio.²⁶⁵ Another study showed

264. 567 U.S. 709, 719 (2012) (plurality opinion).

265. Jacob L. Nelson, *Is 'Fake News' a Fake Problem?*, COLUM. JOURNALISM REV. (Jan. 31, 2017), <https://www.cjr.org/analysis/fake-news-facebook-audience-drudge-breitbart-study.php> [<https://perma.cc/FY4X-R7H6>].

that social media, where fake news tended to spread more frequently, has become an important source of political news, television is still a substantially more important source.²⁶⁶ Consistent with that, there is also data to suggest that the narrative about media bubbles shaping public opinion is not accurate.²⁶⁷ It should not be surprising, then, to find that scholars and policymakers continue to focus on the phenomenon of fake news to gain a better understanding of what we are facing as a democratic society.

For some of the same reasons that it is difficult to measure the extent of fake news's influence, it is hard to identify causal links between its publication and broad social harms. Though some have speculated that Russian disinformation campaigns affected the outcome of the 2016 presidential election, particularly because the vote margins in swing states were so close,²⁶⁸ it would be virtually impossible to pin that on fake news given the wide range of uncontrollable variables that might have simultaneously affected voter behavior.²⁶⁹

On the other hand, there are circumstances in which the link between fake news and resultant harm is much more direct. In such cases, applying the principles from *Alvarez*, there should be much less of a First Amendment concern regarding narrowly targeted laws that focus on actual harms to individuals.²⁷⁰ As Justice Breyer noted in his concurring opinion, the government may regulate lies that cause "specific harm to identifiable victims."²⁷¹ This limiting principle is consistent with Professor Sunstein's suggestion, discussed above, that false statements should be presumptively protected "unless the government can show that allowing them will

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

267. See Maggie Koerth, *Media Bubbles Aren't the Biggest Reason We're Partisans*, FIVETHIRTYEIGHT (Oct. 8, 2019, 10:50 AM), <https://fivethirtyeight.com/features/media-bubbles-arent-the-biggest-reason-were-partisans/> [<https://perma.cc/X22L-EK7Q>].

268. Jane Mayer, *How Russia Helped Swing the Election for Trump*, NEW YORKER (Sept. 24, 2018), <https://www.newyorker.com/magazine/2018/10/01/how-russia-helped-to-swing-the-election-for-trump> [<https://perma.cc/39DN-3CXP>].

269. See Silver, *supra* note 152.

270. See *United States v. Alvarez*, 567 U.S. 709, 734 (2012) (Breyer, J., concurring).

271. *Id.*

cause serious harm that cannot be avoided through a more speech-protective route.”²⁷²

For example, Professor Richard Hasen has recently suggested that laws that regulate false *election* speech, which he defines as “false speech about the mechanics of voting,” would not violate the First Amendment.²⁷³ Thus, a news story that falsely reports that a local election has been moved from Tuesday to Wednesday or misidentifies the polling place for a particular precinct could be regulated.²⁷⁴ I agree with Hasen’s assessment for three reasons. First, this type of speech is more akin to outright fraud than other forms of fake news, and the speech here is much more likely to be linked to a material harm to individual voters. Second, as with fraud, there is a limited and identifiable class of victims of this type of speech. Third, false statements about election mechanics seem less likely to have the kind of self-realization value or social cohesion effect than fake news stories that advance other forms of mistruths. Indeed, there might even be a claim that such actions are more like conduct (for example, physically blocking a person from a voting booth) than speech.

For similar reasons, Professor Rebecca Green’s recent proposal to regulate “counterfeit campaign speech,” which she defines as “instances in which political candidates’ identities, actions, words, and images are intentionally faked with the intent to confuse voters and distort democracy,” would not be problematic.²⁷⁵ Similar to the laws Hasen proposes, Green’s proposal targets fraud-like activity and not fake news more generally. Moreover, the type of speech targeted by Hasen’s and Green’s proposals may not even fall within this Article’s definition of fake news.

