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FAKE NEWS AND THE FIRST AMENDMENT:  
RECONCILING A DISCONNECT BETWEEN THEORY AND  
DOCTRINE

By

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**Abstract**

*This Article analyzes calls for regulating so-called “fake news” through the lens of both traditional theories of free expression – namely, the marketplace of ideas and democratic self-governance – and two well-established First Amendment doctrines, strict scrutiny and underinclusivity. The Article argues there is, at first glance, a seeming disconnect between theory and doctrine when it comes to either censoring or safeguarding fake news. The Article contends, however, that a structural rights interpretation of the First Amendment offers a viable means of reconciling theory and doctrine. A structural rights approach focuses on the dangers of collective power in defining the truth, rather than on the benefits that messages provide to society or individuals. Ultimately, a structural rights conception illustrates why, at the level of free*

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*speech theory, the government must not censor fake news.*

#### INTRODUCTION

*“And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?”<sup>1</sup>*

John Milton penned this often-quoted passage more than 370 years ago, planting the seed for “the oldest of the rationales for the principle of freedom of expression”<sup>2</sup>—the metaphorical marketplace of ideas.<sup>3</sup> Unfortunately, he never could have imagined the hoopla,<sup>4</sup> if not utter panic, among some people regarding fake news in the months surrounding the 2016 United States presidential election.<sup>5</sup>

Indeed, a January 2017 report by U.S. intelligence officials concluded that Russia and its leader, Vladimir Putin, deployed “an aggressive mix of digital thefts and leaks, *fake news* and propaganda”<sup>6</sup> to disrupt the 2016 presidential campaign and to tilt it in favor of Republican Donald J. Trump. For some liberals and Democrats, fake news became a reason – more cynically, an excuse – why Hillary Clinton lost to Trump.<sup>7</sup>

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

2. C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other “Special Contexts,”* 56 U. CIN. L. REV. 779, 786 (1988).

3. See RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 6 (1992) (“The ‘marketplace of ideas’ is perhaps the most powerful metaphor in the free speech tradition.”).

4. Nina Agrawal, *Back Story; Where Fake News Came From*, L.A. TIMES, Dec. 20, 2016, at A2 (“Despite all the *hoopla about fake news* – President Obama has denounced it and Facebook has pledged to rein in websites that spread it – the phenomenon is not new”) (emphasis added).

5. See, e.g., Jim Rutenberg, *Media’s Next Challenge: Overcoming the Threat of Fake News*, N.Y. TIMES, Nov. 7, 2016, at B1 (“The internet-borne forces that are eating away at print advertising are enabling a host of faux-journalistic players to *pollute the democracy with dangerously fake news items.*”) (emphasis added); Margaret Sullivan, *Sick of the News? This is No Time to Tune Out*, WASH. POST, Dec. 8, 2016, [https://www.washingtonpost.com/lifestyle/style/sick-of-the-news-this-is-no-time-to-tune-out/2016/12/08/97ff1e70-bd61-11e6-91ee-1addfe36cbe\\_story.html](https://www.washingtonpost.com/lifestyle/style/sick-of-the-news-this-is-no-time-to-tune-out/2016/12/08/97ff1e70-bd61-11e6-91ee-1addfe36cbe_story.html), 2016, [https://www.washingtonpost.com/lifestyle/style/sick-of-the-news-this-is-no-time-to-tune-out/2016/12/08/97ff1e70-bd61-11e6-91ee-1addfe36cbe\\_story.html](https://www.washingtonpost.com/lifestyle/style/sick-of-the-news-this-is-no-time-to-tune-out/2016/12/08/97ff1e70-bd61-11e6-91ee-1addfe36cbe_story.html) (asserting that the United States today is facing “the era of *fake news causing real trouble*”) (emphasis added).

6. Brian Bennett, *Report Points to Putin*, L.A. TIMES, Jan. 7, 2016, at A1 (emphasis added).

7. Michael Wolff, *Fake News is a Real Pawn in Claims of Media Bias; New Genre Targets an Unsuspecting, Susceptible Audience*, USA TODAY, Dec. 12, 2016, at 1B (asserting that “the ‘fake news’ notion has become part of the epistemological phenomenon offered by liberal media to explain why Donald Trump was elected and, therefore, to discredit that election. In this, fake news becomes part of a broader conspiracy theory of unseen forces manipulating a gullible public”); Teri Sforza, *Fake News Has Real Impact*, DAILY NEWS (L.A., Cal.), Dec. 18, 2016, at A1 (“How big a problem is it? On the

For example, John Herrman contended in the *New York Times* that “[f]or many people, and especially opponents of President-elect Donald J. Trump, the attention paid to fake news and its role in the election has provided a small relief, the discovery of the error that explains everything.”<sup>8</sup> A *USA Today* column also declared that fake news “on social media is what a growing chorus of journalists, liberals and tech leaders at least partially blame for Donald Trump’s election victory.”<sup>9</sup> Steve Deace, a conservative radio talk-show host, opined in the same column that “the Trump campaign shamelessly rode a wave of fake news sites to help it corral a gullible public.”<sup>10</sup> On the other end of the political spectrum, left-leaning *New York Times* columnist Paul Krugman similarly considered fake news to be a big problem.<sup>11</sup>

More significantly, Hillary Clinton asserted in December 2016 that an “epidemic of malicious fake news”<sup>12</sup> posed “a danger that must be addressed and addressed quickly.”<sup>13</sup> The former presidential nominee even “voiced support for some federal legislation to address the ‘fake news’ issue.”<sup>14</sup>

In fact, the Federal Trade Commission has targeted fake news websites designed to sell “bogus weight-loss products”<sup>15</sup> and acai berry supplements as forms of deceptive advertising.<sup>16</sup> However, the

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left, some say fake news pushed people to make Donald Trump the most powerful man on Earth.”)

8. John Herrman, *Fixation on Fake News Overshadows Waning Trust in Real Reporting*, N.Y. TIMES, Nov. 18, 2016, <http://www.nytimes.com/2016/11/19/business/media/exposing-fake-news-eroding-trust-in-real-reporting.html><http://www.nytimes.com/2016/11/19/business/media/exposing-fake-news-eroding-trust-in-real-reporting.html>.

9. Steve Deace, *Who Left Us Vulnerable to Fake News?*, USA TODAY, Nov. 25, 2016, at 13A.

10. *Id.*

11. See Paul Krugman, *The Age of Fake Policy*, N.Y. TIMES, Jan. 6, 2016, at A19, <https://www.nytimes.com/2017/01/06/opinion/the-age-of-fake-policy.html> (“And I’m not talking about ‘fake news,’ as big a problem as that is becoming; I’m talking about respectable, mainstream news coverage.”) (emphasis added).

12. Noam Scheiber et al., *Trump is Still Not Very Popular, and His Problem with Women Could Return*, N.Y. TIMES, Dec. 8, 2016, <http://www.nytimes.com/2016/12/08/us/politics/donald-trump-transition.html>.

13. *Id.*

14. Paul Kane, *Hillary Clinton Attacks ‘Fake News’ in Post-election Appearance on Capitol Hill*, WASH. POST, Dec. 8, 2016, <https://www.washingtonpost.com/news/powerpost/wp/2016/12/08/hillary-clinton-attacks-fake-news-in-post-election-appearance-on-capitol-hill>.

15. Press Release, Federal Trade Commission, *FTC Charges Marketers Used Massive Spam Campaign to Pitch Bogus Weight-Loss Products* (June 6, 2016), <https://www.ftc.gov/news-events/press-releases/2016/06/ftc-charges-marketers-used-massive-spam-campaign-pitch-bogus>.

