Anti-Speech Acts and the First Amendment

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Crash on the levy, mama, water's gonna overflow
Swamp's gonna rise, no boat's gonna row . . .
Now, it's king for king, queen for queen,
it's gonna be the meanest flood that anybody's seen . . .[1]

The real opposition is the media. And the way to deal with them is to flood the zone with shit.[2]

Internet political ads present entirely new challenges to civic discourse: machine learning-based optimization of messaging and micro-targeting, unchecked misleading information, and deep fakes. All at increasing velocity, sophistication, and overwhelming scale.[3]

[Y]ou have pushed out your gates the very defender of them, and in a violent popular ignorance, given your enemy your shield . . . [.][4]

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[1] BOB DYLAN, CRASH ON THE LEVEE (DOWN IN THE FLOOD) (Columbia Records 1971).

[2] Sean Illing, *"Flood the zone with shit": How misinformation overwhelmed our democracy*, VOX (Feb. 6, 2020, 9:27 AM), https://www.vox.com/policy-and-politics/2020/1/16/20991816/impeachment-trial-trump-bannon-misinformation [https://perma.cc/D3GY-UQTF].

[3] Jack Dorsey (@jack), TWITTER (Oct. 30, 2019, 4:05 PM), https://twitter.com/jack/status/1189634369016586240 [https://perma.cc/XM72-XLPZ].

[4] WILLIAM SHAKESPEARE, CORIOLANUS *in* THE COMPLETE PELICAN SHAKESPEARE 1701, 1746 (Stephen Orgel & A.R. Braunmuller eds., 2002).

Introduction

In many states today, there are laws on the books designed to protect the legitimacy and fairness of elections by barring the knowing or reckless dissemination of demonstrably false statements.[5] Regulating this kind of deliberate deception protects the public against the erosion of First Amendment freedoms—such as the freedom to think and express one's own thoughts and to meaningfully deliberate in an electoral process free from deliberate efforts to flood the zone of public discourse with confusion and mistrust based on deliberate and provable falsehoods. Some of these regulations, however, have been successfully challenged on First Amendment grounds.[6] In what follows, I contend that using First Amendment doctrine to shield illiberal attacks on the electoral process mocks the democratic values for which that doctrine stands.[7]

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[5] *See, e.g.*, Alaska Stat. Ann. § 15.13.095(a) (West, Westlaw through First Reg. Sess. of 32nd Leg. (2021)); Colo. Rev. Stat. Ann. § 1-13-109 (West, Westlaw through First Reg. Sess. of 73rd General Assemb. (2021)); Fla. Stat. Ann. § 104.271 (West, Westlaw through First Reg. Sess. & Spec. "A" Sess. of 27th Leg. (2021)); La. Stat. Ann. § 18:1463(C) (West, Westlaw through Reg. Sess. & Veto Sess. (2021)); Miss. Code Ann. § 23-15-875 (West, Westlaw through Reg. Sess. (2021)); N.C. Gen. Stat. Ann. § 163-274(a)(8) (West, Westlaw through Reg. Sess. of General Assemb. (2021)); N.D. Cent. Code Ann. § 16.1-10-04 (West, Westlaw through Reg. Session of 67th Leg. Assemb. (2021)); Or. Rev. Stat. Ann. § 260.532 (West, Westlaw through Reg. Sess. of 81st Leg. Assemb. (2021)); S.D. Codified Laws § 12-13-16 (West, Westlaw through Sess. Laws (2021)); Tenn. Code Ann. § 2-19-142 (West, Westlaw through First Reg. Sess. of 112th Tenn. General Assemb. (2021)); Utah Code. Ann. § 20A-11-1103 (West, Westlaw through First Spec. Sess. (2021)); Wash. Rev. Code Ann. § 42.17A.335 (West, Westlaw through Reg. Sess. of Wash. Leg. (2021)); W. Va. Code Ann. § 3-8-11(c) (West, Westlaw through 1st Spec. Sess. (2021)); Wis. Stat. Ann. § 12.05 (West, Westlaw through Act 59-79 (2021)). According to Robert Spicer, forty-four statutes in thirty-four states provide some form of regulation of campaign deception. Robert N. Spicer, Free Speech and False Speech: Political Deception and Its Legal Limits (or Lack Thereof) 35 (2018). Areas of statutory concern include: the use of deliberate deception to mislead voters concerning polling locations, voting times, ballot authenticity and ballot availability, voting instructions, provably false factual assertions in candidate statements or in claims regarding ballot initiatives or recall petitions, false assertions of incumbency or campaign affiliation, and false information about issues and candidates. *Id.* at 34–41.

[6] *See, e.g.*, 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014), in which the Court of Appeals for the Eighth Circuit struck down Minnesota's ban on false campaign speech as unconstitutional for failing to meet the demands of strict scrutiny. Minnesota's statute made it a gross misdemeanor to "intentionally participate[ ] in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false." *Id.* at 778. This analysis reflects the "actual malice" standard announced by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). According to the court in *281 Care Comm.*: "There is no reason to presume that counterspeech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal." *281 Care Comm. V. Arneson*, 766 F.3d at 793. *See* additional cases cited *infra* n. 39.

[7] Ironically, the free speech protection being offered increasingly benefits not real persons but rather digital bots, cyborgs, and trolls that deliberately hide their identity to spread lies and confusion more effectively online. *See* Sinan Aral, The Hype Machine: How Social Media Disrupts Our Elections, Our Economy, and Our Health—and How We Must Adapt 48 (2020) (noting that the initial spreaders of disinformation "are much more likely to be bots than humans").

Strategies of deception designed to disrupt public discourse in the electoral context constitute a special form of violence against speech and against meaningful engagement in individual and collective deliberation.[8] That is why I call the illiberal practices that cause this harm "anti-speech acts." Anti-speech acts constitute an attack upon the efficacy of communication itself.[9] Their purpose is not to advance opinions or ideas in the service of truth or judgment; rather, their objective is to jam deliberation—to deliberately sow confusion and mistrust—by propagating demonstrably false information upon which others are meant, or are reasonably expected, to rely. Profiting from such false coinage is a fraud upon the public.[10] This danger is particu-

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[8] *See infra* note 137. Acts of violence against speech share kindred effects associated with the strategic infliction of violence against the body. Such tactics not only destroy the victim's ability to engage in meaningful discursive exchange, but also, in so doing, ultimately nullify the victim's normative world. *See* ROBERT COVER, *Violence and the Word*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 205 (Martha Minow, Michael Ryan & Austin Sarat eds., 1995) ("That one's ability to construct interpersonal realities is destroyed by death is obvious, but in this case, what is true of death is true of pain also, for pain destroys, among other things, language itself."). According to Cover, the destruction of language and the capacity for meaningful discursive engagement with others marks "the end of the bonds that constitute the [victim's] community." *Id. See* PETER POMERANTSEV, THIS IS NOT PROPAGANDA: ADVENTURES IN THE WAR AGAINST REALITY 113 (2019) (noting that Vaclav Havel, who served several lengthy prison terms for political dissidence in communist Czechoslovakia before becoming the first president of the Czech Republic, called upon people "to stop repeating official language; it was the repetition of things you didn't believe that helped to break you.").

[9] Rather than advocating on behalf of illiberal ideas (which would be protected by the First Amendment), tactical anti-speech acts constitute an illiberal attack upon speech and meaningful deliberation itself. On the difference between protected speech and prohibited acts, *compare* Collin v. Smith 578 F.2d 1197 (7th Cir. 1978) (holding that racist speech is constitutionally protected) *with* Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e-2 (prohibiting racist conduct, such as the refusal to hire a prospective employee on the basis of race). *See generally* Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881, 932 (1962–63) (noting that "society must withhold its right of suppression until the stage of action is reached" and that "[t]he crucial principle is that the issue be conceived and its resolution sought in terms of permitting 'expression' and punishing 'action'"). By virtue of the violence they commit against meaning and the practice of efficacious communication, anti-speech acts fail to fulfill—and in fact actively impede—the core justifications Emerson provides for maintaining a system of free expression, namely: "(1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making . . . ." *Id.* at 878. *See* POMERANTSEV, *supra* note 8, at 186 ("What if one were to refocus disinformation from content to behavior: bots, cyborgs, and trolls that purposefully disguise their identity to confuse audiences . . . .").

[10] *See* Rosenbloom v. 704 Metromedia, Inc., 403 U.S. 29, 52 (1971) ("Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech.'") (citing Garrison v. Louisiana, 379 U.S. 64, 75 (1964)); Time, Inc. v. Hill, 385 U.S. 374, 389-90 (1967) ("But the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function. We held in New York Times that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct."); St. Amant v. Thompson, 390 U.S. 727, 732 (1968) ("Neither lies nor false communications serve the ends of the First Amendment."); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 63 (1966) ("[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth."); Vanasco v. Schwartz, 401 F. Supp. 87, 93 (S.D.N.Y. 1975) ("[W]e can agree with the Board's argument that calculated falsehoods are of such slight social value that no matter what the context in which they are

larly acute in a digital communication ecosystem where proprietary algorithms funnel and shape political discourse to advance not truth, but profit derived from maximized attention share online.

The burden of this essay is to make as plain as possible why, in the digital age, traditional doctrinal reliance upon "more speech" as an adequate response to deliberate falsehoods in the electoral context disserves core First Amendment values. Courts that use free speech doctrine to shield those who deliberately or recklessly disseminate demonstrably false statements in pursuit of fraudulent electoral or commercial gain subvert the very values they purport to uphold. Freedom of thought and expression and the continued integrity of the electoral process are served (not hindered) by prudent regulation of anti-speech acts.[11]

In this Article, I rebut the claim that regulating anti-speech acts chills political speech. To the contrary, protecting public discourse and electoral integrity against the corrosive effects of certain kinds of deliberate lying in the electoral context safeguards conditions essential to a robust and varied

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made, they are not constitutionally protected."), *affirmed by* Swain v. Tennessee, 423 U.S. 1041 (1976). *See also* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 803 (1988) (Scalia, J., concurring in part, concurring in judgment) ("Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception."); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971) (White, J., concurring) ("Misinformation has no merit in itself; standing alone it is as antithetical to the purposes of the First Amendment as the calculated lie.").

Many state courts agree. *See, e.g.,* State ex rel. Hampel v. Mitten, 278 N.W. 431, 435 (Wis. 1938) ("Nothing is more important in a democracy than the accurate recording of the untrammeled will of the electorate. Gravest danger to the state is present where this will does not find proper expression due to the fact that electors are corrupted or are misled . . . . It is . . . possible and feasible to require of candidates that statements of fact known to be false and so substantially bearing upon the fitness of other candidates as to have a tendency to influence votes shall not be made the basis of appeals for votes."); Fellows v. National Enquirer, Inc., 211 Cal. Rptr. 809, 824 (Ct. App. 1985) ("[A] publisher of what the Supreme Court has termed a 'calculated falsehood' . . . enjoys no constitutional protection." (Citations omitted)), *rev'd on other grounds* 721 P.2d 97 (Cal. 1986); Long v. State, 622 So. 2d 536, 537 (Fla. App. 1993) ("The use of calculated falsehoods under any circumstances, even in the criticism of public officials, is not constitutionally protected."); Thibadeau v. Crane, 206 S.E.2d 609, 610 (Ga. Ct. App. 1974) ("There is no privilege protecting the use of calculated falsehood."); People v. Duryea, 351 N.Y.S.2d 978, 988 (N.Y. Sup. Ct. 1974) ("Calculated falsehood is never protected by the First Amendment."); People v. Bloss, 184 N.W.2d 299, 311 (Mich. Ct. App. 1970) ("We see no difference constitutionally between the calculated falsehood and the calculated appeal to prurient interest. Neither is a communication of ideas entitled to constitutional protection."), *rev'd on other grounds*, 201 N.W.2d 806 (Mich. 1972); Theckston v. Triangle Publications Inc., 242 A.2d 629, 631 (N.J. Super. Ct. App. Div. 1968) ("Speech concerning public affairs is the essence of self-government so that, where public officials are concerned, it is only the calculated falsehood which will afford redress."); State v. Powell, 839 P.2d 139, 142 (N.M. Ct. App. 1992) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.").

[11] As the New York Appellate Division concluded in its decision to suspend Rudolph Giuliani's license to practice law for knowingly disseminating demonstrably false information regarding fraud in the 2020 presidential election: "The hallmark of our democracy is predicated on free and fair elections. False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of a free society." In re Giuliani, 146 N.Y.S.3d 266, 283 (N.Y. App. Div. 2021) (per curiam).

exchange of opinions and ideas. Tactical anti-speech acts are the kinds of lies that *should* be chilled to avoid significant social and political harms.[12] We do not say that lying to the FBI or to a jury, or deliberately making false claims about corporate earnings or products should not be regulated because it might chill truth telling. Rather, we say that the value to society that this protection affords significantly outweighs the costs.[13] Regulating tactical anti-speech acts follows a similar logic.

There is also an important analytical component in cautioning against overstating the risk of chilling protected speech. It consists in the notion that framing freedom of speech exclusively as a negative right—protecting speakers from impermissible government interference—is insufficient to safeguard core free speech values. To rectify this imbalance, proper scope also must be afforded to the First Amendment's affirmative function to protect the right of citizens to access, and participate in, informed and wide-ranging public discourse.[14] Immoderate anxiety about risks, however remote, of chilling protected speech threatens to eclipse an equally compelling, but at times competing concern, namely: the risk of failing to preserve the minimum conditions essential to a robust marketplace of opinions and ideas.

Laws like the Model Election Integrity Act proposed in Part III of this Article protect the integrity of the public square by regulating deliberately disruptive speech acts that are inimical to the values, institutions, and practices of liberal democracy. In so doing such laws pay heed to the First Amendment's affirmative function. For to what avail is a highly guarded right to speak without meaningful access to reliable information and diverse opinions and ideas?[15]

These are the stakes. The argument for an updated First Amendment framework that upholds the regulation of tactical anti-speech acts follows.

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[12] *See* CASS SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 51 (2021) ("If false statements create serious problems, it is important to ensure that the fear of a chilling effect does not itself have a chilling effect on public discussion or on social practices.").