A critic of this approach might respond in two ways. First, the systemic harms to democracy may not be provable. However, the risk that democratic rule may be undermined (if, for example,

272. Sunstein, *supra* note 85, at 406 (emphasis omitted).

273. Hasen, *supra* note 90, at 14. Hasen also suggests that a law requiring social media platforms to identify video or audio that has been altered using the best “reasonably available” technology would pass constitutional muster, *see id.* at 15, but this proposal addresses only deepfake videos, which I have previously bracketed for purposes of this Article, *see supra* note 90.

274. *See* Hasen, *supra* note 90, at 14.

275. Green, *supra* note 90, at 1450.

people lose trust in the electoral system) provides sufficient justification to regulate fake news. Indeed, those harms may actually be *greater* than those of an individual voter showing up to the wrong polling place or on the wrong date. Again, however, the lack of evidence of direct harm is problematic in any First Amendment analysis.²⁷⁶ Second, there will be cases in which it is difficult to distinguish between general and specific harm. Take, for example, the Comet Ping Pong pizza incident.²⁷⁷ Under the model proposed in this Article, the government could arguably prove a sufficiently direct link between the story and the harmful conduct such that regulation would be appropriate. The concern here, however, would be that any number of stories, or even parodies, could cause an unreasonable individual or person with mental illness to act in harmful ways, which might lead to overbroad regulations. Of course, even if fake news is sometimes constitutionally protected, the tangible harms it causes can still be criminalized.²⁷⁸

Perhaps another limitation arises when fake news's appeal to the emotional rather than the rational is directly linked to a cognizable or material harm. Some examples of this already exist in the current doctrine. The subversive advocacy cases, for example, hold that statements that potentially incite unlawful conduct are protected unless the government can show that they were "directed to inciting or producing imminent lawless action and [are] likely to incite or produce such action."²⁷⁹ In one view, the idea that such speakers can be punished is premised on the notion that the inciting speech provokes such a visceral emotional response as to overcome or reduce the audience's capacity for deliberation.²⁸⁰ Here, however, we

276. To be sure, in the no-value speech cases, the Court has presumed the harms because they are self-evident, at least to the Court. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942); see also Chen & Marceau, *supra* note 12, at 664. In other areas, and even under intermediate scrutiny, the Court imposes on the government a burden of justification for its speech regulations. See *McCullen v. Coakley*, 573 U.S. 464, 495 (2014).

277. See *supra* text accompanying note 153.

278. Matthew Haag & Maya Salam, *Gunman in 'Pizzagate' Shooting Is Sentenced to 4 Years in Prison*, N.Y. TIMES (June 22, 2017), <https://www.nytimes.com/2017/06/22/us/pizzagate-attack-sentence.html> [<https://perma.cc/X4PH-A57L>].

279. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

280. See Lidsky, *supra* note 161, at 815; see also Lyrissa Barnett Lidsky, *Brandenburg and the United States' War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1021 (2002).

must be careful because so much speech that is valuable, including fake news, can also stimulate an emotional and impassioned response. As the Court stated in *Terminiello v. Chicago*, free speech “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”²⁸¹

Analysis of future regulations would probably have to be done under a case-by-case balancing approach rather than a categorical balancing approach to ensure that speech is not impeded except when there is tangible evidence that it causes a cognizable harm. That could lead to some uncertainty, which is less than optimal, but it is probably a preferable approach to a categorical rule here.

B. Noncensorship Proposals

To the extent that fake news does cause potentially broad social harms, but direct censorship regulations are problematic under free speech law, policymakers could consider noncensorship alternatives to addressing such harms. This already occurs at the international and domestic levels. But there are numerous challenges here as well.