16. See Press Release, Federal Trade Commission, *FTC Permanently Stops Fake News Website Operator that Allegedly Deceived Consumers about Acai Berry Weight-Loss Products* (Feb. 7, 2013), <https://www.ftc.gov/news-events/press-releases/2013/02/ftc-permanently-stops-fake-news-website-operator-allegedly> (“The marketers behind an online scheme that the Federal Trade Commission charged with deceptively using fake news websites to market acai berry supplements and other weight-loss products have agreed to pay more than \$1.6 million in settlements that will permanently halt their

possibility of a law banning or censoring fake news unrelated to product ads raises significant First Amendment<sup>17</sup> hurdles. Those concerns are particularly problematic to the extent that fake news affects politics, as was feared during the 2016 presidential election. Political speech, after all, resides at the core of the First Amendment.<sup>18</sup>

Addressing some of the dangers to free speech posed by regulating fake news, former U.S. Congressman and presidential candidate Ron Paul asserts that “[t]he latest, and potentially most dangerous, threat to the First Amendment is the war on ‘fake news.’ Those leading the war are using a few ‘viral’ internet hoaxes to justify increased government regulation – and even outright censorship – of internet news sites.”<sup>19</sup> He adds that “[t]hose calling for bans on ‘fake news’ are not just trying to censor easily disproved Internet hoaxes. They are working to create a government-sanctioned ‘gatekeeper’ with the power to censor any news or opinion displeasing to the political establishment.”<sup>20</sup>

Fake news and its suppression are clearly controversial. Precisely what constitutes fake news, however, is murky. There is no single, agreed upon definition.<sup>21</sup> One *New York Times* story reports that fake news is “widely understood to refer to fabricated news accounts that are meant to spread virally online.”<sup>22</sup> Yet Carl Cannon, executive editor of *RealClearPolitics*, observes that “the definition is vague”<sup>23</sup> and that the term “is being used promiscuously.”<sup>24</sup>

Others also contend that “‘fake news’ is fuzzy. It can refer to a multitude of problems, including disinformation, propaganda, [and]

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operation.”).

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

18. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (“If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech.”); *Monitor Patriot v. Roy*, 401 U.S. 265, 272 (1971) (observing that when it comes to the First Amendment freedom of speech, “it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office”).

19. Ron Paul, *Fake News, Free Speech*, PUB. OPINION (Chambersburg, Pa.), Dec. 14, 2016, at A9, reprinted at <http://www.publicopiniononline.com/story/opinion/2016/12/13/fake-news-free-speech/95366720>.

20. *Id.*

21. Ethan Baron, *Google Hasn't Kept Ads Off Sites Peddling Fake News*, DAYTON DAILY NEWS (Ohio), Dec. 17, 2016, at A8 (observing that “defining ‘fake’ news can be difficult”).

22. Jeremy W. Peters, *Wielding Claims of ‘Fake News,’ Conservatives Take Aim at Mainstream Media*, N.Y. TIMES, Dec. 26, 2016, at A11.

23. Carl M. Cannon, *The Age of Disinformation*, DAILY NEWS (L.A., Cal.), Dec. 18, 2016, at A15.

24. *Id.*

conspiracy-mongering.”<sup>25</sup> Fake news can even sweep up satirical news articles.<sup>26</sup> At its broadest, fake news is “an all-purpose insult for news coverage a person doesn’t like.”<sup>27</sup>

Conversely, when “[n]arrowly defined, ‘fake news’ means a made-up story with an intention to deceive, often geared toward getting clicks.”<sup>28</sup> In a similarly narrow vein, *Washington Post* columnist Margaret Sullivan calls fake news “deliberately constructed lies, in the form of news articles, meant to mislead the public.”<sup>29</sup>

For purposes of this Article, fake news is narrowly defined. It includes only articles that suggest, by both their appearance and content,<sup>30</sup> the conveyance of real news,<sup>31</sup> and that knowingly include at least one material<sup>32</sup> factual assertion that is empirically verifiable as

25. Margaret Sullivan, *Feds Should Stay out of Fight Against Fake News*, WASH. POST, Dec. 16, 2016, at C1.

26. Abby Ohlheiser, *How the War Against Fake News Backfired*, WASH. POST, Dec. 7, 2016, <https://www.washingtonpost.com/news/the-intersect/wp/2016/12/07/how-the-war-against-fake-news-backfired>.

27. Neil Irwin, *Fake News? Welcome to ‘False Remembering.’* N.Y. TIMES, Jan. 26, 2017, at A3. President Donald Trump, for instance, broadly tars and feathers entire news media outlets as fake news organizations. For example, in February 2017 he tweeted, “The fake news media is going crazy with their conspiracy theories and blind hatred. @MSNBC & @CNN are unwatchable. @foxandfriends is great!” David Jackson & Kevin Johnson, *White House Faces an Onslaught*, USA TODAY, Feb. 16, 2017, at 1A. See Nicholas Kristof, *What Did Trump Know?*, N.Y. TIMES, Feb. 16, 2017, at A27 (noting that “Trump lashes out wildly at ‘the fake news media’ without answering questions”).

28. Sabrina Tavernise, *As Fake News Spreads Lies, More Readers Shrug at Truth*, N.Y. TIMES, Dec. 7, 2016, at A1.

29. Margaret Sullivan, *It’s Time to Retire the Tainted Term ‘Fake News.’* WASH. POST, Jan. 8, 2017, [https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a-76f69a399dd5\\_story.html?utm\\_term=.146db39702b1](https://www.washingtonpost.com/lifestyle/style/its-time-to-retire-the-tainted-term-fake-news/2017/01/06/a5a7516c-d375-11e6-945a-76f69a399dd5_story.html?utm_term=.146db39702b1).

30. This part of the definition, regarding what an article suggests by its appearance and content, employs a reasonable reader standard akin to that in defamation law. See, e.g., *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 515 (1991) (concluding that the meaning of a statement in defamation law must be made “by reference to the meaning a statement conveys to a reasonable reader”); *Lynch v. New Jersey Educ. Ass’n*, 735 A.2d 1129 (N.J. 1999) (“If a statement has more than a literal meaning, the critical consideration is what a reasonable reader would understand the statement to mean.”).

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

32. The idea that fake news, under this definition, must involve “material” falsity – rather than minor falsity – borrows, in part, from a recent U.S. Supreme Court decision affecting defamation law. See *Air Wis. Airlines Corp. v. Hoeper*, 134 S. Ct. 852, 861 (2014) (“Indeed, we have required more than mere falsity to establish actual malice: The falsity must be ‘material.’”). Additionally, the Federal Trade Commission uses a materiality standard in considering if a misrepresentation or omission of a fact is actionable. See *Fanning v. FTC*, 821 F.3d 164, 172 (1st Cir. 2016), *cert. denied*, 2017 U.S. LEXIS 648

false and that is not otherwise protected by the fair report privilege.<sup>33</sup> Put slightly differently, to constitute fake news under this definition, an article's publisher must act with the subjective state of mind that satisfies the first half of the actual malice test adopted by the U.S. Supreme Court in *New York Times Co. v. Sullivan*.<sup>34</sup> That facet of actual malice requires proving an article was published "with knowledge that it was false."<sup>35</sup> The definition's notion of verifiable falsity, which also borrows from libel law,<sup>36</sup> reflects the idea that fake news, as used here, does not pertain to expressions of opinion.

For example, the much publicized story that Pope Francis endorsed Trump for president fits this Article's definition of fake news.<sup>37</sup> First, it was a factual assertion and, in turn, one that was verified as false by the Pope proclaiming at a news conference "he would not endorse any candidate."<sup>38</sup> Second, the falsity was material because such an endorsement might well have influenced some voters. Third, the story's creators published it knowing it was false.<sup>39</sup>

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(Jan. 9, 2017) ("The FTC Act imposes liability for misrepresentations only if they are material."); *Kraft, Inc. v. Fed. Trade Comm'n*, 970 F.2d 311, 322 (7th Cir. 1992) ("A claim is considered material if it 'involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding a product.'") (quoting *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, \*107 (1984)).

33. Exempting falsities that fall within the scope of the fair report privilege from the statute's definition of fake news is both strategic and crucial. That's because the fair report privilege – in stark contrast to fake news – actually "promotes our system of self-governance by serving the public's interest in official proceedings." *Solaia Tech., LLC v. Specialty Publ'g Co.*, 852 N.E.2d 825, 842 (Ill. 2006). As Dean Rodney Smolla explains, "[t]he rationale for the privilege is of considerable vintage, but remains as relevant as ever: The reporter is a surrogate for the public, permitting it to observe through the reporter's eyes how the business of government is being conducted." RODNEY A. SMOLLA, *THE LAW OF DEFAMATION* § 8:67 (2d ed., Rel. 25, Apr. 2012). Put differently, the fair report privilege exists to enlighten voters, not to confuse them. *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977) ("The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.").

34. 376 U.S. 254 (1964).

35. *Id.* at 280. The second half of the test for actual malice asks whether the publisher of an article acted "with reckless disregard of whether it was false or not." *Id.*

36. *See Kahn v. Bower*, 284 Cal. Rptr. 244, 250 (Cal. Ct. App. 1991) (observing that "it is a question of law for the court whether a challenged statement is reasonably susceptible of an interpretation which implies a *provably false assertion of actual fact*") (emphasis added).