[13] *Id.* at 65 ("If an approach chills a very large number of very damaging falsehoods and a small number of not-very-important truths, we should probably adopt it.").

[14] *See* Associated Press v. United States, 326 U.S. 1, 20 (1945) (noting that the purpose of the First Amendment is to foster "the widest possible dissemination of information from diverse and antagonistic sources"); Pickering v. Bd. of Educ., 391 US 563, 573 (1968) (noting the "core value" protected by the First Amendment is the individual right to meaningfully participate, either as speaker or as listener, in a "free and unhindered debate on matters of public importance."); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1338 (2020) (advocating for a First Amendment "conceived primarily as a safeguard of democratic government, rather than private autonomy."); Genevieve Lakier, *The Non–First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021) (noting that during the eighteenth and nineteenth centuries legislators expressed a much less laissez-faire understanding of the government's responsibilities in regard to the marketplace of ideas reflecting their deep concern about "the threat that private economic power poses to expressive freedom"—particularly to the "the less powerful, as well as to the well-being of the institutional press"—due to "the concentration of economic power produced by the increasing industrialization of the U.S. economy.").

[15] *See* ARAL, *supra* note 7, at 309–10 ("If our elections lack integrity, no amount of free speech or inclusion can save our democracies because voting protects all other rights.").

Part I lays out in greater detail why the substantial social and political harms brought about by anti-speech acts cannot be averted through less intrusive (more speech-protective) measures than regulation. Counterspeech, labels or other warnings, as well as independent fact checking, can help stem the tide of harmful falsehoods. But they are insufficient to defend against the harms anti-speech acts pose to free speech, the integrity of the electoral process and, by extension, to liberal democracy itself in the digital age. With the public square's relentless migration online, the orthodox doctrinal claim that counterspeech is the only acceptable ("least intrusive") means of opposing anti-speech acts has become inexorably anachronistic. Part II shows that state regulation of the deliberate or reckless dissemination of provable falsehoods in the electoral context is consistent with core free speech values. Fundamental safeguards designed to preserve individual dignity, autonomy, and expressive liberty require prudent assessment of countervailing harms. Without a legal framework that can guarantee the minimum conditions necessary to maintain a robust marketplace of opinions and ideas, the right to freedom of speech remains a hollow promise. Part III offers a model regulation of anti-speech acts that passes muster within a revised first amendment framework.

I. Why Counterspeech Cannot Adequately Safeguard the Virtual Public Square from the Harms of Tactical Anti-speech Acts

Life online offers much in the way of information, entertainment, market convenience, and commercial opportunity. But it promises no sanctuary for freedom of thought and expression. That prospect ultimately depends upon the dis-equilibration of private commerce and public deliberation. Balanced policy objectives and moral consensus do not spring full grown from the calculative logic of the marketplace. They require informed political debate and public deliberation.[16] This kind of expressive freedom presupposes a protected communication ecosystem to safeguard its operation.[17] Whoever controls that space—including the kinds of expressive interaction the dominant communication infrastructure is designed to encourage and amplify—

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[16] *See, e.g.,* Claudio Lombardi, *The Illusion of the Marketplace of Ideas and the Right to Truth*, *in* Am. Affs. (Feb. 20, 2019), https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/ [https://perma.cc/2WCA-6G84] (noting that Justice Holmes's famous dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ["The best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."] fails to appreciate that "when an idea is tied to an advertisement . . . it becomes more difficult to differentiate between the world of ideas and that of products . . . . Marketing techniques aim exactly at familiarizing consumers with ideas that contradict known truths, all the while behaving as if only their claims were true. To take a classic case, consider the illusion that cigarettes are for happy, athletic, successful people . . . .").

[17] *See* Jack Balkin, *The Future of Free Expression in a Digital Age*, 36 Pepp. L. Rev. 427, 432 (2009) (noting that freedom of speech requires "an infrastructure").

conditions liberty in the same measure. Ever increasing disparities of wealth and power now dominate the attention economy in which most members of our information society live and work.[18] And just as the constitutional shield that protected the contract rights of gilded industrial barons eroded the social welfare of labor over a century ago, so, too, today the shield of free speech rights protects gilded social media barons—impairing freedom of thought and expression among those subject to their unchecked power.

In his seminal law review article, "The New Property," Charles Reich writes: "The chief legal bulwark of the individual against oppressive government power is the Bill of Rights. But government largess may impair the individual's enjoyment of those rights."[19] Reich worried about public benefits being cut off by administrative policies that were neither "important" nor "wise".[20] Over half a century later, concern has shifted to what is arguably the most fundamental of individual rights: namely, freedom of thought and expression—a right that is increasingly at risk of being impaired by powerful private actors in the service of corporate media policies that are neither as important or wise as the foundational principles upon which that right stands.

A new kind of autocracy, masked by the trappings of democracy,[21] is displacing the capricious administrative state that piqued Reich's concern. The virtual public square online, within which vital functions of democracy are being performed, is algorithmically designed to alienate us from what Justice Brandeis considered to be an indispensable means of discovering and spreading political truth. He had in mind those "deliberative forces" that allow us to "think as we will and speak as we think."[22]

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[18] The idea of an attention economy is often attributed to Herbert Simon who noted, as early as 1971, that "a wealth of information creates a poverty of attention." DAVID E. POZEN, THE PERILOUS PUBLIC SQUARE 20 (2020).

[19] *See* Charles Reich, *The New Property*, 73 YALE L. J. 733, 760 (1964).

[20] *Id.* at 769.

[21] *See infra* note 70 (on *skeuomorphs*).

[22] *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."). Brandeis might have had Thomas Jefferson's words in mind: "[T]o preserve the freedom of the human mind. . . [and]freedom of the press, every spirit should be ready to devote itself to martyrdom; for as long as we may think as we will and speak as we think, the condition of man will proceed in improvement." THE PAPERS OF THOMAS JEFFERSON, To William Green Munford (2004), https://jeffersonpapers.princeton.edu/selected-documents/william-g-munford [https://perma.cc/RQJ2-66XR]. *Contra* Renee Diresta, *Free Speech Is Not the Same as Free Reach*, WIRED (Aug. 30, 2018), https://www.wired.com/story/free-speech-is-not-the-same-as-free-reach/next [https://perma.cc/UW58-2JRK] ("[Invisible algorithms] determine what content billions of internet users read, watch, and share . . . [For example,] YouTube's video-

The public square is a cultural construct, as are the myriad forms of expressive freedom we perform there. As a political and legal matter, it is a collective choice whether or not we will continue to safeguard this basic element of liberal democracy. Privatizing the dominant deliberative fora in society conditions free speech rights much as administrative discretion has conditioned social welfare rights (Reich's "new property"). These disparate concerns share a common truth: Just as property rights are not necessarily a friend of liberty,[23] free speech rights may become similarly afflicted when wielded as a shield for the powerful few against the exploitable many (i.e., the vast population of information consumers online).[24]

During the first half of the twentieth century, the Supreme Court, after years of seemingly intractable doctrinal inertia, eventually upheld the power of the people through their elected officials to regulate contract obligations in order to protect the health, safety, and welfare of laborers in the workplace. But by the century's end, the pendulum had swung away from welfare state aspirations to a neo-liberal vision of the minimal state, dominated by policies favoring private market deregulation. As a result, the flow of power reversed course, streaming into fewer and fewer hands.

When the private market can no longer perform its liberty and privacy-protective functions, it becomes necessary to regulate that market in order to attain a more optimal balance between property and liberty.[25] Likewise, when an increasingly anachronistic first amendment doctrine is no longer

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recommendation algorithm inspires 700,000,000 hours of watch time per day—and can spread misinformation, disrupt elections, and incite violence."). Recommendation engines, search, trending, autocomplete, and other mechanisms predict what social media users want to see. The algorithms used do not understand the difference between disinformation and truth. Their sole function is to surface content deemed relevant to the user. Notable as well is the fact that ranking, filtering, and amplification of selected content discriminates on the basis of content, gender, and race. Studies have shown that because algorithms build on past bias using past data, bias is reified and reinforced in the algorithms. *See generally* Marcelo Prates, Pedro Avelar, and Luis C. Lamb, *Assessing Gender Bias in Machine Translation – A Case Study with Google Translate*, Neural Computing & Applications J., vol. 32, 6363–81 (2019), https://arxiv.org/pdf/1809.02208.pdf [https://perma.cc/DU5L-J594]; Emily M. Bender, Angelina McMillan-Major, Timnit Gebru & Shmargaret Schmitchell, *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?* FAccT '21 (2021), https://dl.acm.org/doi/pdf/10.1145/3442188.3445922 [https://perma.cc/HX3D-D2U7]; *see also* Blake Smith, *Hannah Arendt's Critique of Social Media*, Tablet (Dec. 4, 2020), https://www.tabletmag.com/sections/arts-letters/articles/hannah-arendt-judgment [https://perma.cc/UFX2-RHDC] ("When we give an opinion on Twitter, we are not inspired by an authentic, personal desire to have our particular relationship to the world enlarged by an encounter with other such relationships, but by a derivative, imitative desire to have the attention that other people seem to enjoy.").

[23] Reich, *supra* note 19, at 772.

[24] *See* Sophia Rosenfeld, Democracy and Truth: A Short History 156 (2018) ("[B]y shielding both abusive trolling and what are known as 'flooding tactics' designed to manipulate what gets heard amidst all the online noise," the dominant laissez-faire (free market) approach to speech "has enabled the silencing of unwelcome or unpopular voices, including disproportionately those of women and members of minority groups.").

[25] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 285 (1964) (Douglas, J., concurring) ("The institution of private property exists for the purpose of enhancing the individual freedom and liberty of human beings.") (quoting S. Rep. No. 88-2, at 12–13 (1964)).

able to perform its liberty-protective function, it, too, must give way to a new formulation better adapted to the changed conditions to which it applies.

The current marketplace of opinions and ideas is troubled in particular by a disturbing paradox. Consumers of goods and services in commercial markets are protected against the harmful effects of the knowing and willful dissemination of demonstrably false information.[26] But similar protections for consumers of political information are constitutionally fraught,[27] as are efforts to secure electoral integrity and the digital information infrastructure itself from the harms that flow from deliberate falsehoods.[28] And while the dangers of market distortion resulting from daunting concentrations of wealth and exclusivity of control are subject to antitrust regulation, when it comes to the marketplace of opinions and ideas, similar distortions, based on similarly concentrated forces, are discounted on the discreditable assumption that, left unchecked, this market is capable of self-correction.

The upshot is that a person who takes out a newspaper ad falsely claiming that a bottle of Tylenol has been tampered with may be prosecuted in criminal court and sued for civil damages. But if the same person knowingly makes false claims in campaign advertisements about the impact of a state school bond referendum, say,[29] those falsehoods may garner First Amendment protection. In the campaign case, a court may be expected to say that the best response to false speech is speech that's true. But in the Tylenol case an appropriate legal response might well be an indictment.

The difference in approach is not because economic harm to a company is considered more important than harm to fair and truthful elections. The operative idea in the campaign case is of another sort. The First Amendment claim being made is that barring demonstrably false political speech may chill the truthful kind, so protecting deliberate lies in the political arena is the price we must pay to provide the "breathing space" political discourse needs in a robust democracy.[30] But, in order to flourish, political speech also requires adequate chilling of harms that threaten it.[31] Anti-speech acts constitute such a threat. Their regulation is necessary in order to preserve a space in which robust and diversified expressive speech and deliberation may proceed.

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[26] *See, e.g.,* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771-72 (1976) ("The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

[27] *See, e.g., 2*81 Care Comm. v. Arneson, 766 F.3d 774, 787 (8th Cir. 2014).

[28] *See, e.g.*, 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

[29] This was the issue before the court in *281 Care Comm.*, 766 F.3d at 777–78.

[30] *See* NAACP v. Button, 371 U.S. 415, 433 (1963) (Brennan, J.) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

[31] *See* SUNSTEIN, *supra* note 12, at 65 ("To know how to think about a chilling effect, we would need to know its size and then the harm produced by chilling truth, along with the benefit produced by chilling falsehood."). For example, "[t]he benefit of learning what others think might be outweighed by the cost of allowing falsehoods to spread." *Id.* at 68.

Whether they are committed to disrupt voter registration or otherwise block lawful access to the ballot, or to delegitimate a legal ballot count, or to deliberately confuse voters through paid political advertisements or campaign literature, tactical anti-speech acts impede the exercise of fundamental rights, such as the right to think and speak freely and engage in meaningful individual and collective deliberation in conjunction with the right to vote. First Amendment doctrine should support (not prohibit) their regulation.[32]

Yet, the prohibition of such regulations on First Amendment grounds remains the unfortunate consequence of continued judicial reliance upon an outmoded, but highly resilient analytical framework. Under current political, cultural, and technological conditions, the traditional mantra of "more speech"—in the guise of encouraging more competition in the marketplace of ideas—is an ineffectual response to the political and cognitive harms that anti-speech acts present. For one thing, the nation's currently dominant digital communication infra-structure promotes (often by design) strategically amplified and micro-targeted disinformation.[33] Studies confirm that online "falsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information."[34] This state of affairs is consistent with the logic of the marketplace in an attention economy.

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[32] *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."); Garrison v. Louisiana, 379 U.S. 64, 75 (1964); *see also* Karl Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341, 392 (2018) ("So long as the government is not intervening specifically to suppress particular topics or viewpoints, a more deferential standard should apply.").

[33] According to internal company documents, in 2017, Facebook's ranking algorithm treated emoji reactions as five times more valuable than "likes". The underlying idea was that an increased number of reaction emojis would correlate with increased user engagement (and holding users' attention is the key to Facebook's business). In 2019, Facebook's data scientists confirmed that "posts that sparked angry reaction emoji were disproportionately likely to include misinformation, toxicity, and low-quality news." In short, Facebook systematically amplified the worst content on its platform by making it more prominent in users' feeds and spreading it to a much wider audience. As whistleblower Frances Haugen put it, "Anger and hate is [sic] the easiest way to grow on Facebook." *See* Jeremy B. Merrill and Will Oremus, *Five Points for Anger, One for a 'Like': How Facebook's Formula Fostered Rage and Misinformation*, WASH. POST (Oct. 26, 2021), https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/ [https://perma.cc/KL3G-QGR3] (noting that "time and again, Facebook made adjustments to weightings [in their algorithms] after they had caused harm."); *see also* Langvardt, *supra* note 32, at 350 ("Platforms do not, for the most part, effect cultural change through ordinary persuasion. Instead, they effect cultural change through matchmaking and behavioral-modification techniques. A simple change to a sorting algorithm can produce cultural change—for instance, in the overall level of ideological segregation among platform users—essentially overnight.").