1. Counterspeech

First, we might consider turning to what has by now evolved into a cliché of First Amendment doctrine—that the solution to problematic or potentially harmful speech is not regulation, but the promotion of more speech. A standard response to arguments to censor or otherwise regulate harmful speech is that society is better served by a system that promotes speech that directly counters such harmful expression. In this way, so the argument goes, the speech is addressed not by government power but by being subject to open criticism and rebuttal in ways that command the public’s

281. 337 U.S. 1, 4 (1949).

attention.²⁸² In other words, the harmful speech is defeated in the battle for truth.

At first glance, promotion of counterspeech seems like a particularly helpful way to address the fake news problem for a number of reasons. If the lies are objectively verifiable as false, the presentation of alternative factual scenarios seems like a more direct kind of counterspeech than simply rebutting an idea or philosophy.

That does not mean that presentation of counterspeech will necessarily be persuasive. For the reasons described above, some audiences may want to be lied to because lies better fit their internal views and values than objective factual truth. But for those open to such convincing and who want to engage in rational deliberation, factual responses may be important. Indeed, it is possible that one positive externality of the proliferation of fake news is an increasing awareness among the general public that this phenomenon exists, which ideally would breed greater skepticism throughout society. A Pew Research Center poll shortly after the 2016 presidential election indicated that 64 percent of Americans polled believed that fake news caused “a great deal of confusion” about the basic facts of current events, and another 24 percent believed it caused “some confusion.”²⁸³ “[I]f one knows fake news exists, then it should make one a more thoughtful, active, and inquisitive news consumer. People who understand fake news as a reality should rightfully be more skeptical about the veracity of what they read rather than accepting it blindly or at face value.”²⁸⁴ Thus, heightened awareness of the potential invalidity of news stories published through social media may be an essential component of a response to fake news. Though certainly not controlling, public opinion polls also reflect that a majority of Americans would

282. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) (“[I]t is our law and our tradition that more speech, not less, is the governing rule.”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”), *overruled by Brandenburg*, 395 U.S. at 449.

283. Michael Barthel, Amy Mitchell & Jesse Norman, *Many Americans Believe Fake News Is Sowing Confusion*, PEW RSCH. CTR. (Dec. 15, 2016), <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/> [<https://perma.cc/6GD7-6WCK>].

284. Calvert & Vining, *supra* note 22, at 170.

prefer freedom of access to online information to government regulation, even if it means some false information is published.²⁸⁵

How might we promote more counterspeech? In some ways, responses have already emerged as independent, nonprofit organizations such as Snopes²⁸⁶ and PolitiFact²⁸⁷ have become valuable market participants. Mainstream media outlets, too, have begun to print and broadcast explicit fact-checking features.²⁸⁸

For what should be obvious reasons, it would probably not be a very good idea to have government agencies in charge of fact checking, particularly in the context of lies expressed in campaigns. It seems highly counterintuitive to think about government truth-sayers vetting fake news stories at this point in history. But that should not stop policymakers from thinking creatively about ways to promote the mainstream media and subsidize fact checking in the private or nonprofit sectors. The Australian government, for example, has announced that it will begin negotiations to require Facebook and Google to pay news organizations for stories that are reproduced through their sites.²⁸⁹ Another recent, though controversial, proposal is the idea of establishing government funding to promote local news outlets.²⁹⁰

Skeptics, however, argue that in this context “more speech” is a woefully inadequate solution to the dissemination of fake news. First, there may be a primacy or stickiness effect such that once people hear fake news, they absorb it in ways that are stabilized

285. Amy Mitchell, Elizabeth Grieco & Nami Sumida, *Americans Favor Protecting Information Freedoms over Government Steps to Restrict False News Online*, PEW RSCH. CTR. (Apr. 19, 2018), <https://www.journalism.org/2018/04/19/americans-favor-protecting-information-freedoms-over-government-steps-to-restrict-false-news-online/> [https://perma.cc/42WH-4Q85].

286. *Fact Check*, SNOPEs, <https://www.snopes.com/fact-check/> [https://perma.cc/5DA5-Y89W].