37. *See Paul Davidson & Kevin McCoy, Top 10 Business Stories of 2016*, USA TODAY, Dec. 29, 2016, at 1B ("A post-election analysis by BuzzFeed found that fake stories shared on Facebook outperformed real news stories during the final three months of the campaign cycle. The most shared story was a fake report about Pope Francis' endorsement of then-Republican nominee Trump."); David Zurawik, *Fake News a Symptom of Sickness in Media Ecosystem*, BALTIMORE SUN, Nov. 20, 2016, at E1 (identifying the story that Pope Francis endorsed Donald Trump as one of the two biggest false election stories).

38. Agrawal, *supra* note 4, at A2.

39. The story was created on a website called WTOE 5 News that "owns up to being a fake news website." Sydney Schaedel, *Did the Pope Endorse Trump?*, FACTCHECK.ORG, Oct. 24, 2016, <https://www.factcheck.org/2016/10/did-the-pope-endorse-trump>.

With this definition and example of fake news in mind, the Article explores the constitutionality of a hypothetical federal statute that: (1) criminalizes the knowing<sup>40</sup> creation and dissemination in interstate commerce<sup>41</sup> of fake news<sup>42</sup> that purports to be about matters of public concern;<sup>43</sup> and (2) is intended to serve the dual interests of preventing confused decision-making in voting choices and safeguarding democratic self-governance during the voting process.<sup>44</sup> The Article analyzes this fictional statute from the perspective of both the First Amendment doctrine and the free speech theory.

Specifically, the Article argues that while such a statute almost certainly is unconstitutional under the doctrines of strict scrutiny and underinclusiveness, traditional understandings of both the marketplace of ideas and democratic self-governance theories of free expression do *not* support shielding fake news from government censorship. For instance, if in philosopher-educator Alexander Meiklejohn's view the twin points of ultimate interest in protecting political speech are "the minds of the hearers"<sup>45</sup> and "the voting of wise decisions,"<sup>46</sup> then fake news goes unprotected because it potentially confuses the minds of

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40. The "knowing" requirement is mandated per the necessity of a *mens rea* component in a criminal statute such as the hypothetical one considered here. See *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) ("The 'central thought' is that a defendant must be 'blameworthy in mind' before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like.") (quoting *Morrisette v. United States*, 342 U.S. 246, 252 (1952)) (emphasis in original).

41. The movement of these messages in interstate commerce provides the jurisdictional peg for federal regulation. See *Torres v. Lynch*, 136 S. Ct. 1619, 1624 (2016) ("In our federal system, 'Congress cannot punish felonies generally'; it may enact only those criminal laws that are connected to one of its constitutionally enumerated powers, such as the authority to regulate interstate commerce.") (citation omitted).

42. See *supra* notes 30-33 and accompanying text (defining fake news for purposes of this statute). The statute applies only to the original creator and publisher of the story, not to individuals or entities that later forward it to others. The statute includes a defense for publishers of satire if those publishers make it clear, either on their home pages or with disclaimers in the articles themselves, that their articles are satire and not to be taken seriously. A complete discussion of these provisions is beyond the scope of this Article, which focuses on the apparent disconnect between First Amendment theory and doctrine when it comes to any efforts to regulate fake news.

43. To eliminate the issue of the possible vagueness of the term "public concern," the statute adopts and incorporates the U.S. Supreme Court's own definition adopted in *Snyder v. Phelps*, 562 U.S. 443 (2011). The Court held in *Snyder* that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' . . . or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Id.* at 453 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983), and *San Diego v. Roe*, 543 U.S. 77, 83-84 (2004)) (citations omitted).

44. These two interests are asserted here because they reflect the genuine concerns of many people that fake news may have affected voters and influenced the outcome of the 2016 presidential election. *Supra* notes 6-11 and accompanying text.

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

46. *Id.*



those who hear it. In turn, fake news may cause them to vote unwisely. Furthermore, in Meiklejohn's words, "what is essential is not that everyone shall speak, but that everything worth saying shall be said."<sup>47</sup> Those who create fake news, as defined in this Article, can be censored as speakers under a Meiklejohnian view because fake news simply is *not* worth saying.

In brief, First Amendment doctrine seemingly protects fake news but free speech theory, at first blush, does not. This Article concludes, however, that by adopting what the late Professor Steven Gey called "a structural rights interpretation of the First Amendment,"<sup>48</sup> rather than "our persistent reliance on an individual rights conception,"<sup>49</sup> one can reconcile doctrine and theory such that *both* safeguard fake news from censorship. As Gey later asserted, "[t]he structural rights perspective does a much better job of explaining the expansive scope and speech-protectiveness of modern First Amendment jurisprudence than the individual rights justifications that the Court continues to rely on in its opinions."<sup>50</sup>

Part I of this Article initially provides an overview of the strict scrutiny and underinclusiveness doctrines.<sup>51</sup> It also argues that the hypothetical statute regulating fake news described above would likely be unconstitutional under those two standards. This is especially probable in light of the Supreme Court's rigorous and newfound "direct causal link"<sup>52</sup> requirement between speech and harm, as well as its decision in *United States v. Alvarez*<sup>53</sup> suggesting that counterspeech typically is the proper remedy for correcting certain deliberate falsehoods.<sup>54</sup> Part II then offers a brief overview of the marketplace of ideas and democratic self-governance theories of free expression, and it avers that neither theory shields fake news from government regulation.<sup>55</sup>

Next, Part III argues that this seeming disconnect – First Amendment doctrine safeguarding fake news from censorship versus free speech theory offering, at most, negligible support for protecting it – is

47. *Id.*

48. Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 17 (2008).

49. *Id.* at 3.

50. Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 10 (2009).

51. *Infra* notes 59-180 and accompanying text.

52. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 799 (2011); *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012).

53. 132 S. Ct. 2537 (2012).

54. *See id.* at 2549.

55. *Infra* notes 181-257 and accompanying text.

reconciled by embracing a structural rights interpretation of the First Amendment.<sup>56</sup> Finally, Part IV concludes that private efforts to combat fake news, including counterspeech, self-regulation and media-literacy education, are far superior to creating a government agency vested with Orwellian authority<sup>57</sup> to determine what news is true and false and, in turn, to censor the latter.<sup>58</sup>

### I. A DOCTRINAL ANALYSIS OF CENSORING FAKE NEWS: WHY THE HYPOTHETICAL STATUTE FAILS STRICT SCRUTINY AND IS FATALLY UNDERINCLUSIVE

This Part has two sections. Section A initially examines the hypothetical fake news statute through the lens of strict scrutiny, while Section B addresses issues of underinclusivity.

#### A. *Strict Scrutiny*

A trio of well-established tests – strict scrutiny,<sup>59</sup> intermediate scrutiny,<sup>60</sup> and rational basis review<sup>61</sup> – generally governs as-applied

56. *Infra* notes 258-290 and accompanying text.

57. GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Alfred A. Knopf, 1992) (1949). The book's protagonist, Winston Smith, works for the fictional and totalitarian government of Oceania's Ministry of Truth, which, as the late Chief Justice of the United States William Rehnquist once wrote, "deals in lies." William H. Rehnquist, *Survey of Book*, 102 MICH. L. REV. 981, 981 (2004) (reviewing GEORGE ORWELL, 1984) (Plume, Centennial Ed. 2003) (1949).

58. *Infra* notes 291-312 and accompanying text.

59. *See infra* notes 72-79 (describing strict scrutiny in greater detail).

60. *See* Leslie Kendrick, *Nonsense on Sidewalks: Content Discrimination in McCullen v. Coakley*, 2014 SUP. CT. REV. 215, 238 (2014) (remarking that intermediate scrutiny "has historically required that the law be 'narrowly tailored to serve a significant governmental interest' and that it leave open 'ample alternative channels of communication'" (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081, 2084 (2015) (noting that "content-neutral regulations commonly receive less exacting, less demanding, mid-level judicial scrutiny" that typically requires the government to demonstrate "a significant or substantial government interest" being served by a "reasonable or proportionate" statute that leaves open ample alternative modes of communication).