[34] *See* Soroush Vosoughi, Deb Roy, & Sinan Aral, *The Spread of True and False News Online*, SCIENCE (Mar. 9, 2018) https://science.sciencemag.org/content/359/6380/1146 [https://perma.cc/QFM3-NTJE].

The quest for profit in a privatized digital public square demands maximized attention share; attention share, in turn, thrives on enhanced emotion, shock value (favoring extreme viewpoints), and cohesive group identity (filtering out dissonant views). Machine learning-based algorithms designed to maximize attention share online are ill-suited to advance informed deliberation amidst a swirl of diverse ideas and opinions openly competing for acceptance. On social media today, that Holmesian ideal is dead. To stake the continued vitality of free speech on a chimerical "free market of ideas" capable of competition-optimizing self-regulation is disingenuous.

Nevertheless, anachronistic cries for "more speech" as the only permissible ("least restrictive") means to repel the knowing dissemination of demonstrable falsehoods continue to reverberate in contemporary caselaw. Consider, for example, *281 Care Committee*. In a closely divided Eighth Circuit decision, the majority reversed a lower court ruling upholding a Minnesota statute that prohibited the knowing or reckless dissemination of false statements in paid political advertising or campaign material involving ballot initiatives. According to the majority, the law suffered from the constitutional defect of over-inclusiveness: it failed to adopt the least restrictive means available to redress the problem.[35] In the court's words: "There is no reason to presume that counterspeech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal."[36] Justice Holmes's familiar First Amendment mantra immediately follows: "The remedy for speech that is false is speech that is true."[37] Then, for emphasis, the court adds: "[C]ounterspeech, alone, establishes a viable less restrictive means of addressing the preservation of fair and honest elections."[38]

On this view, any statutory effort to counter ill-gotten political or commercial gain from the strategic use of demonstrably false information will not pass constitutional muster if it proposes a remedy other than encouraging "more speech."[39] The idea of a self-regulating market of opinions and

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[35] 281 Care Comm. v. Arneson, 766 F.3d 774, 793 (8th Cir. 2014); *see also* United States v. Alvarez, 567 U.S. 709, 726, 729 (2012) (Breyer, J., concurring). For further discussion of Alvarez, *see infra* note 132.

[36] 281 Care Comm., 766 F.3d at 793 (8th Cir. 2014); *see also* Commonwealth v. Lucas, 34 N.E.3d 1242, 1245 (Mass. 2015) ("[I]n the election context, as elsewhere, it is apparent that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the people's wishes safely can be carried out.") (quoting Lyons v. Globe Newspaper Co., 612 N.E.2d 1158, 1164 (Mass. 1993)).

[37] *Id.*

[38] *Id.* at 794.

[39] *See, e.g.*, Meyer v. Grant, 486 U.S. 414, 419–20 (1988) (noting that "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."); Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991); McKimm v. Ohio Elections Commission, 729 N.E.2d 364, 375 (Ohio 2000); *see also* Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014); State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 696 (Wash. 1998) (stating in the course of overturning Washington statute banning false statements of material fact made with actual

ideas, notwithstanding compelling evidence against it, remains rutted in the court's imagination.

Afoot here is a free speech orthodoxy that sets before us a stark choice: either we endorse "an unconditional right to say what one pleases"[40] (anti-speech tactics included) or we submit to "Oceania's Ministry of Truth"[41] (referencing George Orwell's fictional state propaganda apparatus). Lost from view in this hyperbolic framing of the issue is the way in which granting anti-speech acts first amendment protection brings the Ministry of Truth closer to reality.[42]

The paradoxical use of free speech doctrine to impede meaningful free speech practice compels reassessment of that doctrine. This need is especially acute in a political environment increasingly choked with anti-speech acts—enhanced by machine learning-based optimization of messaging and microtargeting and the widespread dissemination online of unchecked disinformation—potent enough to poison whatever political breathing space remains.[43] A First Amendment doctrine that overstates the chilling effect of

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malice in campaign advertisements that "instead of relying on the State to silence false political speech, the First Amendment requires our dependence on even more speech to bring forth truth"); Rickert v. State, Pub. Disclosure Comm'n, 168 P.3d 826, 850 (Wash. 2007) (asserting the applicable statute "naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech"). The Washington State Legislature subsequently revised the statute, finding that "a violation of state law occurs if a person sponsors false statements about candidates in political advertising and electioneering communications when the statements are made with actual malice and are defamatory." WASH REV. CODE. TIT. 42, § 42.17A.335, n.2. The legislature also found that "in such circumstances damages are presumed and do not need to be established when such statements are made with actual malice in political advertising and electioneering communications and constitute libel or defamation per se." *Id.* at n.3.

[40] Rosenblatt v Baer, 383 U.S. 75, 95 (1966) (Black J., concurring and dissenting).

[41] United States v. Alvarez, 567 U.S. 709, 723 (2012).

[42] *See* Miguel Schor, *Trumpism and the Continuing Challenges to Three Political- Constitutionalist Orthodoxies* SOC. SCI. RSCH. NETWORK (Nov. 16, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730945 [https://perma.cc/ZW94-8FL3]. ("The [Alvarez] Court stood Orwell on his head by broadly protecting lies. During the Trump presidency, the United States enjoyed an official ministry of truth in the form of the President's bully pulpit which Trump used to normalize lying. Kellyanne Conway, Donald Trump's political advisor, has a surer grasp on how political speech operates than does the Supreme Court. When she injected the phrase 'alternative facts' into the political lexicon in 2016, sales of George Orwell's *Nineteen Eighty-Four* took off.")

[43] The practical difficulty of contesting deliberately distorted online videos (or "deep fakes"), for example, reinforces the view that counterspeech cannot serve as an adequate counter-measure to certain kinds of harmful falsehoods. *See* SUNSTEIN, *supra* note 12, at 119 (noting that deepfakes and doctored videos are singularly "self-authenticating" and cannot be easily dismissed due to the mind's susceptibility to pre-critical ["System I" or "fast and automatic"] belief); *see also* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes are you Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (criticizing the Supreme Court for concluding, after watching a police video of a car chase, that no reasonable juror could find lethal force was *not* required under the circumstances). The mental phenomenon of "naïve realism" (also described as "identity-protective cognition") tells us that "people are likely to construe the facts depicted in the tape in a way that reinforces the beliefs that predominate among their peers." *Id.* at 853. *Cf.* Scott v. Harris, 550 U.S. 372, 380–81 (2007) ("Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him.").

government regulation at the expense of safeguarding the conditions essential to a robust marketplace of opinions and ideas disserves core free speech values.

If freedom of speech and the pluralist spirit of informed deliberation amidst tolerance of difference are to be preserved, corporate control of the dominant platforms for public discourse must be redressed. Public square values and practices will have to be secured anew in light of the digital communication infrastructure in which we now live. That infrastructure is part of a growing threat to liberal democracy at home and abroad.

According to a recent study, only 4.5% of the world's population lives in a fully functioning democracy.[44] Over recent years, conditions adverse to democracy appear to be worsening.[45] The confluence of factors at work are cultural, economic, political, and technological in nature:

-huge wealth disparities inspire cynicism about 'rigged' institutions and lost opportunities;

-social media have helped to transform the marketplace of ideas into self-reinforcing echo chambers of the like-minded, displacing the professional ethos of journalism with an overarching drive to maximize attention share which renders all information equivalent and incentivizes the monetization of false information;

-loss of coherent political identity increases anxiety which encourages conspiracy theories pointing to 'enemy' 'Others' responsible for lost opportunities, values, and hope for the future;

-loss of shared facts coincides with the rise of parallel but separate universes ("filter bubbles") fragmenting social/political reality and rendering inoperable a crucial component of democratic life, namely: the capacity to consider alternative viewpoints.

Pronouncements concerning the arrival of a post-truth society have gained significant traction particularly in light of former President Trump's

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[44] Thomas Seifert, *Demokratie weltweit unter Druck*, WIENER ZEITUNG (February 27, 2018), https://www.wienerzeitung.at/nachrichten/welt-europa/weltpolitik/949766_Demokratie-weltweit-unter-Druck.html [https://perma.cc/WAS9-EV3N]; *see Democracy—Demokratieverdrossenheit* SECOND.WIKI (Aug. 17, 2021), https://second.wiki/wiki/demokratieverdrossenheit [https://perma.cc/8KL9-GXS5].

[45] According to a recent Pew Research poll, 46% of US respondents find both democratic *and* nondemocratic alternatives to be acceptable. Richard Wike, Katie Simmons, Bruce Stokes & Janell Fetterolf, *Globally, Broad Support for Representative and Direct Democracy*, PEW RSCH. CTR. (Oct. 16, 2017), https://www.pewresearch.org/global/2017/10/16/globally-broad-support-for-representative-and-direct-democracy/ [https://perma.cc/M8UJ-V5FR]; *see* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM 21 (2019) ("[S]urveillance capitalism is best described as a coup from above, not an overthrow of the state but rather an overthrow of the people's sovereignty and a prominent force in the perilous drift toward democratic deconsolidation that now threatens Western liberal democracies.").

and his allies' strident renunciations of the press as "enemies of the people" in conjunction with flagrant repudiations of scientific expertise and of the authority of experts more generally.[46] Adding to the increasing destabilization of a shared, fact-based reality is the growing normalization of QAnon, a cult-like web phenomenon that features intensely paranoid, conspiracy-driven discourse.[47] Former President Obama vividly captured the predicament we now face: "If we do not have the capacity to distinguish what's true from what's false, then by definition the marketplace of ideas doesn't work. And by definition our democracy doesn't work. We are entering into an epistemological crisis."[48]

This crisis has been deepened by a flood of disinformation, digitally amplified and strategically targeted (by bots [automated algorithms] and sock puppets [hidden identities behind fake sites and identities online, both foreign and domestic[49]]) within a digital architecture designed to maximize

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[46] *See, e.g.*, David Remnick, *Trump and the Enemies of the People*, NEW YORKER (Aug. 15, 2018) https://www.newyorker.com/news/daily-comment/trump-and-the-enemies-of-the-people [https://perma.cc/C9AB-4P52]; *see also* Lee McIntyre, *The Post-Truth Society*, BOOKFORUM (Mar. 14, 2017) https://www.bookforum.com/article/17524 [https://perma.cc/U4XA-LH3Y]; POST-TRUTH, PHILOSOPHY AND LAW (Angela Condello & Tiziana Andina eds. 2019). The 'big lie' regarding the "stolen" Presidential election of 2020 is, of course, yet another reflection of post-truth politics. *See, e.g.*, Jennifer Rubin, *Opinion: We Must End the Post-Truth society*, WASH. POST (Jan. 12, 2021), https://www.washingtonpost.com/opinions/2021/01/12/we-must-end-post-truth-society/ [https://perma.cc/54YR-35ST].

[47] Matthew Hannah, *QAnon and the Information Dark Age*, FIRST MONDAY 26(2) (Jan 15, 2021) ("The information dark age is predominately characterized by the viral spread of unsubstantiated, unverified information (which seems plausible enough on the surface) through unauthorized channels combined with a general reaction against corporate media and academic expertise."); *see* Reed Berkowitz, *A Game Designer's Analysis of QAnon*, MEDIUM (Sep. 30, 2020) ("Q is fictional and acts exactly like a fictional character acts. This is because the purpose of Q is not to divulge actual information, but to create fiction . . . QAnon is an attempt to create a new reality that can be acted on, lived in 'as-if', and manipulated, but it does not match actual reality . . . . [Its message is] to doubt reality. To create the fog of war without the war."); *see also* Julia Carrie Wong, *QAnon explained: the antisemetic conspiracy theory gaining traction around the world*, GUARDIAN (Aug. 25, 2020) https://www.theguardian.com/us-news/2020/aug/25/qanon-conspiracy-theory-explained-trump-what-is [https://perma.cc/KG2M-47MC] (on recurrence of familiar anti-Semitic tropes tracing back to the 'Protocols of the Elders of Zion'). As ongoing evidence of QAnon's increasing 'normalization,' consider the 2020 electoral successes of Congresswomen Marjorie Taylor Greene (R-GA) and Lauren Boebert (R-CO) both of whom have repeated QAnon conspiracy theories. Jack Brewster, *Congress Will Get Its Second QAnon Supporter, As Boebert Wins Colorado House Seat*, FORBES (Nov. 4, 2020), https://www.forbes.com/sites/jackbrewster/2020/11/04/congress-will-get-its-second-qanon-supporter-as-boebert-wins-colorado-house-seat/?sh=628e4c4f568f [https://perma.cc/C7FF-9HTZ].

[48] Jeffrey Goldberg, *Why Obama Fears for Our Democracy*, ATLANTIC (Nov. 16, 2020), https://www.theatlantic.com/ideas/archive/2020/11/why-obama-fears-for-our-democracy/617087/ [https://perma.cc/ZUW9-DRQY]; *see* HANNAH ARENDT, THE PORTABLE HANNAH ARENDT 568 (Peter R. Baehr ed., 2003) ("The result of a consistent and total substitution of lies for factual truth is not that the lies will now be accepted as truth, and the truth defamed as lies, but that the sense by which we take our bearings in the real world – and the category of truth vs. falsehood is among the mental means to this end—is being destroyed.").