287. POLITIFACT, <https://www.politifact.com/> [https://perma.cc/A84P-PVT8].

288. See, e.g., Glenn Kessler, *Fact Checker: The Truth Behind the Rhetoric*, WASH. POST, https://www.washingtonpost.com/news/fact-checker/?utm_term=.7c7c3a24c87e [https://perma.cc/9R8R-PZ6A]; *Fact Checks*, N.Y. TIMES, <https://www.nytimes.com/spotlight/fact-checks> [https://perma.cc/EXZ2-6HX6].

289. Ben Smith, *Big Tech Has Crushed the News Business. That's About to Change*, N.Y. TIMES (May 10, 2020), <https://www.nytimes.com/2020/05/10/business/media/big-tech-has-crushed-the-news-business-thats-about-to-change.html> [https://perma.cc/H6MP-5VCR].

290. See Jeffrey A. Roberts, *Skeptic Turned Believer on Public Funding for Local News*, COLO. FREEDOM OF INFO. COAL. (Oct. 13, 2019), <https://coloradofoic.org/skeptic-turned-believer-on-public-funding-for-local-news/> [https://perma.cc/2J9G-X9CM].

before timely counterspeech can be disseminated.²⁹¹ Perhaps even more troublesome, several studies have suggested that corrections to objectively false facts have the *opposite* of the intended effect, and rather than dissuade listeners instead re-entrench their belief in the false news.²⁹²

Even when myths *are* dispelled, their effects linger. The Boston College political scientist Emily Thorson conducted a series of studies showing that exposure to a news article containing a damaging allegation about a fictional political candidate caused people to rate the candidate more negatively even when the allegation was corrected and people believed it to be false.²⁹³

Indeed, one of the factors that researchers have identified as most important to the effectiveness of fact-checking is that fact checks “don’t directly challenge one’s worldview and identity.”²⁹⁴

These concerns underscore the importance of recognizing how listeners value fake news because of its self-realization and social cohesion functions. It is precisely the emotional value of the speech that may make it more difficult to persuade some audiences that it is objectively false. These limitations are critical for policymakers to understand, but that does not mean they should give up on ways to promote counterspeech. We should continue to study ways to correct misinformation more effectively. “Adam Berinsky of M.I.T., for instance, found that a surprising co-partisan source (a Republican member of Congress) was the most effective in reducing belief in the ‘death panel’ myth about the Affordable Care Act.”²⁹⁵ With a clear eye focused on these limitations, however, creative ideas to promote counterspeech to fake news should be a part of the menu of solutions.

291. Emily A. Thorson & Stephan Stohler, *Maladies in the Misinformation Marketplace*, 16 FIRST AMEND. L. REV. 442, 443 (2017). These have been described as “belief echoes: attitudinal shifts that persist even after individuals abandon their commitment to incorrect information.” *Id.* at 449.

292. PINKER, *supra* note 52, at 359, 377.

293. Taub & Nyhan, *supra* note 244.

294. Lee Drutman, *Fact-Checking Misinformation Can Work. But It Might Not Be Enough*, FIVETHIRTYEIGHT (June 3, 2020, 1:01 PM), <https://fivethirtyeight.com/features/why-twitthers-fact-check-of-trump-might-not-be-enough-to-combat-misinformation/> [https://perma.cc/CUK2-YYVH].

295. Taub & Nyhan, *supra* note 244.

2. *Technological and Platform-Based Solutions*

To some extent the market is already responding to the fake news problem, as social media platforms have finally begun to think about ways to address fake news dissemination. These efforts fall into a few general categories.