61. Variations of rational basis review are limited in First Amendment jurisprudence to special settings and groups of individuals, such as the speech rights of prison inmates and public school students. *See* *Turner v. Safely*, 482 U.S. 78, 89 (1987) (holding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (concluding "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns"); *see also* David M. Shapiro, *Lenient in Theory, Dumb in Fact: Prison, Speech, and Scrutiny*, 84 GEO. WASH. L. REV. 972, 982 (2016) (calling the *Turner* test for prisoner speech rights "a standard much lower than the strict scrutiny or even intermediate scrutiny

challenges in First Amendment jurisprudence.<sup>62</sup> Strict scrutiny, ostensibly the most rigorous test,<sup>63</sup> pertains to content-based speech restrictions.<sup>64</sup> The U.S. Supreme Court recently explained in *Reed v. Town of Gilbert*<sup>65</sup> that a law is content based if it “applies to particular speech because of the topic discussed or the idea or message expressed”<sup>66</sup> or “target[s] speech based on its communicative content.”<sup>67</sup> Writing for the *Reed* majority, Justice Clarence Thomas added that “the phrase ‘content based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”<sup>68</sup>

This Article’s hypothetical statute regulating fake news<sup>69</sup> easily falls within this definition. It not only targets a particular type of message and topic – fake news<sup>70</sup> – but also restrains fake news that concerns only specific subjects – namely, matters of public concern.<sup>71</sup> Thus, the statute is content based and subject to strict scrutiny.

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ordinarily applied to First Amendment claims in other contexts”); S. Elizabeth Wilborn, *Teaching the New Three Rs – Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 122 (1995) (dubbing the Court’s *Hazelwood* standard “essentially a rational basis test” and adding that “when school-sponsored speech is involved, government need act with only minimal rationality”).

62. See R. Randall Kelso, *The Structure of Modern Free Speech Doctrine: Strict Scrutiny, Intermediate Review, and “Reasonableness” Balancing*, 8 ELON L. REV. 291, 291 (2016) (noting that modern doctrine utilizes “strict scrutiny, intermediate review, [and] ‘reasonableness’ balancing”); Christina E. Wells, *Trends in First Amendment Jurisprudence: Beyond Campaign Finance: The First Amendment Implications of Nixon v. Shrink Missouri Government PAC*, 66 MO. L. REV. 141, 158 (2001) (describing a “multi-tiered system of judicial review” in constitutional law consisting “of three levels of scrutiny – strict, intermediate, and rational basis – all of which share the same general structure”).

63. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (upholding a state judicial canon in the face of strict scrutiny, but calling the result “one of the *rare cases* in which a speech restriction withstands strict scrutiny”) (emphasis added); but see Matthew D. Bunker et al., *Strict in Theory, But Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 377 (2011) (contending strict scrutiny “is arguably a weaker judicial tool today for measuring the constitutionality of laws targeting speech than it was in the past. Although still strongly protective of expression, there is at least some evidence that the test lacks the rigor for which it once was noted”).

64. See David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 363 (2015) (noting “the longstanding default rule that strict scrutiny applies to content-based restrictions on speech”).

65. 135 S. Ct. 2218 (2015).

66. *Id.* at 2227.

67. *Id.* at 2226.

68. *Id.* at 2227.

69. See *supra* notes 40-44 and accompanying text (setting forth the hypothetical statute).

70. See *supra* notes 30-33 (providing the hypothetical statute’s definition of fake news).

71. See *supra* note 43 and accompanying text (limiting the hypothetical statute’s reach to speech about matters of “public concern” and invoking the U.S. Supreme Court’s definition of that term from *Snyder v. Phelps*, 562 U.S. 443 (2011)).

In *Brown v. Entertainment Merchants Association*,<sup>72</sup> the Court held that a statute survives strict scrutiny only if “it is justified by a *compelling government interest* and is *narrowly drawn* to serve that interest.”<sup>73</sup> This test involves two prongs: (1) proving a compelling interest, and (2) demonstrating that the means serving it are sufficiently narrowly tailored.<sup>74</sup>

To satisfy the first part, the government “must specifically identify an ‘actual problem’ in need of solving”<sup>75</sup> and prove there is, in fact, “a direct causal link between”<sup>76</sup> the regulated speech and the harm it allegedly causes. As the Court wrote in *United States v. Playboy Entertainment Group*,<sup>77</sup> “the Government must present more than anecdote and supposition.”<sup>78</sup> Furthermore, the late Justice Antonin Scalia pointed out in *Brown* that even when a causal effect is proven, it does not justify regulation if the impact is “small and indistinguishable from effects produced by other media.”<sup>79</sup>

The hypothetical fake news statute asserts two compelling interests – “preventing confused decision-making in voting choices and safeguarding democratic self-governance during the voting process.”<sup>80</sup> The former rationale resides at the micro level – protecting people from fake news that causes them to vote differently from how they would have voted if they had *not* been exposed to fake news. The latter justification, in contrast, exists at the macro level – stopping overall election results in a democratic society from changing due to fake news.

There is little doubt, at least superficially, that these interests appear compelling. After all, a fair democratic society requires voters to understand policies and to make informed decisions.<sup>81</sup> As Alexander Meiklejohn contended, the goal of free speech in a democratic society is “the voting of wise decisions.”<sup>82</sup> Borrowing Meiklejohn’s own words,

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72. 564 U.S. 786 (2011).

73. *Id.* at 799 (emphasis added).

74. See generally R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759, 777 (2012) (identifying strict scrutiny as having “two prongs” and specifying the first prong as requiring a “compelling government interest” and the second prong as requiring “sufficiently narrow tailoring”).

75. *Brown*, 564 U.S. at 799 (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 822 (2000)).

76. *Id.* See also *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (“There must be a direct causal link between the restriction imposed and the injury to be prevented.”).

77. 529 U.S. 803 (2000).

78. *Id.* at 822.

79. *Brown*, 564 U.S. at 800-01.

80. *Supra* note 44.

81. Jennifer L. Hochschild, *If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?*, 9 ELECTION L. J.: RULES, POL. & POL’Y 111, 111 (2010).

82. MEIKLEJOHN, *supra* note 45, at 25.

fake news seemingly contributes to the “mutilation of the thinking process of the community”<sup>83</sup> of voters. The overall outcome of an election, one hopes, would not be swayed and determined by fake news.

Yet, strict scrutiny requires proving a “direct causal link”<sup>84</sup> to demonstrate that fake news is, in fact, “an ‘actual problem’ in need of solving.”<sup>85</sup> In other words, the government must establish that fake news truly causes vote-changing confusion (the micro-level harm) and directly changes the outcome of elections (the macro-level harm). Anecdotal evidence will not cut the constitutional mustard.<sup>86</sup> As Justice Scalia wrote in *Brown*, “ambiguous proof will not suffice.”<sup>87</sup>

Fake news certainly is blamed for causing a few high-profile incidents. Most notably, there was a shooting at a pizzeria in which a man was more than a little confused, if not completely bamboozled, by fake news.<sup>88</sup> Thus, it is clear some people believe fake news. There simply is, however, no empirical proof of a direct causal link between fake news and either confused decision-making in the voting process or harm to democratic self-governance in terms of the outcome of an election changing.

Proving a direct causal link, especially in the intangible realm of decision-making, is extremely difficult. Many factors may influence a voter’s state of mind and, ultimately, his or her voting decision. In brief, teasing apart and separating variables that may lead to the decision of how to vote is an exceedingly complex process.<sup>89</sup>

For instance, a person who voted for Donald Trump might have read and actually believed a fake news story relating to Trump or Hillary Clinton, but the vote for Trump may have been based on a myriad of additional variables. These variables might include a personal dislike of Clinton, a disagreement with her positions on substantive issues, or a

83. *Id.* at 26.

84. *Brown*, 564 U.S. at 799.

85. *Id.* (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 822 (2000)).

86. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 822 (2000) (opining that “the Government must present more than anecdote and supposition”).

87. *Brown*, 564 U.S. at 799-800.

88. See Cecilia Kang & Adam Goldman, *Fake News Brought Real Guns in Washington Pizzeria Attack*, N.Y. TIMES, Dec. 6, 2016, at A1 (describing an incident in which a man who had been reading “fake news articles about Comet Ping Pong” supposedly “harboring young children as sex slaves as part of a child-abuse ring led by Hillary Clinton” went to the restaurant “to see the situation for himself” and, in turn, “fired from an assault-like AR-15 rifle”).

89. See Blair Lehman et al., *Confusion and Complex Learning During Interactions With Computer Learning Environments*, 15 INTERNET & HIGHER EDUC. 184, 184 (2012) (concluding that “complex learning occurs when learners work towards comprehending difficult material, solve a difficult problem, or make a difficult decision,” such as voting decisions, and contending that during complex learning “there is a natural ebb and flow between positive and negative emotions, coinciding with the struggles and successes that learners experience during effortful problems solving, reasoning and comprehension”).

disdain for all Democratic politicians. Conversely, other variables may include a personal fondness of Trump, an agreement with his positions on substantive issues, a loyalty to the Republican party,<sup>90</sup> and so forth.