[49] *See, e.g.*, *Russian interference in the 2016 United States elections*, WIKIPEDIA, (Aug. 15, 2021) https://en.m.wikipedia.org/wiki/Russian_interference_in_the_2016_United_States_elections [https://perma.cc/2EVC-Q73B] ("The Internet Research Agency (IRA), based

attention—the coin of the social media realm.[50] As Shoshana Zuboff writes, the business model of Facebook, Google, and Twitter, among other social media platforms, reaps significant rewards from the monetization of all the digital data that flows on their service, including disinformation.[51] Indeed, false claims are more valuable to these platforms because the most dramatic, emotionally intense, and politically extreme assertions online are the most likely to garner the most attention.[52] This means that, within the current attention economy, falsity has greater market value than truth. Little wonder Facebook resisted pressures to more actively weed out verifiably false political content.[53] From a business perspective, all information, whether true or false, whether conducive to rational, deliberative discourse or to irrational anxiety, rage, and confusion, is equivalent: whatever holds attention makes money.

In defense of his laissez-faire approach to political content, Facebook CEO Mark Zuckerberg has relied upon familiar first amendment claims, particularly the idea that, in a democracy, "more speech" is the best remedy against false speech.[54] This defense channels Justice Brandeis's oft-cited con-

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in Saint Petersburg, Russia and described as a troll farm, created thousands of social media accounts that purported to be Americans supporting radical political groups and planned or promoted events in support of [Donald] Trump and against [Hillary] Clinton [in the 2016 US presidential elections]. They reached millions of social media users between 2013 and 2017. Fabricated articles and disinformation were spread from Russian government-controlled media and promoted on social media.").

[50] *See* POZEN, *supra* note 18, at 29 ("The [Chinese] government fabricates and posts about 448 million social media comments a year."); *id.* at 30 (noting that in the days leading up to the 2016 US Presidential election, "'[J]unk news was shared just as widely as professional news. . . .'").

[51] ZUBOFF, *supra* note 45, at 509.

[52] According to Zuboff, within the domain of neo-liberal, surveillance capitalism, social media firms are committed to digital designs and techniques that manipulate information and micro-target its delivery to audiences that predictive algorithms, based on a mind-boggling supply of intimate data provided by users of the platform themselves, have identified as the most susceptible to influence. Influence here means both discursive and behavioral in the marketplace of ideas as well as goods and services. As Zuboff documents, the architecture of social media is deliberately designed to bypass reflective decision making in the hope, ultimately, of rendering human autonomy and freedom of choice obsolete. *See* ZUBOFF, *supra* note 45. See also BENNETT, THE DISINFORMATION AGE, 74 (2020) ("Falsehoods were 70 percent more likely to be retweeted. . ."); Rui Fan, Jichang Zhao, Yan Chen, & Ke Xu, *Anger Is More Influential than Joy: Sentiment Correlation in Weibo*, PLOS ONE (Oct. 15, 2014) https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0110184 [https://perma.cc/87N6-LGQW].

[53] *See* Mike Isaac & Cecilia Kang, *Facebook Says It Won't Back Down From Allowing Lies in Political Ads*, N.Y. TIMES (Jan. 9, 2020) https://www.nytimes.com/2020/01/09/technology/facebook-political-ads-lies.html [https://perma.cc/VAA4-K85B] ("Mr. Zuckerberg said he believed in the power of unfettered speech, including in paid advertising, and did not want to be in the position to police what politicians could and could not say to constituents. Facebook's users, he said, should be allowed to make those decisions for themselves: 'People having the power to express themselves at scale is a new kind of force in the world—a Fifth Estate alongside the other power structures of society.'").

[54] *See, e.g.*, Tony Romm, *Zuckerberg: Standing For Voice and Free Expression*, WASH. POST (Nov. 17, 2019) ("I believe we should err on the side of greater expression.") https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression/ [https://perma.cc/5Y7L-STEV]. Contrast Twitter's January 2021 policy restatement:

curring opinion in *Whitney*: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is *more speech*, not enforced silence."[55] The defense of "more speech" is often joined with another free speech staple, namely: Justice Oliver Wendell Holmes's famous concurrence in Abrams: "The best test of truth is the power of the thought to get itself accepted in the *competition of the market*."[56]

There are two problems with these joint claims. For one, there isn't time to counter deliberate falsehoods when digital newsfeeds, tweets, and all manner of online memes almost instantly go viral on a massive scale. For another, it isn't debate in the marketplace of ideas that drives "acceptance" online. Getting accepted in the digital marketplace is increasingly a matter of algorithmic amplification, micro-targeting, and sophisticated techniques of behavioral modification in the service of generating maximum attention share.[57]

Suffice it to say, earlier notions of a public marketplace of ideas, which continue to underpin the Supreme Court's free speech jurisprudence, do not accurately reflect the design and dominant practices of contemporary communication online – whether it is political discourse, or the dissemination of news. Kelly Born cogently captures a key aspect of the shift that has taken place:

> As the public square has moved online, societies have begun to fragment along racial, religious, partisan, and economic lines. Social media platforms, rather than credentialed journalists, now hold significant power not only to communicate with the public but also to highlight key issues and to unite likeminded strangers, enmeshing these new groups in their own distinct (sometimes inaccurate) information systems.[58]

"You may not use Twitter's services for the purpose of manipulating or interfering in elections or other civic processes. This includes posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process. In addition, we may label and reduce the visibility of Tweets containing false or misleading information about civic processes in order to provide additional context." *Civic Integrity Policy*, TWITTER (Oct. 2021) https://help.twitter.com/en/rules-and-policies/election-integrity-policy [https://perma.cc/2TWV-AFFM].

[55] *See* Whitney v. California, 274 U.S. 357, 376–77 (Brandeis, J., concurring).

[56] Lombardi, *supra* note 16 (emphasis added).

[57] *See, e.g.*, Karl Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 150 (2019) ("Facebook users who 'like,' share, and comment on what they see are given an apparent opportunity to express themselves in public discussions, though the recommendation algorithm determines who will see it and when."); *See* ARAL, *supra* note 7, at 97 ("Social media is designed for our brains. It interfaces with the parts of the human brain that regulate our sense of belonging and social approval. It rewards our dopamine system and encourages us to seek more rewards by connecting, engaging, and sharing online.").

[58] *See* Kelly Born, *Can Digital Disinformation be Disarmed?*, PROJECT SYNDICATE (Jan. 29, 2021), https://www.project-syndicate.org/onpoint/how-to-stop-disinformation-on-social-media-platforms-by-kelly-born-2021-01 [https://perma.cc/V2ZL-5Y3K] ("By 2018, leading platforms such as Twitter and Facebook had surpassed print newspapers in the US as a more frequent news source. In 2020, social media surpassed TV [cable, network, and local] as the

When "fake news" or "fake commentaries" or "propaganda robots" or "troll armies" can easily and cheaply "flood the zone" in order to drown out disfavored speech "more speech" cannot be regarded as a meaningful remedy to purposeful falsehood.[59] Indeed, as "more speech" increasingly becomes weaponized in an effort "to confuse, blackmail, demoralize, subvert, and paralyze,"[60] rather than serve as an ally in the battle against falsehood, it has become part of the problem.[61] As Tim Wu succinctly puts it: "The [First] Amendment has become increasingly irrelevant in its area of historic concern: the coercive control of coercive speech."[62] Today's mix of neo-liberal (*laissez-faire*) -nomics, surveillance capitalism, and strategic disinformation at scale has created toxic conditions for liberal democracy.

In the current attention-based economy, contrary to Holmes's assumption, truth is neither the operative measure of success nor for that matter a core value. When the key metric is engagement, market value accrues from maximizing the time a platform user spends engaged with whatever happens to draw and hold attention.[63] In such a market, falsehood and the distortions of amplified affect have the upper hand. An exclusive dedication to truth online carries a distinct competitive disadvantage.[64]

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primary source of political news in the US. Among US adults under the age of 30, 48% already get most of their political news from social media. As younger age cohorts reach maturity, these numbers will grow accordingly."). According to Langvardt, 62% of Americans get their news from social media. Langvardt, *supra* note 32, at 378.

[59] *See* POZEN, *supra* note 18, at 272.

[60] POMERANTSEV, *supra* note 8, at 273; s*ee also id*. at 171 (describing the current post-Cold War *Zeitgeist* as "a world where spectacle had pushed out sense, leaving only gut feelings to guide one through the fog of disinformation," a state of "radical relativism that implies truth is unknowable").

[61] *See* ZUBOFF, *supra* note 45, at 322 ("Concepts of freedom, privacy, and self-determination inherently conflict with programs designed to control not just physical freedom, but the source of free thought as well. . ."); *see also id*. at 497 ("Total information tends toward certainty and the promise of guaranteed outcomes."); *id.* at 464 ("Life in the hive favors those who most naturally orient toward external cues rather than toward one's own thoughts, feelings, values, and sense of personal identity."); *id.* at 324 ("The First Amendment 'must equally protect the individual's right to generate ideas' and the right to privacy should protect citizens from intrusions into their thoughts, behavior, personality, and identity lest these concepts 'become meaningless.'"). On free speech fundamentalism, *see* Frank Pasquale, *The Automated Public Sphere*, COMM. L. & POL'Y EJOURNAL (November 8, 2017); MARY ANN FRANKS, THE CULT OF THE CONSTITUTION, ch. 3 (2019).

[62] POZEN, *supra* note 18, at 16 (quoting Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete [https://perma.cc/YT2J-UN2J]).

[63] *See* Langvardt, *supra* note 32 ("Essentially everything a user does on Facebook has cash value to the company: clicking 'liking,' sharing, messaging, commenting, even *beginning* to type out a message before retracting it. All of this 'engagement' helps Facebook to build a deeper dossier on the user.").

[64] *See* ARAL, *supra* note 7, at 47 (studies show that because algorithms used by Google, Twitter, Facebook, Youtube, and other social media platforms deliberately amplify stories that trigger outrage and fear, lies spread faster than the truth); *See* Berisha v. Lawson, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting) (Observing with respect to traditional defamation rules: "If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?").

In this digital bizarro world, acceptance becomes a better test for falsehood and distortion than for truth,[65] while market outcomes are less indicative of free competition than calculated prediction. Surveillance capitalism facilitates profit-generating commercial behavior by maximizing the acquisition of detailed personal data about every user on the platform in order to accurately predict his or her immediate wants or preferences. This is the art of the nudge on digital steroids.[66]

Three decades ago, Cass Sunstein observed that "New Deal ideas have played remarkably little role in the constitutional law of free speech."[67] This remains true today.[68] At the beginning of the last century, laissez-faire policies stymied New Deal market regulation. In the age of *Lochner*, the Supreme Court relied upon putatively neutral market conditions to justify (as unconstitutionally interventionist) state regulations that called for maximum work hours or minimum wages, or that protected employee health and proscribed child labor. In a similar manner, laissez-faire free speech doctrine threatens to render the state helpless in the face of an increasingly dysfunctional and singularly exploitative private market.[69] Today, rather than contract-based fundamentalism it is free speech orthodoxy that 'naturalizes' the status quo. What we are now seeing are *skeuomorphs*[70] of democracies. Social media technologies are creating—by intent and design[71]—attributes that look and feel democratic but are authoritarian to the core.[72]

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[65] *See, e.g.*, ROSENFELD, *supra* note 24, at 151 (According to a major study in SCIENCE, "on Twitter, falsehood and rumor dominate truth by every metric, reaching more people, penetrating deeper into social networks, and doing so more quickly than do accurate stories.").

[66] *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2007).

[67] CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 34 (1993).

[68] *But see* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) ("Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.").

[69] ZUBOFF, *supra* note 45, at 519 ("We can now see that surveillance capitalism takes an even more expansive turn toward domination than its neoliberal source code would predict. . . [I]ts antidemocratic collectivist ambitions reveal it as an insatiable child devouring its aging fathers.")

[70] A skeuomorph is a design feature copied from a similar feature in another object, even when not functionally necessary. *See Skeuomorph*, WIKIPEDIA (Aug. 1, 2021) https://en.wikipedia.org/wiki/Skeuomorph [https://perma.cc/2VUX-6F85].

[71] As the saying goes, disinformation isn't a bug, it's a feature. *See* Nicholas Carr, *'It's Not a Bug, It's a Feature.' Trite—or Just Right?*, WIRED (Aug. 19, 2018) https://www.wired.com/story/its-not-a-bug-its-a-feature/ [https://perma.cc/4DUZ-BVTF]. Former Facebook vice-president Chamath Palihapitiya doesn't mince words: "The short-term dopamine-driven feedback loops that we have created are destroying how society works: no civil discourse, no cooperation, misinformation, mistruth. . . It is eroding the core foundations of how people behave by and between each other." Julia Carrie Wong, *Former Facebook Executive: Social Media is Ripping Society Apart,* GUARDIAN (Dec. 12, 2017) https://www.theguardian.com/technology/2017/dec/11/facebook-former-executive-ripping-society-apart [https://perma.cc/R5HN-67RC].

[72] *See, e.g.*, Langvardt, *supra* note 57, at 133 ("The addiction-driven nature of social media probably harms the quality of public discourse and deliberation."); *id.* at 150 ("By serving users'

Is this an economic problem? A cultural problem? A political problem? A legal problem? No doubt, it is all of these things, though the cultural dimension of the challenge looms especially large. If enough people come to embrace anti-democratic ideas and practices, law will not save us.[73] In an illiberal society, where the threat to freedom of thought and expression is met with indifference, the burdensome challenge to reframe anachronistic legal doctrines may become moot. Taking this grave threat to democracy as our point of departure, a central question arises: What safeguards are essential to preserve the minimum conditions necessary for a robust market of opinions and ideas in the digital age?

II. Preserving the Minimum Conditions Necessary for a Robust Marketplace of Opinions and Ideas Compels the Regulation of Tactical Anti-speech Acts

As an ever-growing literature attests, the profound challenge to democracy presented by disinformation in the digital age may be approached from a variety of angles:[74]

1. Legislative/regulatory responses: Current proposals for regulatory reform target 'upstream', 'midstream', and 'downstream' sectors in the information ecosystem. Upstream regulation focuses on improving the quality of information being disseminated. Midstream regulatory approaches focus on regulating the behavior of the dominant social media platforms (e.g., through content moderation, network curation, and enhanced transparency/privacy rules[75]) and contemplate a range of anti-trust actions. Downstream

'revealed preferences' rather than their *stated* preferences, user engagement algorithms largely crowd out the individual's role in cultivating a set of interests and values."); *id.* at 158 ("Sometimes simple aesthetics can drive compulsive use.").