First, there are notice or labeling requirements to make consumers aware of the source of the stories that they are reading. Facebook, for example, announced plans to require advertisers to verify their identities and locations before running political ads and will soon require the identities and locations of people who run large Facebook groups.²⁹⁶ Several platforms have indicated interest in adding “trust indicators” to posted stories. These would be symbols that would appear by the stories indicating how they were reported, by whom, and noting the credentials of the reporter.²⁹⁷ Some have proposed the development of a uniform private accreditation system to establish industry standards for identifying reliable sources of news and other information.²⁹⁸ Educational efforts by social media companies are another way they can address the consumption of fake news. For example, Facebook paid for ads in major Mexican newspapers in advance of a national election to provide citizens with tips about how to identify fake news stories.²⁹⁹

Second, some social media platforms have engaged independent fact-checking organizations to help them identify fake news. Facebook has been doing this since 2016 and has brought in organizations from a range of political ideologies to help.³⁰⁰ Though

296. Jack Nicas, *Facebook to Require Verified Identities for Future Political Ads*, N.Y. TIMES (Apr. 6, 2018), <https://www.nytimes.com/2018/04/06/business/facebook-verification-ads.html> [<https://perma.cc/2F7U-AXX6>].

297. Mike Snider, *Facebook, Google, Twitter and Media Outlets Fight Hoaxes with ‘Trust Indicators’*, USA TODAY (Nov. 16, 2017, 9:18 AM), <https://www.usatoday.com/story/tech/news/2017/11/16/facebook-google-twitter-and-media-outlets-fight-fake-news-trust-indicators/869200001/> [<https://perma.cc/G5NE-UG3F>].

298. Gonzalez & Schulz, *supra* note 156, at 317; *see also* Daniela C. Manzi, Note, *Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News*, 87 FORDHAM L. REV. 2623, 2649 (2019) (proposing the licensing of professional journalists).

299. Andrea Navarro, *Facebook Wants to Keep Fake News out of Mexico Presidential Election*, DALL. MORNING NEWS (Mar. 21, 2018, 11:28 AM), <https://www.dallasnews.com/news/2018/03/21/facebook-wants-to-keep-fake-news-out-of-mexico-presidential-election/> [<https://perma.cc/33WT-C7RC>].

300. Regina Rini, Opinion, *How to Fix Fake News*, N.Y. TIMES (Oct. 15, 2018),

this system does not stop people from posting fake news, the system warns them that they may be sharing false information before they repost it.³⁰¹ In 2017, Google announced that it would employ a range of mechanisms to combat the spread of false information, including working with the International Fact-Checking Network run by the Poynter Institute.³⁰² Google has also partnered with the Trust Project, a consortium of news companies dedicated to developing transparency standards.³⁰³

Third, there is a proliferation of technology companies, including many new start-ups, trying to develop artificial intelligence mechanisms to address fake news.³⁰⁴ A nonprofit organization called Fake News Challenge, which describes itself as “a grassroots effort of over 100 volunteers and 71 teams from academia and industry around the world,” has even established a competition to promote the development of artificial intelligence mechanisms for detecting fake news.³⁰⁵

Not surprisingly, there are limits to these approaches as well. First, the development of technological solutions does not forestall those who wish to promote the spread of fake news from developing workarounds, resulting in something of a fake news arms race. Furthermore, social media platforms themselves appear to be worried about being viewed as biased. “Effectiveness of these efforts is limited since they inevitably provoke accusations of censorship and partisanship. Changes to algorithms have often been met with suspicion and criticism over lack of transparency.”³⁰⁶

<https://www.nytimes.com/2018/10/15/opinion/facebook-fake-news-philosophy.html>
[<https://perma.cc/CBQ2-D4KE>].

301. *Id.*

302. Tina Dyakon, *Google News Lab Partners with Poynter’s International Fact-Checking Network*, POYNTER INST. (Oct. 26, 2017), <https://www.poynter.org/news-release/2017/google-news-lab-partners-with-poynter%C2%92s-international-fact-checking-network/> [<https://perma.cc/S4JX-T8AX>].

303. *Leading News Outlets Establish Transparency Standards to Help Readers Identify Trustworthy News Sources*, TRUST PROJECT (Nov. 16, 2017), <https://thetrustproject.org/launch/> [<https://perma.cc/QF2M-9D4C>].