Now consider the impact of *real* news relevant to the 2016 presidential election. For instance, the decision of James Comey, the Director of the Federal Bureau of Investigation – just eleven days before the election – to reinvestigate Clinton’s private email server may have caused people to vote for Trump.<sup>91</sup> Indeed, the *New York Times* reported that Clinton directly “cast blame for her surprise election loss” on Comey’s announcement.<sup>92</sup> Alternatively, some Democrats attribute the outcome of the election to computer hacking by Russia and the subsequent release of emails from the Democratic National Committee and from Clinton’s campaign chair.<sup>93</sup>

Imagine having to pick one variable – fake news, Comey, or Russia – and then attempting to control for the other two, as well as controlling for typically influential factors such as party identification, gender, substantive issues, and interpersonal networks, to determine why people voted the way they did. It is not easily said and even less easily done.

In a nutshell, it is far simpler to hurl verbal blame for why people vote the way they do than to empirically prove what actually causes them to do so. Direct causation is what strict scrutiny demands per *Brown* and *Alvarez*. Fake news – although perhaps believed – does not necessarily lead to either a changed or confused voting decision. Dozens of other bits of information and factors swirl frenetically in any election season that may cause a citizen to choose to vote for a particular candidate.<sup>94</sup>

Similarly, voters can be confused by many things *other than* and *in addition to* fake news in deciding for whom to vote. They may be influenced and befuddled by numerous outside factors, including the

90. See generally Gregory L. Hager & Jeffery C. Talbert, *Look for the Party Label: Party Influences on Voting in the U. S. House*, 25 LEGIS. STUD. Q. 75, 94 (2000) (“Our results suggest that parties do influence member behavior beyond that predicted from their individual preference structure.”).

91. See Michael S. Schmidt & Adam Goldman, *President is Said to Ask Comey to Keep F.B.I.* *Post*, N.Y. TIMES, Jan. 25, 2017, at A15 (“Mrs. Clinton and many Democrats blame Mr. Comey for her defeat, and it is not clear whether she would have kept him on had she won.”).

92. Amy Chozick, *Clinton Blames F.B.I. Director for Her Defeat*, N.Y. TIMES, Nov. 13, 2016, at A1.

93. See Michael D. Shear & David E. Sanger, *Putin Led Scheme to Aid Trump*, N.Y. TIMES, Jan. 7, 2017, at A1 (providing an overview of a report prepared by several U.S. intelligence agencies regarding Russian hacking intended to influence the presidential election in Trump’s favor).

94. See Benjamin I. Page & Calvin C. Jones, *Reciprocal Effects of Policy Preferences, Party Loyalties and the Vote*, 73 AM. POL. SCI. REV. 1071, 1087 (1973) (asserting that “researchers who rely on single-equation techniques simply fail to reproduce faithfully the *underlying complexity of the electoral decision process*”) (emphasis added).

views of neighbors, friends, and relatives during interpersonal conversations, the views of radio talk show hosts and television personalities, advertisements for candidates on television, biased reporting (which is not the same as fake news defined in this Article), and conspiracy theories.

In addition to a dearth of empirical research proving that banning fake news would promote the government's dual interests, a recent study indicates fake news may have had, if anything, a *de minimis* effect on the 2016 presidential election.<sup>95</sup> Economists from New York University and Stanford found that fake news likely did not sway the U.S. presidential election, despite the fact that it only needed to change the votes of 0.73% of the voting-age population to do so.<sup>96</sup> According to the researchers,

data suggest that social media were not the most important source of election news, and even the most widely circulated fake news stories were seen by only a small fraction of Americans. For fake news to have changed the outcome of the election, a single fake news story would need to have convinced about 0.7 percent of Clinton voters and non-voters who saw it to shift their votes to Trump, a persuasion rate equivalent to seeing 36 television campaign ads.<sup>97</sup>

Furthermore, a December 2016 Pew Research Center survey found an overwhelming majority of Americans expressed confidence in their ability to detect fake news, with about four out of ten (39%) feeling very confident they could recognize fabricated news and another 45% being somewhat confident.<sup>98</sup> In other words, 84% of those surveyed were either somewhat or very confident they would *not* be fooled by fake news. This too suggests fake news is not “an actual problem.”<sup>99</sup>

Moreover, scant data exist on any aspect of fake news, much less whether it causes voters to change their ballots. A January 2017 analysis in *Columbia Journalism Review* posits that “[w]e know little about the amount of fake news an average citizen consumes, or how it fits into their overall news diet. In fact, we don’t know much about the

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95. Working Paper No. 23089, Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, NAT’L BUREAU ECON. RES. (Jan. 2017) (on file with author).

96. *Id.* at 20.

97. *Id.* at 22.

98. Michael Barthel et al., *Many Americans Believe Fake News is Sowing Confusion*, PEW RES. CTR., Dec. 15, 2016, <http://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion>.

99. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 822 (2000).

fake news audience, period.”<sup>100</sup> The same analysis suggests that fake news might not be a problem at all. Why? First, it found “the fake news audience is tiny compared to the real news audience – about ten times smaller on average.”<sup>101</sup> Second, the study underscores “the fact that the fake news audience is small and highly likely to also visit real news sites may come as a relief to those who fear this audience lives in a separate, distorted reality.”<sup>102</sup>

Ultimately, it is much easier to *claim* that fake news influences voters than it is, under strict scrutiny, to *prove* a direct causal link between fake news and the harm it causes either to individual voting decisions or to overall election outcomes. Thus, the government would find it extraordinarily challenging to prove that the two interests were compelling enough to justify a hypothetical law criminalizing the knowing creation and dissemination of fake news about matters of public concern.

As Justice Anthony Kennedy explained in announcing the Court’s judgment in *Alvarez*, “[t]here must be a direct causal link between the restriction imposed and the injury to be prevented.”<sup>103</sup> There is, however, *no* direct causal evidence revealing that fake news prompts individuals to vote differently than they would have without fake news or that fake news causes overall election outcomes to change. Put more bluntly, no evidence demonstrates fake news is “an actual problem”<sup>104</sup> when it comes to voters’ decisions.

More so, even if one could prove that some voters did in fact change their decisions due to fake news, it would not justify government regulation if the real-world effect was “small and indistinguishable from effects produced by other media.”<sup>105</sup> In other words, the government would need to somehow demonstrate that the effect of fake news in influencing voter decisions was larger than, and distinguishable from, the impact of innumerable messages affecting voter decisions.

Assuming for the sake of argument that a direct causal link between fake news and voting decisions was demonstrated and that the impact carried practical significance, this still would not end the strict scrutiny inquiry. Specifically, the second prong of the test requires that a statute be narrowly tailored.

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

101. *Id.*

102. *Id.*

103. *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012).

104. *Playboy*, 529 U.S. at 822.

105. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 800-01 (2011).



As defined in 2014 by the majority in *McCullen v. Coakley*,<sup>106</sup> strict scrutiny's narrow-tailoring prong mandates that lawmakers use "*the least restrictive means* of achieving a compelling state interest."<sup>107</sup> Put differently, a content-based law will not pass constitutional muster if a compelling interest "can be accomplished by a less restrictive alternative."<sup>108</sup> In fact, as the Court noted, "[w]hen a plausible, less restrictive alternative is offered to a content-based speech restriction, it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."<sup>109</sup> The burden thus shifts to the government to refute the effectiveness of a plausible, less restrictive method of serving a compelling interest.

As applied to this Article's hypothetical statute, the government would need to prove the inefficacy of at least three plausible, less speech-restrictive ways of preventing people from being confused by fake news such that they vote differently because of it. Those three alternatives are: (1) *counterspeech*, (2) *education*, and (3) *self-regulation*.

The doctrine of counterspeech is grounded in Justice Louis Brandeis's observation ninety years ago that "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is *more speech, not enforced silence*."<sup>110</sup> The doctrine's premise is "that 'bad speech' can be effectively countered or cured with more speech."<sup>111</sup>

Dean Rodney Smolla points out that Justice Kennedy's plurality opinion in *Alvarez* "emphasized the importance of counterspeech in the balance, and the requirement that the government show that counterspeech will not work to vindicate its interests."<sup>112</sup> Professor Howard Wasserman concurs, noting that Kennedy's strict scrutiny analysis emphasized that "any confusion from false statements could be overcome by truthful counterspeech as the remedy for false speech."<sup>113</sup>

This is particularly significant because *Alvarez* – in line with the hypothetical statute's definition of fake news<sup>114</sup> – involved a material,

106. 134 S. Ct. 2518 (2014).