[73] Without citizens of courage and conviction, democracy yields to timidity and acquiescence to force. As Judge Learned Hand famously said: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it." Learned Hand, *The 'Spirit of Liberty' Speech*, Found. for Indiv. Rts. in Educ. (Aug. 15, 2021) https://www.thefire.org/first-amendment-library/special-collections/the-spirit-of-liberty-speech-by-judge-learned-hand-1944/ [https://perma.cc/J49N-DG6E]; *see also* Harold Laski, *The Prospects of Democratic Government,* 33 Wm. & Mary Bull. No. 4, at 4 (1939) ("Democracy is not merely a form of government; it is also a way of life; Richard K. Sherwin, *Character Is a Sacred Bond,* Angelaki: J. Theoretical Humans. 24, 73 (2019) ("[C]haracter may be thought of as a constitutive agent or offshoot of the collective performance through which sovereignty attains [or loses] legitimacy. . . Character is the dark energy of law – the force that binds, or rends, the *nomos*, the given world of meaning, in which we live.").

[74] Commentators such as W. Lance Bennett and Steven Livingston maintain that unless trust can be regained in "the legitimacy of authoritative institutions" no remedy is likely to be fruitful. Bennett, *supra* note 52, at 4.

[75] *See, e.g.*, J. Scott Babwah Brennen and Matt Perault, *Breaking Black Boxes: Roadblock to Analyzing Platform Political Ad Bans,* Duke Ctr. on Sci. & Tech. Pol'y, 3–6 (Mar. 2, 2021), https://scienceandsociety.duke.edu/breaking-blackout-black-boxes/ [https://perma.cc/SGM5-VCJQ] ("The Honest Ads Act, which remains unpassed after first being introduced in the Senate in 2018, requires platforms to establish archives of digital political ads they run. It specifies that the archives include copies of ads along with a series of basic metadata, including: a description of the audience targeted by the advertisement, the number of views generated

regulations focus on improving audience engagement (e.g., through media literacy training and independent fact checking).

While, taken together, these regulatory measures are likely to provide some improvement within the current information ecosystem, they are highly unlikely to solve the larger problems that we face regarding anti-speech acts online. For one thing, when the core business model is the problem—monetizing disinformation incentivizes its unchecked dissemination—incremental solutions are likely to fall short. Literacy training remains difficult to scale up.[76] Online moderation standards are hard to alter, and difficult to enforce. And susceptibility to disinformation (based on strategic bias confirmation and deliberate micro-targeting of information in the service of maintaining insular tribal identities) remains largely unimpeded. Against this backdrop, breaking up Google, Facebook, and Amazon, will most likely simply distribute their undesirable behaviors among an increased number of players.[77]

2. Legal responses: Proposals on this front include re-assessing safe harbor protections for social media firms under Section 230(c) of the Communications Decency Act of 1996, as well as re-examining core free speech principles and doctrines.[78] As Justice Thomas recently noted, the two most likely justifications for regulating digital platforms consist in treating them either as "common carriers" or "public accommodations."[79] The need to more effectively monitor and remove, or label as false, harmful disinformation online is widely acknowledged.[80] Legislative actions along these and other lines are currently pending. The application of anti-speech act regulations to concentrated social media firms like Facebook, Google, and Twitter, in combination with revisions of current safe harbor provisions, hold out a promising path for reform. The success of this integrated strategy, however, requires reworking an anachronistic self-regulating market framework for free speech doctrine.

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from the advertisement, and the date and time that the advertisement is first displayed and last displayed.") .

[76] *But see Illinois Legislation,* MEDIA LITERACY NOW (Nov. 13, 2021) https://medialiteracynow.org/your-state-legislation-2/illinois-legislation/ [https://perma.cc/F85N-T58G] (Illinois' recent House Bill 234 established mandatory media literacy curriculum in public schools.)

[77] *See, e.g.,* Roger McNamee, *Big Tech Needs to Be Regulated: Here Are 4 Ways to Curb Disinformation and Protect Our Privacy*, TIME (Jul. 29, 2020) https://time.com/5872868/big-tech-regulated-here-is-4-ways/ [https://perma.cc/UYD9-E44M].

[78] *See* 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section").

[79] *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1226–27 (2021) ("'It stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of' digital platforms" (citing Turner) and "Even if digital platforms are not close enough to common carriers, legislatures might still be able to treat digital platforms like place of public accommodation."); *see also* Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization*, 52 HARV. C.R.-C.L. L. REV. 145 (2017).

[80] *See, e.g.,* SUNSTEIN, *supra* note 12, at 8 ("[T]elevision networks, newspapers, magazines, Facebook, Twitter, YouTube, and other social media platforms should be doing more than they are now to control the spread of falsehoods.").

3. Cultural and normative responses: Commentators approaching the challenge of deliberate disinformation from this perspective often focus on the centrality of individual autonomy, privacy rights, and the need for meaningful public discourse in an open society. Recommendations here include: increased funding for public civics education, improved programs for visual/digital literacy, developing independent fact checking agencies, and strengthening the role of professional journalism in public media more generally.

These three approaches to the problem of disinformation are deeply entangled, requiring close attention on both the micro and macro level. Each approach offers a set of tools that can help to ameliorate the various social and political harms associated with disinformation. In this part, I contend that the substantial harms associated with tactical anti-speech acts are egregious enough to require regulation. These are harms that cannot be avoided through less intrusive (more speech-protective) measures. Orthodox free speech doctrine, however, threatens to stymie regulatory actions in this limited domain. That orthodoxy needs to adapt to a changed information ecosystem.

Informed public discussion and reasoned debate among competing ideas and opinions are among the prime casualties of a polluted and dysfunctional information ecosystem.[81] In this respect, regulating anti-speech acts is crucial to preserving the minimum conditions necessary for meaningful individual and collective deliberation and electoral integrity. Subjecting social media firms to additional responsibilities regarding the quality of information that they strategically deliver is an essential part of the remedial equation.

Responsibility follows function. Firms that assume the role of information provider should also assume the professional/ethical responsibility that comes with providing reliable information. The firm's superior knowledge and control of the information archive and transmission network, in conjunction with foreseeable reliance by the information consumer, are precisely the conditions that account for being treated as a fiduciary or trustee.[82] By parity of reasoning, the power to control or significantly influence the flow of information among information consumers likewise generates a fiduciary

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[81] *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 WM. & MARY L. REV. 653, 677 (1988) ("If we abandon the faith that reason matters, we are left with a society governed exclusively by force."). As Justice Brandeis contended, "It is the function of speech to free men from the bondage of irrational fears." Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

[82] *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1207 (2016) ("The client puts their trust or confidence in the fiduciary, and the fiduciary has a duty not to betray that trust or confidence."). *Cf.* Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970); Tarasoff v. Regents, 551 P.2d 334, 440 (Cal. 1976) (holding that exclusive control and reliance generate responsibility to victims for foreseeable harm due to lack of reasonable care).

responsibility.[83] It is not an acceptable defense, upon knowingly delivering false information, for a fiduciary to argue 'I gave her what she wanted.'[84] Civil society has the power (and has used it for centuries in the Anglo-American common law tradition) to establish norms of social and commercial conduct. To that end, laws protect consumers from deception in advertising and fraud.[85]

Bad faith communication at scale ("mass dis-communication") poisons public discourse. The issue, therefore, is not whether "the First Amendment assumes the existence of a populace that is reasonably educated, thoughtful, responsible, and intelligent."[86] Intelligence notwithstanding, the cost of obtaining adequate information may exceed its perceived benefit.[87] The real issue is whether and how a liberal democracy provides for informed political

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[83] *See, e.g.*, James Grimmelmann, *Speech Engines*, 98 MINN. L. REV 868, 874, 904 (2014) ("From the user's perspective, a search engine is not primarily a conduit or an editor. Instead, it is a trusted *advisor*"); *Id.* at 904 ("The common themes of fiduciary relationships are dependence, trust, and vulnerability. The search engine provides a valuable service from a position of superior knowledge and superior skill; the user provides it with valuable and often sensitive information, trusting in it to provide suggestions consistent with her interests. Search engines resemble lawyers and investment advisors, both of whom give advice to their clients and are regarded as fiduciaries when they do."); Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 984 (2018) (noting that "digital media companies are *information fiduciaries* who have duties of care and loyalty toward their end-users."); Tim Wu, *Is the First Amendment Obsolete?*, *in* THE PERILOUS PUBLIC SQUARE, *supra* note 19, at 41 (noting that "a law that makes any social media platform with significant market power a kind of trustee operating in the public interest, and requires that it actively take steps to promote a healthy speech environment . . . could, in effect, be akin to a fairness doctrine for social media.").

[84] Compare, for example, the fiduciary obligations of attorneys to their clients. *See* Lisa G. Lerman, *Lying to Clients*, 138 U. PENN. L. REV. 659, 661–62 (1990) ("Lawyers are not supposed to lie to their clients. Ever. The disciplinary rules prohibit all conduct involving 'dishonesty, fraud, deceit or misrepresentation." (quoting MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 1989) [hereinafter MODEL Rule]; MODEL CODE OF PRO. RESP. dr 1-102(A)(4) (AM. BAR ASS'N 1981)). A lawyer must 'keep a client reasonably informed about the status of a matter' [quoting MODEL RULE 1.4(a)]and must 'render candid advice.'" [quoting MODEL RULE 2.1]).

[85] Tort law, responding to evolving social norms, has developed civil protections that go beyond the proscription of impermissible bodily invasions to include such non-physical wrongs as intentional (and, more recently, negligent) infliction of emotional distress. In time, the law might well come to recognize the significant social, political, and psychological harm associated with the intentional infliction of *severe cognitive debilitation* stemming from the knowing and willful dissemination of demonstrably false information for an unwarranted gain or advantage.

[86] Geoffrey Stone, *Reflections on Whether the First Amendment Is Obsolete*, *in* THE PERILOUS PUBLIC SQUARE, *supra* note 19, at 47.

[87] *See, e.g.*, James Fishkin, *Deliberative Democracy: What and Why?* OPEN DEMOCRACY (Sept. 25, 2007), https://www.opendemocracy.net/en/what_and_why/ [https://perma.cc/SQ3Q-JSPM] ("If I have only one vote in millions, why should I pay attention to the details of public policy or the positions of parties in elections? My individual vote will not make much difference - and we all have more pressing things to do. . ."). According to the literature on "rational ignorance," "when the cost of [sufficiently] educating oneself about [a public issue]. . . to make an informed decision . . . outweigh[s] any potential benefit one could reasonably expect to gain from that decision," "it would be irrational to waste time" investing in that benefit. *Rational ignorance*, WIKIPEDIA (Aug. 1, 2021) https://en.wikipedia.org/wiki/Rational_ignorance [https://perma.cc/K589-6C5G].

discourse and robust public exchange. The liberal state is responsible to the public for ensuring equality and autonomy for all participants in the political process. This includes a regulatory responsibility not only to maintain a robust communication infrastructure for individual and collective deliberation,[88] but also a duty to secure that infrastructure against illiberal forces that seek to undermine it.[89]

Making social media firms, among other actors, responsible for harms associated with the knowing dissemination of provably false information requires legislative action. It can hardly be gainsaid that significant shifts in cultural, economic, and technological realities, compared to when the information economy first emerged in the early 1990s, warrant this change in approach. The importance of protecting fledgling social media firms to ensure economic growth and effective global competition has now given way to the overriding importance of regulating a new generation of corporate titans in order to protect democracy itself from the encroachments of surveillance capitalism in alliance with laissez-faire economics in the dominant attention economy.[90]

Imposing on political and commercial actors (including social media firms)—whether through legislation or common law— a duty to take reasonable measures to avoid foreseeable harm to electoral integrity stemming from the knowing or reckless dissemination of demonstrable falsehoods is a vital first step.[91] But it will not suffice if doctrinal obstacles to protecting expressive liberty from the harms that tactical anti-speech acts pose remain in place.

The work of First Amendment reconstruction requires a return to fundamentals. A good place to begin is with the words of Benjamin Cardozo: "*Freedom of thought, and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of this truth can be traced in our history, political and legal.*"[92]

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[88] *See generally* BRUCE A. ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004); JAMES S. FISHKIN, DEMOCRACY WHEN THE PEOPLE ARE THINKING: REVITALIZING OUR POLITICS THROUGH PUBLIC DELIBERATION (2018).

[89] See Genevieve Lakier, *Imagining an Antisubordinating First Amendment,* 118 COLUM. L. REV. 2117, 2154 (2019) (noting that "the Court [has] recognized the possibility that the autonomy of private actors could be constrained, consistent with the Free Speech Tradition, when that autonomy poses a real threat to the robustness and inclusivity of public debate.").

[90] Needless to say, the initial romance with the world wide web is over. *Cf.* John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (1996), https://www.eff.org/cyberspace-independence [https://perma.cc/B5UT-JGZ9] ("Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind . . . I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.").

[91] As Jack Balkin succinctly puts it: "[O]nline service providers may not act like con men." Balkin, *supra* note 82, at 1224.

[92] Palko v. Connecticut, 302 US 319, 327 (1937). Cardozo immediately adds: "[T]he domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of

Linda McClain associates this paramount value with "protected inner space."[93] It is not difficult to see why. Freedom of speech presupposes freedom of thought which in turn presupposes sanctuary—the modicum of privacy necessary for the authenticity of being and thinking for oneself.[94] This kind of authentic freedom is also associated with what sociologist Erving Goffman called the "backstage"—that precious region of private sanctuary where the demands of social life, and the responsive public performance that it elicits, loosen their grip.[95] Absent a meaningful opportunity to cultivate real autonomy, the aspiration of free speech— which is to say, the capacity to think and express one's own thoughts—loses both its aspirational as well as its practical meaning.

The promise of freedom without an appropriate legal and political framework to secure it remains hollow. Fundamental safeguards that preserve individual dignity, autonomy, and expressive liberty must be based on prudent assessment of conditions that generate unacceptable levels of social and political harm. Sometimes, unacceptable harm arises in the form of state action that threatens free speech; sometimes, the prevention of unacceptable harm requires laws that limit access to information or that curtail expressive action. Copyright law, defamation law, child pornography law, privacy law, and laws against deceptive advertising are illustrative of information-limiting laws.[96] Laws regulating speech acts that incite imminent violence are

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action." *Id. See* JOSEPH RAZ, THE MORALITY OF FREEDOM 372–73 (1980) (noting that in order to be the author of one's life, one's choices "must be free from coercion and manipulation by others.").