304. See Jackie Snow, *Can AI Win the War Against Fake News?*, MIT TECH. REV. (Dec. 13, 2017), <https://www.technologyreview.com/s/609717/can-ai-win-the-war-against-fake-news/> [<https://perma.cc/KY9T-FF6S>].

305. See FAKE NEWS CHALLENGE, <http://www.fakenewschallenge.org/> [<https://perma.cc/4JHT-5KHL>].

306. Gonzalez & Schulz, *supra* note 156, at 318-19 (footnotes omitted).

Of course, these are market solutions rather than government ones. Some have suggested limited intervention by the state to tweak the existing social media framework. One such proposal is that governments should require social media platforms to use an “open application programming interface,” which would allow third parties to develop software to monitor and report on the impact of social media algorithms.³⁰⁷ This would not require the platforms to reveal their proprietary algorithms but would mandate that they share the results of those algorithms. Government solutions carry their own baggage, however, as social media platforms might enjoy their own First Amendment rights.³⁰⁸

3. *Structural Changes to the Information Environment*

Finally, perhaps one of the principal problems with the proliferation of fake news is the demise of professional journalism, especially the traditional print media. The best antidote to fake news might be a robust, objective, well-resourced professional press, but market forces are diminishing the number of independent media sources and are likely to continue to do so.³⁰⁹ Even if professional journalism makes a comeback, the economics of the industry make it unlikely it will return to its former standard of credibility. Similar to other institutions, the press has lost much credibility among the general public in recent years.³¹⁰

Numerous proposals have been made to increase public awareness of fake news and to improve the levels of civic education and critical analytical thinking, particularly in younger people. California and other states have adopted laws requiring their education departments to provide media literacy sources to teachers and students.³¹¹ Instilling such skills early in the educational process

307. Tom Wheeler, Opinion, *How to Monitor Fake News*, N.Y. TIMES (Feb. 20, 2018), <https://www.nytimes.com/2018/02/20/opinion/monitor-fake-news.html> [<https://perma.cc/K868-PJ8R>].

308. See Klonick, *supra* note 4, at 1612-13.

309. See Joe Pompeo, *The U.S. Has Lost More than 166 Print Newspapers Since 2008*, BUS. INSIDER (July 6, 2010, 12:51 PM), <http://www.businessinsider.com/the-us-has-lost-more-than-166-print-newspapers-since-2008-2010-7> [<https://perma.cc/CM4V-SPA2>].

310. See *Confidence in Institutions*, GALLUP (June 28, 2018), <https://news.gallup.com/poll/1597/confidence-institutions.aspx> [<https://perma.cc/TJ7G-9MU5>].

311. See Marissa Melton, *California Joins Other States in Passing New Media Literacy*

may have a multiplier effect given already existing generational differences in the consumption of fake news. One study by researchers at New York University and Princeton showed that people over the age of sixty-five are much more likely to spread fake news through social media.³¹² But others propose a more widely reaching educational effort aimed at the university level and beyond.³¹³ In addition, organizations including National Public Radio and the RAND Corporation are increasingly providing tools to educate consumers about how to identify fake news stories.³¹⁴

These efforts seem sensible, but they too must be undertaken with an understanding about the emotional impact and power of fake news stories. If, as we have already seen, people come to stand by their beliefs because of their prior partisan or otherwise ideological commitments, the effectiveness of educational measures to promote critical thinking might be severely limited. Some researchers dispute the emotional claim and argue that belief in fake news has more to do with laziness than with an individual's partisan affiliation.³¹⁵ If that is the cause of fake news proliferation, then it stands to reason that promotion of critical thinking might help.³¹⁶

However, if the researchers who conclude that emotional connection to belief is more powerful than objective fact are correct, education may not be the solution.³¹⁷ Moreover, the research of the latter group not only suggests that education will have no significant impact on the proliferation of fake news, but also that it might even be counterproductive. Recall that some of this research

Law, VOICE OF AM. (Sept. 23, 2018, 6:30 AM), <https://www.voanews.com/usa/california-joins-other-states-passing-new-media-literacy-law> [<https://perma.cc/52EQ-AYZL>].