107. *Id.* at 2530 (emphasis added).

108. *Playboy*, 529 U.S. at 814.

109. *Id.* at 816.

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

111. Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 BYU L. REV. 553, 554 (2000).

112. Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499, 515 (2012).

113. Howard M. Wasserman, *Holmes and Brennan*, 67 ALA. L. REV. 797, 824 (2016).

114. *See supra* notes 30-33 and accompanying text (providing the hypothetical statute's definition

factual assertion that was empirically verifiable as false. Specifically, Xavier Alvarez falsely claimed to possess the Congressional Medal of Honor.<sup>115</sup> He was, in turn, “indicted under the Stolen Valor Act for lying about the Congressional Medal of Honor.”<sup>116</sup>

In declaring the Stolen Valor Act unconstitutional under what he called “exacting First Amendment scrutiny,”<sup>117</sup> Kennedy concluded that “[t]he Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie.”<sup>118</sup> With concision and eloquence, Kennedy explained that “the remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”<sup>119</sup> Intimating that the government simply has no role to play as truth arbiter, Kennedy added that “only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.”<sup>120</sup>

As applied to fake news, counterspeech easily takes the form of non-governmental fact-checking organizations and mainstream news media outlets that investigate and, in turn, rebut fake news spewed by others.<sup>121</sup> The Poynter Institute for Media Studies, for example, coordinates the International Fact-Checking Network.<sup>122</sup> Websites such as Snopes<sup>123</sup> and PolitiFact<sup>124</sup> are devoted to rigorous verification of facts. These sites, in other words, are themselves counterspeech ventures.

They also represent the type of counterspeech Justice Kennedy valued and praised in *Alvarez*. There, he pointed out that “private individuals have already created databases”<sup>125</sup> listing the names of actual

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of fake news).

115. *United States v. Alvarez*, 132 U.S. 2537, 2542 (2012).

116. *Id.*

117. *Id.* at 2546.

118. *Id.* at 2549.

119. *Id.* at 2550.

120. *Id.* at 2550-51.

121. See LUCAS GRAVES, *DECIDING WHAT’S TRUE: THE RISE OF POLITICAL FACT-CHECKING IN AMERICAN JOURNALISM* (2016) (providing an up-to-date account on fact-checking journalism); Brendan Nyhan & Jason Reifler, *The Effect of Fact-Checking on Elites: A Field Experiment on U.S. State Legislators*, 59 AM. J. POL. SCI. 628 (2015) (studying the effects of fact-checking on deterring politicians from making questionable statements and assertions).

122. About the International Fact-Checking Network, <http://www.poynter.org/about-the-international-fact-checking-network>.

123. Snopes, <http://www.snopes.com>.

124. PolitiFact, <http://www.politifact.com>.

125. *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012).

Congressional Medal of Honor recipients and that “at least one database of past winners is online and fully searchable,”<sup>126</sup> thus countering fabulists such as Xavier Alvarez. Kennedy even suggested the government could create such a database that would constitute “one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system.”<sup>127</sup>

In addition to counterspeech, a second plausible and less restrictive remedy for fake news is education. For example, in terms of educating the public about fake news, the *Washington Post* offers readers a guide for how to detect it.<sup>128</sup> National Public Radio provides a similar online resource.<sup>129</sup>

Perhaps more importantly, state and local governments can adopt improved media literacy programs in public schools. In fact, California lawmakers introduced legislation in January 2017<sup>130</sup> designed to do exactly that in light of fake-news fears.<sup>131</sup> Assembly Bill 155 calls on the California’s Instructional Quality Commission to generate “revised curriculum standards and frameworks for English language arts, mathematics, history-social science, and science that incorporate *civic online reasoning*.”<sup>132</sup> The bill defines “civic online reasoning” as “the ability to judge the credibility and quality of information found on Internet Web sites, including social media.”<sup>133</sup> The bill’s sponsor, Assemblyman Jimmy Gomez, argues it is needed because “[w]hen fake news is repeated, it becomes difficult for the public to discern what’s real. These attempts to mislead readers pose a direct threat to our democracy.”<sup>134</sup>

In addition to counterspeech and education, a third plausible and less speech-restrictive remedy for fake news is voluntary self-regulation by

126. *Id.*

127. *Id.*

128. Glenn Kessler, *The Fact Checker’s Guide for Detecting Fake News*, WASH. POST, Nov. 22, 2016, [https://www.washingtonpost.com/news/fact-checker/wp/2016/11/22/the-fact-checkers-guide-for-detecting-fake-news/?utm\\_term=.c21972a0261c](https://www.washingtonpost.com/news/fact-checker/wp/2016/11/22/the-fact-checkers-guide-for-detecting-fake-news/?utm_term=.c21972a0261c).

129. Wynne Davis, *Fake or Real? How to Self-Check the News and Get the Facts*, NAT’L PUB. RADIO, Dec. 5, 2016, <http://www.npr.org/sections/alltechconsidered/2016/12/05/503581220/fake-or-real-how-to-self-check-the-news-and-get-the-facts>.

130. A.B. 155, Reg. Sess. (Cal. 2017).

131. See Lindsey Bever, *If State Lawmakers Have Their Way, California Schoolchildren May be Taught How to Spot ‘Fake News,’* WASH. POST, Jan. 12, 2017, <https://www.washingtonpost.com/news/the-fix/wp/2017/01/12/if-state-lawmakers-have-their-way-california-schoolchildren-may-be-taught-how-to-spot-fake-news/> (describing the legislation).

132. A.B. 155, Reg. Sess. (Cal. 2017) (emphasis added).

133. *Id.*

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

private entities. Some of these approaches already are underway to tackle fake news frets. For instance, the *New York Times* reported in December 2016 that Facebook was conducting

a series of experiments to limit misinformation on its site. The tests include making it easier for its 1.8 billion members to report fake news, and creating partnerships with outside fact-checking organizations to help it indicate when articles are false. The company is also changing some advertising practices to stop purveyors of fake news from profiting from it.<sup>135</sup>

In a similar vein, Justice Scalia in *Brown* lauded the Entertainment Software Rating Board's (ESRB) self-regulatory system for evaluating video games' suitability for minors as a prime example of a less restrictive method for addressing a supposed problem.<sup>136</sup> "This system does much to ensure that minors cannot purchase seriously violent games on their own, and that parents who care about the matter can readily evaluate the games their children bring home," Scalia reasoned.<sup>137</sup> In other words, the ESRB's ratings combine aspects of *both* education and self-regulation.

Ultimately, it is decidedly unlikely that a statute criminalizing the knowing creation and dissemination of fake news, as defined in this Article,<sup>138</sup> would ever survive strict scrutiny. Even if a compelling interest were substantiated in the face of the demanding direct causal link standard, there are multiple means of combatting fake news that are far less restrictive of speech than criminalizing it. With this assessment in mind, the Article next turns to an underinclusivity analysis of the hypothetical statute.

### B. Underinclusiveness

Can a statute do *too little* to cure problems allegedly caused by speech and thus be struck down for failing to advance a compelling interest? The answer is yes – sometimes – and the doctrine involved is underinclusivity.<sup>139</sup> Although Chief Justice John Roberts recently wrote

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135. Mike Isaac, *Facebook Moves to Limit Tide of Fake News on Its Network*, N.Y. TIMES, Dec. 16, 2016, at B1. See also Jessica Guynn, *Facebook Takes Serious Aim at Fake News*, USA TODAY, Dec. 16, 2016, at B1 (reporting that "[n]ews articles flagged by [Facebook] users will be sent to third-party fact-checking organizations that are part of Poynter's International Fact Checking Network").

136. *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 803 (2011).

137. *Id.*

138. See *supra* notes 30-33 (providing the hypothetical statute's definition of fake news).

139. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1668 (2015) (asserting that while it is "somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little*

that “the First Amendment imposes no freestanding ‘underinclusiveness limitation,’”<sup>140</sup> Professor Mark Cordes dubs underinclusivity “an area of frequent concern for the Supreme Court.”<sup>141</sup>

Indeed, Professor Matthew Bunker observes that the Court’s underinclusivity standard is integral to strict scrutiny’s narrow-tailoring inquiry.<sup>142</sup> Bunker suggests this initially seems counterintuitive,<sup>143</sup> as narrow tailoring examines whether a law uses the least restrictive means of achieving a compelling interest,<sup>144</sup> while underinclusivity conversely considers if a statute is “not broad enough.”<sup>145</sup> In brief, lawmakers tread a tightrope: a statute cannot regulate *too much* speech per narrow tailoring, yet it also cannot regulate *too little* speech per underinclusivity.