[93] *See* Linda McClain, *Inviolability and Privacy,* 7 YALE J. L. & HUM. 195, 203 (1995).

[94] As Jean-Paul Sartre famously observed in his magnum opus, *Being and Nothingness*, "in order to escape bad faith, along with other forms of self-deception, which is to say, in order to attain authenticity, one must freely choose existence for itself ['*Etre-pour-soi*']." Jean-Paul Sartre, BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY 59, 565 (trans. Hazel E. Barnes, Methuen 1958).

[95] See ZUBOFF, *supra* note 45, at 471 (discussing Goffman's seminal work THE PRESENTATION OF SELF IN EVERYDAY LIFE (1956)).

[96] *See* Grimmelmann, *supra* note 83, at 907 ("We have copyright law, defamation law, child pornography law, privacy law, and other kinds of information-limiting laws for good reasons. They already reflect a considered social judgment that some listeners-users-should be denied access to speech they would like to receive. So users have an interest in consulting search engines to help find information only where it is information of a sort they have a legitimate interest in receiving."); New York v. Ferber, 458 U.S. 747, 762 (1982) (child pornography is minimally valuable speech); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) ("Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."); *see also* 18 U.S.C. § 35, "Imparting or conveying false information" (prohibiting false or misleading reports to authorities about crime); 18 U.S.C. §_1038, "False information and hoaxes" (criminalizing "conduct with intent to convey false or misleading information [about the death, injury, or capture of a member of the armed services] under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute a violation."]); Friedman v. Rogers, 440 U.S. 1, X (1979) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading); Hustler Mag. v Falwell, 485 U.S. 46, 57 (1988) (distinguishing between false statements not meant or likely to be believed by readers, or false statements about public figures that cannot reasonably be be-

illustrative of permissible constraints on expressive action.[97]

Anti-speech acts constitute another limit case, namely: the deliberate use of demonstrably false information for the purpose of garnering political or commercial gain in electoral outcomes. Concern about maintaining the integrity of the electoral process transcends political party affiliation.[98] Liberal democratic societies are entitled to take appropriate steps to protect the integrity of elections, including passing laws against knowing and willful efforts to impair freedom of thought and meaningful deliberation. Intolerance of intolerance[99] expresses the basic idea that democracy is not a suicide pact.[100] Indeed, a prime directive of any working Constitution must be to establish and protect the minimum conditions required for that constitutional regime to survive and flourish.[101] As Martha Minow writes:

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lieved—such as satire and parody, and false statements made for the purpose and with the foreseeable consequence of violating a protected right). *See generally* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."). *But see* Rickert v Pub. Disclosure Comm'n, 168 P.3d 826, 829 (Wash. 2007) (state law prohibiting political candidate from telling deliberate lies about opponent in a political campaign "naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech.").

[97] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (intentionally inciting imminent violence or lawlessness constitutes unprotected speech).

[98] For example, following electoral uncertainties in Florida in the 2000 Presidential election and in Ohio in the 2004 election, democratic former President Jimmy Carter and republican former Secretary of State James A. Baker III founded The Commission on Federal Election Reform. Its mandate was to examine the electoral process in the United States, bringing together leaders from the major political parties, academia, and non-partisan civic groups to explore how to maximize both ballot access and ballot integrity. The commission's panel presented 87 recommendations, including a call for nonpartisan professional and state oversight over elections, developing a "universal voting registration system" led by states rather than local jurisdictions, increasing voter registration efforts by the states, and creating a uniform photo identification method to match the voter to the voting roll while also establishing more offices to all non-drivers to more easily register and acquire photo IDs. *Commission on Federal Election Reform*, WIKIPEDIA (Feb, 18, 2022), https://en.wikipedia.org/wiki/Commission_on_Federal_Election_Reform [https://perma.cc/6HHV-89FW].

[99] *See* KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 581 (1945) ("If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them . . . [W]e should claim the right to suppress them if necessary even by force; for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to rational argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant."). *See* RAPHAEL COHEN-ALMAGOR, *Popper's Paradox of Tolerance and Its Modification*, *in* THE BOUNDARIES OF LIBERTY AND TOLERANCE 81 (1994) (asserting that liberal democracies "may be intolerant toward the intolerant" and ought to defend against threats that derive from "wholly different systems of morality within our community").

[100] *See generally* RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

[101] Public servants, culminating in the office of the President, are fiduciaries in this sense. *See* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2192 (2019) ("[T]he President—by original design—is supposed to be like a fiduciary, who must pursue the public interest in good faith republican fashion rather than pursuing his self-interest, and who must diligently and steadily execute Congress's

> "[B]ecause the Constitution depends on informed and active members to make the democracy it establishes work, the Constitution should compel development of the institutional context for democratic self-governance . . . To work, democracy needs: (1) an arena where participants can engage in self-governance; (2) institutions enabling individuals to learn about social needs and personal desires, to deliberate, to express their views, and to select representatives to do the work of governing; and (3) the kind of information that enables people to act to advance their own and society's interests."[102]

Traditional First Amendment doctrine is now in danger of being weaponized by a handful of powerful corporate actors to the disadvantage of the public at large. Left uncontested, this state of affairs leads to skeuomorphs of democracies: societies that have design attributes that look and feel democratic but are authoritarian to the core.[103] To defend against such a fate, a different paradox may be invoked, namely: intolerance of intolerance. Liberal democracies are entitled to safeguard the minimum conditions necessary to maintain the practical requirements, in conjunction with the normative aspirations, of liberal democracy.

III. Regulating Anti-Speech Acts: A Model Election Integrity Law

States have targeted a variety of tactical anti-speech acts in order to protect electoral integrity.[104] Deliberate interference with voter enfranchisement, for example, may occur in various ways, including lying about how to cast a vote or by creating fake ballots,[105] lying about having a campaign affiliation or affiliating with a campaign in order to subvert it or to garner an unwarranted electoral advantage,[106] and lying in campaign statements or po-

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commands."); *see also* Brian Finucane, *Presidential War Powers, the Take Care Clause, and Article 2(4) of the U.N. Charter,* 105 Cornell. L. Rev. (2020) (discussing the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief.").

[102] Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 Loy. L. Rev. 499, 543–44 (2018).

[103] *See, e.g.*, *Hungary—Not an Illiberal Democracy But a Pseudo-Democracy*, Democracy Digest (Aug. 16, 2019) https://www.demdigest.org/hungary-not-an-illiberal-democracy-but-a-pseudo-democracy/ [https://perma.cc/RXX9-TXYN].

[104] *See* Spicer, *supra* note 4, at 36–37.

[105] *See, e.g.*, Conn. Gen. State §9-363 (West, Westlaw through all enactments of the 2021 Reg. Sess. and the 2021 June Spec. Sess. (2021)) (criminalizing the dissemination of false or misleading information regarding ballot information).

[106] *See, e.g.*, Treasurer of the Comm. to Elect Gerald D. Lostracco v. Fox, 389 N.W.2d 446, 448 (Mich. Ct. App. 1986) (describing campaign advertisements that misrepresented the candidate as the incumbent); Ohio Democratic Party v. Ohio Elections Comm'n, No. 07AP–876, 2008 WL 3878364, 8 (Ohio Ct. App. Aug. 21, 2008) (upholding a statute that prohibited a candidate's campaign literature from using the title of an office not currently held

litical advertisements in an effort to deliberately mislead or confuse voters about issues or candidates.[107] To illustrate the gist of an anti-speech act regulation, the following 'Model Election Integrity Law' may be offered:

> Whoever publishes in the course of an election campaign, or in regard to its outcome, a verifiably false factual statement or image pertaining to a candidate or referendum, or an election official or agency operating or overseeing an election, or how to cast a ballot, with knowledge that the statement or image is false, or with reckless disregard for whether it is false, that is intended, or with reasonable probability may be expected, to be relied upon as true, shall be subject to:
>
> (a) a civil suit for damages; and
>
> (b) a criminal prosecution and imprisonment [for not more than {one year}] or a fine of [$10,000], or both;
>
> for having harmed the integrity of an election by distorting the electoral process.[108]
>
> Model Legislative Findings:
>
> Democracy is premised on an informed electorate. To the extent deliberately false statements or visual representations of fact misinform voters they lower the quality of campaign discourse and debate and lead (or add) to voter alienation by fostering voter cynicism and distrust of the political process. Such anti-speech acts constitute a deliberate interference with the process upon which democracy is based and penalize valuable protected rights, such as the right to vote and the right to engage in meaningful deliberation upon competing opinions and ideas.
>
> When electoral communications rely upon knowing or reckless use of false information (including visual and audio-visual

by the candidate); Cook v. Corbett, 446 P.2d 179, 181 (Or. 1968) (describing nonincumbent candidate's campaign advertisements urging voters to "re-elect" her).

[107] *See, e.g.*, WASH. REV. CODE. § 42.17A.335 (West, Westlaw through all effective legis. of the 2021 Reg. Sess. of the Wash. Leg. (2021)) ("Political advertising or electioneering communication—Libel or defamation per se:

> (1) It is a violation of this chapter for a person to sponsor with actual malice a statement constituting libel or defamation per se under the following circumstances:
>
> (a) Political advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office.").

[108] For definition purposes: (a) the term "publish" pertains to the dissemination of any written word, picture, or any other visual symbol in a print or electronic (online or Internet-based) medium for the purpose of influencing voting at a primary or other election; (b) the term "whoever" includes any individual or corporation or other legally recognized organization, political party, or political committee.

> fakes[109]) in political advertising and other efforts to influence voting, damages are presumed and do not need to be established.[110]
>
> There is a rebuttable presumption that a candidate knows of and consents to any publication or advertisement prohibited by this regulation caused by a political committee over which the candidate exercises any direction and control.[111]
>
> In legal challenges involving the invocation of this law, the court may award the prevailing party reasonable attorney fees at trial and on appeal.

It is well settled that protecting antecedent rights in the service of electoral integrity is a compelling interest.[112] Tactical anti-speech acts threaten the fabric of liberal democratic society by nullifying or significantly disabling the conditions necessary to support a functioning marketplace of opinions and ideas. As such, they are a species of fraud. Fraud operates in both material and moral economies. In material economies, we speak of securities fraud, mortgage fraud, racketeering, and so on.[113] In moral economies, we speak of fraud in terms such as obstruction of justice, perjury, and defamation.[114] Tactical anti-speech acts may be regarded as a species of moral fraud. Just as financial fraud has the power to harm commercial markets, informa-

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[109] In an effort to bolster government and industry efforts to identify whether video content is authentic, and to verify its origins, 'The Deepfake Task Force Act' (S.2559) was submitted in the Senate by Sen. Rob Portman on July 29, 2021. S.2599, 117th Cong. (2021–22).

[110] *See* Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919) (noting that the right to vote "is so valuable that damages are presumed from the wrongful deprivation of it."); *cf.* Carey v. Piphus, 435 U.S. 247, 259 (1978) ("[T]he rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question."); s*ee generally* Mark Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1378 (1976) ("The fact that the precise degree of injury may be difficult to calculate should not lead a court to award no damages; rather it should estimate damages, however crudely. Otherwise, the whole notion of an entitlement to dignity becomes a farce.").

[111] The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. For example, in a child custody case, a rebuttable presumption shifts to the guardian seeking custody the burden of persuasion that an award of custody would not be detrimental to the best interests of the child. To rebut the presumption, the guardian would have to show by a preponderance of the evidence that joint or sole custody to him would not be detrimental to the child's best interest. *See, e.g.*, Jason P. v. Danielle S. 215 Cal. Rptr.3d. 542, 563, 568 (Cal. Ct. App. 2017).

[112] *See* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 228 (1989), ("[T]he State has a legitimate interest in fostering an informed electorate.").

[113] *See, e.g.*, Donaldson v. Read Mag., Inc., 333 U. S. 178, 190 (1948) (explaining that the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"); *see also* United States v. Alvarez, 567 U.S. 709, 734–35 (2012) (Breyer, J., concurring) (noting that many statutes and common law doctrines make the utterance of certain kinds of false statements unlawful so long as they are adequately tailored to limit restrictions to the harms in question – as in the case of fraud statutes which "typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.") (quoting RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1976)).

[114] *See id.* at 736 (Breyer, J., concurring) ("In virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies

tion fraud in the electoral context harms the exercise of expressive autonomy—including the right to think and express one's own opinions and ideas.

Deliberate violence to language[115] in an effort to gain fraudulent political or commercial advantage in an election represents a significant interference with essential democratic practices and institutions.[116] These are not the kind of lies that warrant First Amendment protection.[117]

Acts of moral fraud have long qualified for regulatory action.[118] These are the kinds of lies that subvert rather than advance first amendment inter-

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where specific harm is more likely to occur."); *id.* at 742, (Alito, J., dissenting) ("The lies proscribed by the Stolen Valor Act tend to debase the distinctive honor of military awards.").

[115] There has been a long tradition of treating attacks upon truth or meaning as acts of violence. See, e.g., the following entries in the Oxford English Dictionary for the meaning of *"violence"*:

> Improper treatment or use of a word; wresting or perversion of meaning or application; unauthorized alteration of wording. 1596 Lambarde *Peramb. Kent* (ed. 2) 143. Being in some places Adonai cannot be read for Jehovah, without manifest violence offered to the Text. 1662 Evelyn *Chalcogr.* 7 1856 Maurice *Gosp. St. John* vii. 94 Wherever violence is done to the truth of language, I believe more or less of violence is done to some higher truth.

OXFORD ENGLISH DICTIONARY (1989), https://www.oed.com/oed2/00277885 [https://perma.cc/XBE8-UMRW].