312. See Casey Newton, *People Older than 65 Share the Most Fake News, a New Study Finds*, VERGE (Jan. 9, 2019, 2:00 PM), <https://www.theverge.com/2019/1/9/18174631/old-people-fake-news-facebook-share-nyu-princeton> [<https://perma.cc/KT7T-F4R3>].

313. Jankowicz, *supra* note 60.

314. See Miles Parks, *Fake News: How to Spot Misinformation*, NAT'L PUB. RADIO (Oct. 31, 2019, 12:01 AM), <https://www.npr.org/2019/10/29/774541010/fake-news-is-scary-heres-how-to-spot-misinformation> [<https://perma.cc/7898-LUDG>]; *Fighting Disinformation Online*, RAND CORP. (Dec. 19, 2019), <https://www.rand.org/research/projects/truth-decay/fighting-disinformation.html> [<https://perma.cc/KJW8-7LTX>].

315. Gordon Pennycook & David Rand, Opinion, *Why Do People Fall for Fake News?*, N.Y. TIMES (Jan. 19, 2019), <https://www.nytimes.com/2019/01/19/opinion/sunday/fake-news.html> [<https://perma.cc/3BG5-NXS6>].

316. *Id.*

317. *Id.*

indicates that counterspeech may only *harden* the views of fake news consumers.³¹⁸ What is even more alarming is the notion that people with stronger reasoning skills may be even less susceptible to fake news corrections because those skills allow them to rationalize their continuing belief in the fake news story in the face of an objectively true rebuttal.³¹⁹

The broader point here is that in designing reform measures, policymakers should consider the emotional power of fake news and the social cohesion function that it plays for many people in our society.

CONCLUSION

It seems particularly ironic in an era when researchers in many areas, including medicine, education, criminal justice, and public policy, have been making a strong push toward “evidence-based” decision-making that there should at the same time be a widespread epidemic of fake news. Fake news is an ongoing problem in our democracy, even if the actual degree of harm it causes remains in dispute. Recognizing the epistemic harms of fake news without acknowledging that it may also have free speech value to its consumers severely limits our ability to learn when and how it should be appropriately addressed.

Understood in the framework of the self-realization theories of free speech, fake news can have important value to its willing consumers. It can both promote expressive experiential autonomy and serve as a vehicle for fake news readers to connect with other people who share their worldview. These emotional and group bonding values also make it easier to comprehend the seductive allure of fake news. Believers are ushered into a community in which they can find a degree of comfort and support. Understanding these emotional and social cohesion functions is not only a way of

318. See PINKER, *supra* note 52, at 359, 377. *But see* Pennycook & Rand, *supra* note 315 (“Recent studies have shown, for instance, that correcting partisan misperceptions does not backfire most of the time ... but instead leads to more accurate beliefs.”).

319. See Pennycook & Rand, *supra* note 315 (discussing a study by political scientists Brendan Nyhan and Jason Reifler. Pennycook and Rand dispute these findings and argue that the opposite is, in fact, true in most cases).

measuring fake news's First Amendment value but also comprehending the ways to address its antidemocratic effects.

This Article seeks to develop a model for understanding fake news that not only promotes a more nuanced view of why government efforts to contain it might actually exacerbate harms by deepening the emotional entrenchment of fake news consumers, but also allows policymakers to design solutions that may actually address any potential harms in a narrow and focused manner. Thus, it reaches beyond more conventional analyses focusing on why state regulation of fake news might violate the First Amendment to argue that, in the absence of concrete and imminent tangible harms that can be directly tied to specific fake news stories, the First Amendment ought to protect fake news dissemination because it is a form of expression that has value to its consumers. Senator Moynihan, as it turns out, may have been wrong.³²⁰

320. *Supra* text accompanying note 1.