In *Williams-Yulee v. Florida Bar*,<sup>146</sup> Chief Justice Roberts explained that a statute’s “[u]nderinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a comparable way.”<sup>147</sup> Put differently by Harvard Professor Richard Fallon, underinclusivity holds that “[a] statute will not survive strict scrutiny if it fails to regulate activities that pose substantially the same threats to the government’s purportedly compelling interest as the conduct that the government prohibits.”<sup>148</sup>

In *Williams-Yulee*, Roberts explained that underinclusivity may indicate two problems.<sup>149</sup> First, the government may be unjustly promoting one viewpoint over another, instead of addressing a broader interest.<sup>150</sup> Second, a regulation riddled with multiple exemptions and loopholes may fail to advance a compelling interest.<sup>151</sup> Federal appellate court judge Harry Edwards encapsulated these dual concerns

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speech,” a statute’s underinclusiveness can “reveal that a law does not actually advance a compelling interest. For example, a State’s decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy”) (emphasis in original).

140. *Id.* (quoting *R. A. V. v. City of St. Paul*, 505 U. S. 377, 387 (1992)).

141. Mark Cordes, *Sign Regulation After Ladue: Examining the Evolving Limits of First Amendment Protection*, 74 NEB. L. REV. 36, 69 (1995).

142. Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Precision: Contrast Space and Narrow Tailoring in First Amendment Doctrine*, 6 COMM. L. & POL’Y 259, 264 n.16 (2001).

143. *Id.*

144. *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014). See *supra* notes 106-109 and accompanying text (addressing the meaning of narrow tailoring within strict scrutiny).

145. Bunker & Erickson, *supra* note 142, at 264 n.16.

146. 135 S. Ct. 1656 (2015).

147. *Id.* at 1670 (emphasis omitted).

148. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1327 (2007).

149. *Williams-Yulee*, 135 S. Ct. at 1668-69.

150. *Id.*

151. *Id.*

in a 1995 article, remarking that courts

frequently employ an underinclusiveness inquiry to determine whether a given regulation satisfactorily serves the interest that the state purports to advance. If a speech restriction leaves unregulated significant alternative sources of the harm sought to be remedied, a court will reason that the underinclusiveness either belies the state's avowed objective, or establishes that, in practice, the regulation will not adequately serve the state's putatively compelling interest.<sup>152</sup>

Consider the scenario in *City of Ladue v. Gilleo*:<sup>153</sup> the Supreme Court struck down an ordinance banning homeowners from displaying signs on their property while simultaneously exempting ten other varieties of signs from its strictures.<sup>154</sup> The Court reasoned that the numerous exemptions indicated Ladue was not truly worried about its three alleged interests<sup>155</sup> – preserving beauty, maintaining property values, and mitigating traffic hazards.<sup>156</sup> The outcome in *Gilleo* confirms Professor William Lee's perspicacious observation that, per the underinclusivity doctrine, "what a law *excludes* is a critical part of determining whether a law is precisely tailored."<sup>157</sup>

Two newer Supreme Court decisions illustrate that regulating too little speech may render a statute fatally underinclusive. In 2015, the Court in *Reed v. Town of Gilbert*<sup>158</sup> held that a sign ordinance was "hopelessly underinclusive"<sup>159</sup> in serving alleged interests in "preserving the Town's aesthetic appeal and traffic safety."<sup>160</sup> Specifically, the Town of Gilbert's ordinance generally banned outdoor signs within its

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152. Harry T. Edwards & Mitchell N. Berman, *Regulating Violence on Television*, 89 NW. U. L. REV. 1487, 1530-31 (1995) (citations omitted).

153. 512 U.S. 43 (1994).

154. *See id.* at 46 ("The ordinance prohibits all signs except those that fall within 1 of 10 exemptions.").

155. *See id.* at 52 ("Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place.").

156. *See id.* at 47 (noting that Ladue, in the ordinance's declaration of findings, was concerned that an unlimited number of signs would "create ugliness, visual blight and clutter, tarnish the natural beauty of the landscape as well as the residential and commercial architecture, impair property values, substantially impinge upon the privacy and special ambience of the community, and may cause safety and traffic hazards to motorists, pedestrians, and children").

157. William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L. Q. 637, 68788 (1993) (emphasis added).

158. 135 S. Ct. 2218 (2015).

159. *Id.* at 2231.

160. *Id.*

town limits but carved out a whopping twenty-three exemptions.<sup>161</sup>

As for the town's aesthetics rationale, Justice Clarence Thomas explained for the Court that the Town of Gilbert "cannot claim that placing strict limits on temporary directional signs is necessary to beautify the Town while at the same time allowing unlimited numbers of other types of signs that create the same problem."<sup>162</sup> Turning to the municipality's safety interest, Thomas opined that the Town of Gilbert failed to demonstrate

that limiting temporary directional signs is necessary to eliminate threats to traffic safety, but that limiting other types of signs is not. The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs. If anything, a sharply worded ideological sign seems more likely to distract a driver than a sign directing the public to a nearby church meeting.<sup>163</sup>

In its 2011 *Brown v. Entertainment Merchants Association* decision,<sup>164</sup> the Court held that a California statute banning minors from renting and purchasing violent video games was profoundly underinclusive in two respects. First, citing *Gilleo* for support,<sup>165</sup> Justice Antonin Scalia explained for the majority that California failed "to restrict Saturday morning cartoons, the sale of games rated for young children, or the distribution of pictures of guns. The consequence is that its regulation is *wildly underinclusive* when judged against its asserted justification, which in our view is alone enough to defeat it."<sup>166</sup> Second, California's statute carved out an exemption allowing parents and guardians to purchase violent games on behalf of minors.<sup>167</sup> Here, Scalia reasoned:

The California Legislature is perfectly willing to leave this dangerous, mind-altering material in the hands of children so long as one parent (or even an aunt or uncle) says it's OK. And there are not even any requirements as to how this parental or avuncular relationship is to be verified; apparently the child's or putative parent's, aunt's, or uncle's say-so suffices. That is not how one

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161. *Id.* at 2224.

162. *Id.* at 2231.

163. *Id.* at 2232.

164. 564 U.S. 786 (2011).

165. *Id.* at 802.

166. *Id.* at 801-02 (emphasis added).

167. *Id.* at 802.

addresses a serious social problem.<sup>168</sup>

Taking into account the above primer on underinclusivity, a critical issue is whether this Article's hypothetical statute banning the knowing creation and dissemination of fake news about matters of public concern is terminally underinclusive. Initially, it is important to recall that the statute's two asserted interests are "preventing confused decision-making in voting choices and safeguarding democratic self-governance during the voting process."<sup>169</sup> Fake news, in turn, is defined as "articles that suggest, by both their appearance and content, the conveyance of real news, but also knowingly include at least one material factual assertion that is empirically verifiable as false and that is not otherwise protected by the fair report privilege."<sup>170</sup>

The primary underinclusiveness problem here is that many *unregulated* types of speech – some varieties were described earlier<sup>171</sup> – may cause confusion and detrimentally affect voting choices in ways substantially comparable to that of fake news.<sup>172</sup> For example, consider rhetorical hyperbole<sup>173</sup> directly spewed by politicians during speeches, rallies, debates, and press conferences. Such potentially influential yet logically cloudy expression is left unscathed by the hypothetical statute, which applies only to articles appearing to be real news.

Additionally, biased and opinionated journalistic coverage of campaigns and candidates – although *not* factually false – could result in voter confusion. It too goes untouched by the statute, which defines fake news as involving a material and false factual assertion.<sup>174</sup> In other words, journalistic expressions of opinion and slanted coverage may confuse voters equally as much as verifiably false factual assertions, yet the former falls beyond the ambit of the hypothetical statute.

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168. *Id.*

169. *See supra* note 44 and accompanying text (quoting this portion of the text that appears earlier in this article that corresponds with footnote 44).

170. *See supra* notes 30-33 and accompanying text (quoting this portion of the text that appears earlier in this article that corresponds with footnotes 30 through 33).

171. *Supra* Part I, Section A.