[116] Deliberate violence to language is not only destructive of the individual's capacity for autonomous judgment, but also of the very fabric of liberal democracy itself – a polity founded on, and that only flourishes through, the capacity to defend against freedom-crushing ('illiberal') violence. *See generally* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT 251, 256 (2011) (describing "manipulative lies" as an "attempt to undermine the integrity of the other person's decision-making authority."); BRUCE A. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE 70–80 (1980) (framing the necessary conditions for citizenship in a liberal state in terms of "dialogic performance"); Richard K. Sherwin, *Law, Violence, and Illiberal Belief* 78 GEO. L. J. 1785, 1788–89 (1989) (proffering "untrammeled discourse" as a core ideal of liberal democracy). Commercial speech, for example, is subject to regulation in order to avoid the coercive effect of falsehoods upon a listener's ability to make informed decisions. *See* Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748, 764–65 (1976) ("[S]ociety also may have a strong interest in the free flow of commercial information. . .And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.").

[117] Five of the justices in *Alvarez* (the dissenters and the two concurring justices) adopted the view that restrictions on lies should be easier to uphold than restrictions on other kinds of speech. *See* United States v. Alvarez, 567 U.S. 709, 730 (2012) (Breyer, J., concurring) ("The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas."); *see also id.* at 739 (Alito, J. dissenting) ("[F]alse statements of fact merit no First Amendment protection in their own right.").

[118] The Supreme Court has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process. Akin to protecting an individual's reputation from unjustified invasion and wrongful hurt, protecting individuals from bad faith efforts to achieve political gain based on deceit and manipulation through the strategic use of provably false information, "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J.,

ests and values. Regulations of tactical anti-speech acts should be analyzed based not only on the substantive nature of the social and political harm that they cause, but also on the antecedent rights that they protect. Consider, in this regard, the indictment and subsequent arrest on January 27, 2021, of Douglass Mackey (aka Ricky Vaughn, 31). Mackey was charged by criminal complaint in the Eastern District of New York and taken into custody in West Palm Beach, Florida. According to the complaint, the defendant "exploited a social media platform to infringe one of the most basic and sacred rights guaranteed by the Constitution: the right to vote."[119] More specifically, the complaint claims that in 2016, Mackey "established an audience on Twitter with approximately 58,000 followers."[120] A February 2016, analysis by the MIT Media Lab ranked Mackey as the 107th most important influencer of the then upcoming presidential election, ranking his account above outlets and individuals such as NBC News (#114), Stephen Colbert (#119) and Newt Gingrich (#141).[121]

Between September 2016 and November 2016, in the lead up to the November 8, 2016, U.S. Presidential Election, Mackey allegedly conspired with others to use social media platforms, including Twitter, to disseminate fraudulent messages designed to encourage supporters of one of the presidential candidates (the "Candidate") to "vote" via text message or social media, a legally invalid method of voting.[122] For example, on Nov. 1, 2016, Mackey allegedly tweeted an image that featured an African American woman standing in front of an "African Americans for [the Candidate]" sign. The image included a text that read: "Avoid the Line. Vote from Home. Text '[Candidate's first name]' to 59925[.] Vote for [the Candidate] and be a part of history."[123]

The fine print at the bottom of the image stated: "Must be 18 or older to vote. One vote per person. Must be a legal citizen of the United States. Voting by text not available in Guam, Puerto Rico, Alaska or Hawaii. Paid for by [Candidate] for President 2016."[124] The tweet included the typed hashtags "#Go [Candidate]" and "another slogan frequently used by the candidate."[125] By Election Day 2016, at least 4,900 unique telephone numbers

concurring); *see* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (noting that a State "indisputably has a compelling interest in preserving the integrity of its election process."); Anderson v. Celebrezze, 460 U.S. 780, 788 n. 9 (collecting cases that uphold even-handed restrictions that protect "the integrity and reliability of the electoral process itself.").

[119] *See* Press Release, Dep't of Just., U.S. Atty's Off., E. Dist. of N.Y. (Jan. 27, 2021) (available at *Social Media Influencer Charged with Election Interference Stemming from Voter Disinformation Campaign*, https://www.justice.gov/usao-edny/pr/social-media-influencer-charged-election-interference-stemming-voter-disinformation [https://perma.cc/V2M9-LX7F]).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

texted "[Candidate's first name]" or some derivative to the 59925 text number.[126]

According to Nicholas L. McQuaid, Acting Assistant Attorney General of the Justice Department's Criminal Division, the complaint "underscores the department's commitment to investigating and prosecuting those who would undermine citizens' voting rights."[127] Seth D. DuCharme, Acting U.S. Attorney for the Eastern District of New York, adds: "There is no place in public discourse for lies and misinformation to defraud citizens of their right to vote . . . . With Mackey's arrest, we serve notice that those who would subvert the democratic process in this manner cannot rely on the cloak of Internet anonymity to evade responsibility for their crimes. They will be investigated, caught and prosecuted to the full extent of the law."[128]

This kind of prosecution should withstand constitutional scrutiny; yet, free speech orthodoxy regarding counterspeech as the only acceptable ("least restrictive") interference with speech[129] leaves the outcome uncertain. That constitutional shadow is not only misplaced in principle, but it also flies in the face of past practice. Under the Enforcement Act of 1870 and subsequent laws, false registration, bribery, voting without legal right, making false returns of votes cast, interference in any manner with officers of election, and the neglect by any such officer of any duty required of him by state or federal law, were made federal offenses.[130] The Supreme Court has affirmed that private conspiracies to violate protected rights, such as the right to vote, are subject to sanction under 18 U.S.C. Section 241, provided adequate proof is presented regarding the accused's intent to violate the right in question.[131]

Regulating economic and moral fraud to protect electoral integrity is not precluded by the Supreme Court's ruling in *United States v. Alvarez*

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[126] *Id.*

[127] *Id.*

[128] *Id.* According to William F. Sweeney Jr., Assistant Director in Charge of the FBI's New York Field Office: "Protecting every American citizen's right to cast a legitimate vote is a key to the success of our republic. What Mackey allegedly did to interfere with this process—by soliciting voters to cast their ballots via text—amounted to nothing short of vote theft. It is illegal behavior and contributes to the erosion of the public's trust in our electoral processes. He may have been a powerful social media influencer at the time, but a quick Internet search of his name today will reveal an entirely different story." *Id.* In response, Zach Thornley, a lawyer for Tim Gionet, one of the alleged co-conspirators, has contended that his client's actions on Twitter are protected free speech. *See* Joseph Menn, *U.S. Steps up Pursuit of Far-Right Activists in 2016 Voter Suppression Probe*, REUTERS (May 26, 2021) https://www.reuters.com/article/us-usa-vote-charges-idCAKCN2D7125 [https://perma.cc/NG3A-A3DA].

[129] *See* 281 Care Comm. v. Arneson, 766 F.3d 774, 793–94 (2014).

[130] *See Enforcement Act of 1870*, 16 Stat. 140; *Force Act of February 28, 1871*, 16 Stat. 433; *Ku Klux Klan Act of April 20, 1871*, 17 Stat. 13.

[131] *See* United States v. Guest 383 U.S. 745, 753, 760 (1966) (stating that section 241 must be given a "sweep as broad as its language," to protect *"all* of the rights and privileges secured to citizens by *all* of the Constitution," but noting that "[a] specific intent to interfere with the federal right must be proved . . . ." (citing Screws v. United States, 325 U. S. 91, 106–07 (1945))).

(2013). In that case, Xavier Alvarez, an elected official in California, lied about having been awarded the Medal of Honor. This was a violation of The Stolen Valor Act of 2005, under which Alvarez was prosecuted and convicted. Alvarez challenged the Act as a violation of his freedom of speech. The Supreme Court agreed. The plurality opinion, written by Justice Kennedy, adopts a familiar strict scrutiny analysis. If the speech in question does not fall within a specific category of unprotected speech, only a compelling interest will overcome its presumptive First Amendment protection. According to the plurality, lying about the Medal of Honor occupies no such First Amendment carve-out. Moreover, because a lesser restriction—namely, "more speech"—was deemed capable of providing an adequate remedy, Kennedy concluded that the law's burden on free speech was overinclusive.[132]

In a concurring opinion, Justice Breyer, joined by Justice Kagan, determined that intermediate scrutiny was the appropriate test. The question thus becomes how to strike the proper balance between protecting society against a legitimately targeted harm and the associated danger of incidentally suppressing valuable speech. In this respect, Breyer acknowledged the low social value of lies involving "easily verifiable facts," noting that the regulation of social harms such as perjury, defamation, and fraud (including "electoral regulation") do not present insuperable constitutional hurdles. Punishment for lying about the Medal of Honor, however, remains unjustifiable here, in Breyer's view, particularly in light of the law's lack of restrictions regarding the circumstances under which such lies may be uttered.[133]

Justice Alito's dissent, joined by Justices Thomas and Scalia, fails to see any basis for constitutional objection given that "false factual statements possess no intrinsic First Amendment value" and "proscribing them does not chill any valuable speech.[134] Alito goes on to note that the false statements proscribed by the Act "are highly unlikely to be tied to any particular political or ideological message." He adds that even if such a rare ideological association existed it would be effectively nullified by the fact that the Act "applies equally to all false statements, whether they tend to disparage or commend the Government, the military, or the system of military honors."[135]

Alvarez should not be read as posing an obstacle to anti-speech act regulations. Anti-speech act laws do not target specific political ideas or opin-

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[132] United States v. Alvarez, 567 U.S. 709, 727–28 (2012) ("The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. . . The remedy for speech that is false is speech that is true.").

[133] In contrast to anti-speech tactics in the electoral fraud context, the Stolen Valor Act of 2005 applied to private as well as public speech contexts. *See id.* at 736 ("As written, it applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high.") In the aftermath of *Alvarez*, Congress passed a new version of the Stolen Valor Act that narrowed its application. The new law ("The Stolen Valor Act of 2013") only punishes those who make false claims to "receive money, property or other tangible benefit," essentially transforming it into an anti-fraud statute. H.R REP. No. 113-84, *as reprinted in* 2013 U.S.C.C.A.N. 6, 7.

[134] *Alvarez*, 567 U.S. at 746, 749.

[135] *Id.* at 740–41.

ions.[136] Tactical anti-speech acts are committed in order to stymie rather than advance informed competition among ideas or opinions. They subvert the right to vote as well as the right to participate in informed public deliberation. Protecting these fundamental predicate rights manifestly serves society's compelling interest in maintaining the minimum conditions necessary for a functional marketplace of opinions and ideas. Accordingly, regulations that seek to safeguard these rights and conditions meet the plurality's rigorous standard of review.[137] In any event, to the extent that Justice Breyer's concurring opinion may be considered dispositive in *Alvarez*,[138] the intermediate balancing test that he proffered manifestly embraces (as Breyer's list of examples attests) protecting society from harms to electoral integrity.[139]

In contrast to The Stolen Valor Act scenario, incidental risk to protected speech from the regulation of tactical anti-speech acts is adequately constrained. The specificity of the context is much more restrictively tailored, and the substantive nature of the harm associated with anti-speech

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[136] *Cf. id*. at 716 ("'As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (citing Ashcroft v Am. C.L. Union, 535 U.S. 564, 573 (2002)).

[137] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 349 (1995) ("[F]alse statements, if credited, may have serious adverse consequences for the public at large" if made during election campaigns.); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (noting that application of the *N.Y. Times* actual malice standard allowed adequate "breathing space" because honestly held opinions, no matter how exaggerated or unpleasant, would remain protected by the Constitution, while calculated attempts to mislead voters would not).

[138] *See* Marks v. United States, 430 U.S. 188, 193–94 (1977) (holding that when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . ."). Intermediate scrutiny of false speech, as held by the *Alvarez* concurrence, is arguably the narrower basis for striking down the Stolen Valor Act since that standard would find fewer statutes unconstitutional. *See* Coe v. Melahn, 958 F.2d 223, 225 (8th Cir. 1992) (holding Justice O'Connor's concurrence in Hodgson v. Minnesota, 497 U.S. 417 [1990], was the narrowest ground for the majority "because her approach would hold the fewest statutes unconstitutional"). For a slightly different take on *Marks*, *see* Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 694 (3d Cir. 1991), *aff'd in part, rev'd in part, and remanded*, 505 U.S. 833 (1992) (instructing lower courts to treat as controlling "the opinion of the Justice or Justices who concurred on the narrowest grounds necessary to secure a majority" even if the opinion reflects the views of only one Justice); *see, e.g.*, Estes v. Texas, 382 U.S. 532, 588–89 (Harlan, J., concurring) (1965) (where Harlan's single concurring opinion, restricting a ban on cameras in the courtroom to sensationalized and chaotic trials such as the one presented on the facts before the court in lieu of the plurality's per se ban, arguably was dispositive since it occupied the narrowest ground among the three concurring opinions). Combining *dissenting* opinions with a concurring opinion to establish precedential authority remains problematic. *See, e.g.*, King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). For an exhaustive treatment of the issue, see Ryan C. Williams, *Plurality Decisions & Precedential Constraint*, 69 STAN. L. REV. 795, 840 (2017) (urging lower courts to look to the majority's partially overlapping and partially diverging *reasons* for the result that it reached in order to ascertain *why* that result is correct).

[139] This tracks the requirements of United States v. O'Brien, 391 U.S. 367 (1968). Under the O'Brien framework, government regulation that applies to a form of expression is constitutional if: (1) it is within the constitutional power of government, (2) it furthers an important or substantial governmental interest, (3) that interest is unrelated to the suppression of speech, and (4) the restriction it incidentally imposes on speech is no greater than necessary to further that interest. *Id.* at 377.

acts is much greater, than is the case under The Stolen Valor Act of 2005. Anti-speech act regulations typically narrow their provisions to address impermissible gains, occurring, for example, through the dissemination of paid political advertising or campaign material. As the district court noted in *281 Care Comm*, this limitation "specifically allows 'breathing space' for oral statements made in debates, on television, or on the street corner soapbox that might be made spontaneously or in the heat of the moment . . . .[T]he restrictions only apply against those forms of expression that require deliberation and which also tend to have a greater permanence than unscripted oral statements."[140]

With respect to anti-speech act regulations, therefore, claims of overbreadth are significantly undercut. Moreover, the traditional remedy of "more speech" is not a meaningful "less restrictive" option since it fails as a practical matter to counter the substantial harm that tactical anti-speech acts pose in the digital age. Even under the original terms Justice Brandeis provided in his *Whitney* concurrence, "more speech" in this context fails to qualify as an adequate response. It bears recalling here that Brandeis's preference for more speech came with two limiting conditions. One condition requires that there be time for deliberation to avert the foreseeable evil in question. A second condition requires that the speech that is to be countered contributes to meaningful debate about contested opinions and ideas.[141] Tactical anti-speech acts do not meet either of these requirements.

(1) There is no time: As Miguel Schor notes, new information technologies "facilitate the transmission of false information while destroying the economic model that once sustained news reporting." False information "spreads virally via social networks as they lack the guardrails that print media employs to check the flow of information."[142]

(2) This is not meaningful debate: Tactical anti-speech acts do not, nor are they designed to, contribute to meaningful debate or deliberation about contested ideas or opinions. The demonstrably false information that the regulation of anti-speech acts targets aims to jam (or effectively subvert) meaningful political discussion, and in the specific context of electoral disinformation it aims to disable meaningful participation in the political process itself. This is not a question, as Brandeis's concurrence in Whitney stresses, of popular ideas or viewpoints silencing unpopular ones. Rather, it is a question of silencing deliberation itself. Tactical anti-speech acts are not committed to advance truth, knowledge, or meaningful public debate. The

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[140] 281 Care Comm. v. Arneson, No. 09-5215 ADM/FLN, 2013 WL 308901, at *11 (D. Minn. Jan. 25, 2013).

[141] *See* Whitney v. California, 274 U.S. 357, 377 (1927)

[142] Schor, *supra* note 42, at 5–6 ("Flooding tactics can be used to drown out democratic deliberation 'through the creation and dissemination of fake news, the payment of fake commentators, and the deployment of propaganda robots.' New information technologies, moreover, have cannibalized the revenue streams that once sustained newspapers. . . . Instead of consuming information from shared public spaces, political partisans can now obtain information from sources that echo their views. The algorithms that social media use to sort out user created content reward polarizing content.") (citations omitted)).

strategic use of provable falsehoods for electoral advantage stymies the electoral process and, in so doing, mocks the liberal democratic discourse ideal.[143]

Society's compelling interest in safeguarding the integrity of elections from verifiable falsehoods outweighs the latter's minimal social value.[144] Legitimate concerns about chilling protected speech may be reasonably offset by common sense and prudent practice. The courts are a reliable resource for enforcing these laws. Seeking the truth in the face of contested factual claims is what our adversarial trial system was designed to do. A variety of institutional, procedural, and substantive safeguards are in place to justify trust in judicial outcomes.[145] Moreover, as Justice Alito importantly observes in *Alvarez*, we are not dealing here with "laws restricting false statements about philosophy, religion, history, the social sciences, the arts and other matters of public concern."[146] Alito's point is that in certain domains, for example, in the arena of disputed ideas, it would be perilous for the state to serve as the arbiter of truth. But facts subject to demonstrable falsification may be distin-

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[143] *See* Sherwin, *supra* note 116, at 1789 ("As an ideal, discourse embodies both structural checks and emancipatory empowerment. The freedom that untrammeled discourse allows cannot exist without appropriate legal restraints.").

[144] A punch purposefully thrown or, for that matter, a child used in the production of pornography, may retain a modicum of communicative efficacy, but it is manifestly outweighed by the social harm that it produces.

[145] The bipartisan repudiation, by a broad array of federal courts, of former President Donald Trump's unfounded claims regarding pervasive fraud in the 2020 Presidential election, is illustrative of the judicial process in view. *See, e.g.*, Rosalind S. Helderman and Elise Viebeck, *'The last wall': How dozens of judges across the political spectrum rejected Trump's efforts to overturn the election*, WASH. POST (Dec. 12, 2020) ("In a remarkable show of near-unanimity across the nation's judiciary, at least 86 judges—ranging from jurists serving at the lowest levels of state court systems to members of the United States Supreme Court — rejected at least one post-election lawsuit filed by Trump or his supporters."), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/37MR-JH3H]. Likewise, in the face of a complete absence of evidence in support of former President Trump's lawyers' election fraud claims, a federal judge had no difficulty ruling that sanctions against the lawyers were warranted. *See* O'Rourke v. Dominion Voting Syss., Inc., No. 20-cv-03747-NRN (D. Colo. Filed Nov. 22, 2021) ("Plaintiffs' affidavits are replete with conclusory statements about what must have happened during the election and Plaintiffs' 'beliefs' that the election was corrupted, presumably based on rumors, innuendo, and unverified and questionable media reports. . . . [But] 'belief" alone cannot form the foundation for a lawsuit. An 'empty-head' but 'pure-heart' is no justification for patently frivolous arguments or factual assertions. The belief must be a substantiated belief. . . [E]ven media outlets usually perceived to be supportive of the former President publicly announced that they had seen no information or evidence to suggest that election machine companies were involved in election fraud. . . . Given the volatile political atmosphere and highly disputed contentions surrounding the election both before and after January 6, 2021, circumstances mandated that Plaintiffs' counsel perform heightened due diligence, research, and investigation before repeating in publicly filed documents the inflammatory, indisputably damaging, and potentially violence-provoking assertions about the election having been rigged or stolen. . . [A]long with a law license and the associated privilege to make arguably defamatory allegations in judicial proceedings comes the sworn obligation of every lawyer, as an officer of the court and under Rule 11, not to abuse that privilege by making factual allegations without first conducting a reasonable inquiry into the validity of those allegations." [citations omitted]).

[146] United States v. Alvarez, 567 U.S. 709, 751 (2012).

guished from unfalsifiable ideas.[147] As for opinions that rely on false information, they are only affected if the opinion holder is aware of the falsehood upon which it is based and intentionally circulates the opinion notwithstanding that knowledge.[148]

Believing something that turns out to be false may constitute an error, but it is not a lie. Moreover, while some lies, in some circumstances, may not be devoid of social value, while others, although devoid of social value may lack significant social or political harm, the deliberate lies targeted by the regulation of tactical anti-speech acts are conspicuous for the gravity of harm that they pose. These are political lies that attempt to "poison the stream, to deprive voters of a free choice by diverting the intended exercise of the franchise to an unintended result."[149] To be sure, the effects on electoral matters of knowingly false statements, or statements made with reckless disregard for the truth, may not be readily testable on the basis of empirical evidence.[150] But as the court noted in its decision to suspend Rudolph Giuliani's law license in New York for knowingly disseminating demonstrably false claims regarding fraud in the 2020 presidential election:

> "One only has to look at the ongoing present public discord over the 2020 election, which erupted into violence, insurrection and death on January 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections. . .This event only emphasizes the larger point that the broad dissemination of false statements, casting doubt on the legitimacy of thousands of validly cast votes, is corrosive to the public's trust in our most important democratic institutions."[151]

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[147] *See* Gertz v. Robert Welch 418 U.S. 323, 339–40 (1974) ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.").

[148] As the Court has noted, merely inserting the words "in my opinion" does not transform a demonstrably false statement into a disprovable opinion. *See* Milkovich v. Lorain Journal, 497 U.S. 1, 20 (1990) ("Unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable.").

[149] *See* Tomei v Finley, 512 F. Supp. 695, 698 (1981).

[150] *See* 281 Care Comm. v. Arneson, 2013 WL 308901, 9 (D. Minn. 2013) ("The State does not and should not engage in the business of polling its citizens regarding what they voted for and why, and then publicly filing the results.") (citing Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187-88 (8th Cir. 2000), which discussed the importance of the secret ballot to American system of voting)); *see also* Anderson v United States, 417 U.S. 211, 226 (1974) (penalizing "the intent to have false votes cast and thereby to injure the right of all voters in a federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots."). *But cf.* McIntyre v Ohio Elections Comm'n, 514 U.S. 334, 344 (1995) (deeming unconstitutional state election law mandating non-anonymous political leafletting due to overbreadth given the absence of language limiting the law's application to "fraudulent, false, or libelous statements").

[151] *In re* Giuliani, 146 N.Y.S.3d 266, 25–26 (App. Div. 2021).

In sum, the regulation of tactical anti-speech acts does not chill the advocacy of unpopular ideas or causes. What it does chill is the deliberate or reckless use of provably false information to gain impermissible political advantage over vulnerable consumers of political information.[152] This standard is not unduly burdensome. Indeed, it is consonant with the minimum standard of civic responsibility appropriate to democratic life. Tactical anti-speech acts lack political or social value precisely because they are calculated to exploit reliance upon demonstrably false information as a strategy for gaining unfair political or commercial gain. This remains so regardless of the ideological or political advantage with which the act may be associated.

While abuse of anti-speech act legislation cannot be ruled out, the reality is there is no guarantee against improper use of legal process. Sanctions, such as compelling lawyers to assume the cost of their opponent's legal fees, among other penalties[153], may help deter frivolous or malevolent legal actions, as may professional ethical codes that require non-compliant attorneys to forfeit their license to practice law. But these are admittedly imperfect remedies. The regulation of anti-speech acts may not be cost free, but as the Court has made clear, when the exigencies we face are severe enough, the balance of acceptable risk shifts.[154] Preserving the minimum conditions necessary for meaningful political deliberation and electoral integrity is fundamental to a functioning liberal democracy. The social and political value of laws in service to that imperative outweighs the incidental costs associated with their enforcement.

Legislators cannot fight every social evil at once. They are entitled, and are expected, to identify and target those social harms that they find to be, and can persuasively justify as being, of compelling concern. Open societies remain uniquely vulnerable to attacks upon freedom that exploit openness for illiberal gain. Such vulnerability may well be the price we pay for living in a free society.[155] But this does not mean free societies are doomed to stand idle before, much less collude in, their own undoing. Democracy is not a suicide pact. Through law we can bend the sword of unfreedom and keep

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[152] *See* State ex rel. Pub. Disclosure Comm. v 119 Vote No! Comm., 957 P.2d 691, 707 (Wash. 1998) (Madsen, J., concurring) ("The statute chills only this devious liar, not free speech. In short, 'The actual malice test penalizes only the calculated falsehood.'").

[153] *See, e.g.,* FLA. STAT. § 104.271 (2021). ("False or malicious charges against, or false statements about, opposing candidates; penalty—(1) Any candidate who, in a primary election or other election, willfully charges an opposing candidate participating in such election with a violation of any provision of this code, which charge is known by the candidate making such charge to be false or malicious, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083 and, in addition, after conviction shall be disqualified to hold office.").

[154] *See, e.g.,* United States v. Salerno, 481 U.S. 739, 748 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous.").

[155] *See* POPPER, *supra* note 99, at 581 (recalling Plato's claim that only democracy has the potential to lead to tyranny "since it leaves the bully free to enslave the meek").

freedom's shield from falling into the hands of its foes. The First Amendment requires no less.

Conclusion

Anti-speech acts, properly understood, are acts of bad faith: their objective is not to advance truth or even to disseminate ideas. Rather, like a monkey wrench in the machinery of democracy, tactical anti-speech acts thwart meaningful communication. Liberal democracies are entitled to protect by law the minimum conditions necessary for *freedom of thought* which is, after all, the indispensable condition "of nearly every other form of freedom."[156] To forfeit in the name of free speech the power to regulate illiberal practices that thwart the meaningful exercise of free speech is a paradox we need not, and cannot afford to, accept. A preferable paradox, if paradox there must be, is intolerance of intolerance, which constitutes a baseline condition for tolerance itself.

In the age of social media and surveillance capitalism, laissez-faire free speech policies do not serve core First Amendment values. Self-governance in a democracy cannot survive without a free flow of factual information, access to diverse opinions and ideas, and a meaningful opportunity to speak and listen. As the Court said in *Red Lion*: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market."[157] Prudent regulation of the dominant communication ecosystem in the digital age must proceed with this fundamental purpose foremost in mind.

The need for reform, now as in the first Gilded Age of the late nineteenth century, challenges us anew. Then, as now, "the measure of courage in the civic realm is the capacity to experience or anticipate change—even rapid and fundamental change—without losing perspective or confidence."[158] A century ago, the orthodoxy of contract rights threatened the welfare and subsistence of American labor. Half a century on, "new property" rights were named in order to overcome impairments of governmental largesse based on policies neither "important" nor "wise". Today, free speech orthodoxy, in its defense of illiberal anti-speech acts, places at risk the very principles of expressive freedom, tolerance, and informed public discourse that the First Amendment was meant to preserve.

Tactical anti-speech acts are committed not to advance deliberation, or any form of meaningful discourse, but rather to *jam* the possibility of both.

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[156] *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969) .

[157] Red Lion Broad. Co. v. FCC, 395 U.S. 357, 390 (1969); *see* Minow, *supra* note 102, at 543-44 ("[B]ecause the Constitution depends on informed and active members to make the democracy it establishes work, the Constitution should compel development of the institutional context for democratic self-governance . . .").

[158] Blasi, *supra* note 81, at 677.

State regulation of anti-speech acts is not about censoring unpopular ideas, or opinions with which we may disagree or that make us uncomfortable or afraid. It is about securing the infrastructure of democracy in the digital age so that a diverse range of opinions and ideas may freely circulate and informed deliberation, both individual and collective, may meaningfully proceed. It is about safeguarding a communication ecosystem in which all citizens may participate free from deliberate efforts, both foreign and domestic, to rob political communication of meaning. By the same token, it is also about restoring trust in the vital process of deliberation itself.

Those who seek unfair advantage in electoral outcomes by deliberately subverting democratic discourse forfeit the protections to which democratic discourse is entitled. Expressive freedom rights should not serve as a shield in defense of fraudulent political or commercial gain. The preservation of electoral integrity and the democratic ideal of deliberative discourse require no less.

Will an anachronistic First Amendment doctrine continue to protect illiberal practices inimical to freedom itself? The answer depends on our collective capacity to summon the courage and the prudence, as we have at other critical junctures in our history, to work through the doctrinal changes our experiment in democracy needs to survive and prosper. Prudent regulation of tactical anti-speech acts is essential to secure the minimum conditions necessary for a robust and diversified marketplace of opinions and ideas in the digital age.