172. The question of comparability of impact is important, as Chief Justice Roberts wrote in *Williams-Yulee* that "[u]nderinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest in a *comparable way*." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1670 (2015) (emphasis in original).

173. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (safeguarding from libel suits "rhetorical hyperbole," and noting that such speech "has traditionally added much to the discourse of our Nation").

174. *See supra* notes 30-33 and accompanying text (providing the hypothetical statute's definition of fake news").



Furthermore, consider a popular televangelist who instructs tens of thousands of faithful followers during weekly TV sermons and during daily posts on Twitter *not* to vote for Candidate X because, according to the televangelist, Candidate X wants to confiscate their guns in contravention of the Second Amendment to the U.S. Constitution.<sup>175</sup> The statute does not restrict the televangelist's speech, even if the assertions are false, because the statute addresses only "articles that suggest, by both their appearance and content, the conveyance of real news."<sup>176</sup> The televangelist's statements are communicated in sermons and Twitter posts, not in articles purporting to be real news.

Additionally, imagine that while speaking on the senate floor, a lawmaker falsely accuses another senator of having an extramarital affair – a charge streamed live on C-SPAN. This too goes unchecked because the statute only reaches news articles.<sup>177</sup> Moreover, even if a journalist accurately reports the senator's false allegations in a later news article, neither the journalist nor the news outlet can be punished because the statute's definition of fake news exempts falsities that would otherwise be shielded from libel suits under the fair report privilege.<sup>178</sup> Thus, while the accusations levied by both the televangelist and the senator are statements that can be empirically proven as false, they evade the hypothetical statute's reach and thus float free to confuse, bother, and bewilder voters.<sup>179</sup>

Ultimately, whenever and wherever confusion affects balloting, it is likely the consequence of many unregulated variables – ones comparable to, if not more powerful than, fake news in spawning confusion. Furthermore, and perhaps of even greater significance, there

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175. See U.S. CONST. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."). The Second Amendment has been incorporated by the Supreme Court to apply to state and local government entities and officials through the Fourteenth Amendment Due Process Clause. See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010) (holding "that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right" as recognized by the Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), and specifying that "[i]n *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense").

176. *Supra* notes 30-31 and accompanying text.

177. *Supra* notes 30-31 and accompanying text.

178. See *supra* note 33 and accompanying text (describing this exemption from the statute's definition of fake news and the rationale for carving out the exemption); see also KENT R. MIDDLETON & WILLIAM E. LEE, *THE LAW OF PUBLIC COMMUNICATION* 158 (9th ed. 2014) ("A qualified privilege protects journalists who report defamatory comments made in official proceedings as long as the stories are fair and accurate."); ROBERT TRAGER ET AL., *THE LAW OF JOURNALISM AND MASS COMMUNICATION* 197 (6th ed. 2018) (noting that to fit within this privilege, "[t]he news report must fairly and accurately reflect what is in the public record or what was said during the official proceeding," and adding that "[t]he source of the statement should be clearly noted in the news report").

179. Cf. FRANK SINATRA, *Bewitched*, on NOTHING BUT THE BEST (Reprise Records 2008) (singing, in just one of many cover versions of the song over the decades, "I'm wild again, beguiled again, a whimpering, simpering child again, bewitched, bothered and bewildered – am I").

are far vaster and more challenging social and cultural phenomena – systemic variables at a macro level – that likely contribute to voter confusion, but go unchecked by the statute. These include (1) a lack of digital media literacy, news literacy and rudimentary civic education among some people; (2) the replacement of traditional news sources – ones that typically follow ethical tenets of responsible journalism<sup>180</sup> – with information delivered via social media platforms that fail to adhere to such standards; and (3) the inability or unwillingness of politicians to truthfully communicate with their constituents.

As a result, censorship of fake news, as defined in this article, fails to make a dent or dimple on much larger problems of “preventing confused decision-making in voting choices and safeguarding democratic self-governance during the voting process.”<sup>181</sup> This Article’s hypothetical statute thus would almost certainly be declared unconstitutional for its underinclusivity. It simply does too little, failing to directly and materially advance its dual interests.

With this doctrinal analysis of both strict scrutiny and underinclusiveness complete, the Article now addresses two venerable theories of free speech to consider if they would safeguard fake news from government censorship.

## II. A FREE SPEECH THEORY PERSPECTIVE ON CENSORING FAKE NEWS: WHY THE MARKETPLACE OF IDEAS AND DEMOCRATIC SELF-GOVERNANCE THEORIES FAIL TO PROTECT FAKE NEWS FROM CENSORSHIP

This Part has two sections. Initially, Section A analyzes support – or lack thereof – for protecting fake news against government censorship under the marketplace of ideas theory. Section B then considers the same issue, but from the perspective of Alexander Meiklejohn’s theory of democratic self-governance.

### A. *The Marketplace of Ideas*

First Amendment scholar Rodney Smolla crowns the marketplace of ideas as “perhaps the most powerful metaphor in the free speech tradition.”<sup>182</sup> Similarly, Professor Matthew Bunker dubs it “one of the most powerful images of free speech, both for legal thinkers and for

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180. Cf. AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* 2 (2015) (asserting that courts traditionally granted mainstream news organizations deference under the First Amendment based on an assumption “that journalists could be trusted to regulate themselves through professional norms and standards”).

181. *Supra* note 44.

182. SMOLLA, *supra* note 3 at 6.

laypersons.”<sup>183</sup>

Indeed, a content analysis of opinions published twenty-one years ago reveals that the marketplace of ideas is “the model most called upon by the U.S. Supreme Court in the resolution of free-expression cases.”<sup>184</sup> Today, it remains often invoked by the Court.<sup>185</sup>

The foundational premises of this highly influential, albeit often criticized,<sup>186</sup> theory are twofold. The first is that protecting open, uninhibited exchanges of ideas promotes truth discovery.<sup>187</sup> The second premise is that even if absolute truth is never established or agreed upon,<sup>188</sup> the process itself – the testing and confronting of contemporary conceptions of truth – must be privileged.<sup>189</sup> In brief, the marketplace theory is as much about *process* (challenging ideas) as it is about

183. MATTHEW D. BUNKER, *CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 2* (2001).

184. W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 *JOURNALISM & MASS COMM. Q.* 40, 47 (1996).

185. *See, e.g.*, Walker v. Texas Div., Sons of Confederate Veterans, 135 S. Ct. 2239, 2245-46 (2015) (asserting that “government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas”); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2234 (2015) (Breyer, J., concurring) (conceding “that, whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas”); McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (“In light of the First Amendment’s purpose ‘to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,’ . . . this aspect of traditional public fora is a virtue, not a vice.”) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)); Citizens United v. FEC, 558 U.S. 310, 335 (2010) (asserting that when Federal Election Commission advisory opinions “prohibit speech, ‘[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech – harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.’”) (quoting Virginia v. Hicks, 539 U.S. 113, 119 (2003)).

186. *See, e.g.*, Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 *DUKE L.J.* 821, 831 (2008) (“For all of its power, the marketplace of ideas metaphor also has explanatory weaknesses and normative difficulties, almost all of which track the shortcomings of its idealized view of an uninhibited, costless, and perfectly efficient free market.”); Lyriisa Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 *U. ILL. L. REV. ONLINE* 799, 826 (2010) (“According to critics, the marketplace of ideas cannot function because a few powerful voices drown out all others. The resulting lack of diversity in public discourse deprives citizens of the information they need to make rational decisions and denies them their right to participate in policy formation.”).

187. *See* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 *DUKE L.J.* 967, 998 (2003) (“The marketplace of ideas locates the value of free speech in finding the truth, and it makes the market the arbiter of truth or falsity.”).

188. Indeed, Justice Oliver Wendell Holmes, Jr. who, as described later, is most closely associated with the marketplace of ideas theory in First Amendment jurisprudence, “displayed an instinctive aversion to assertions of ‘absolute’ truth.” Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 *SUP. CT. REV.* 1, 14 (2004).

189. *See* Enrique Armijo, *The “Ample Alternative Channels” Flaw in First Amendment Doctrine*, 73 *WASH & LEE L. REV.* 1657, 1696-98 (2016) (noting that “[m]arketplace theory defines the First Amendment’s primary function as *facilitating a process* by which truth can be reached,” and adding that “[a] *process-based definition* of marketplace theory predominates in First Amendment scholarship”) (emphasis added).

*product* (the truth).

As this Article's epigraph reveals, the marketplace of ideas model, with its quest-for-truth telos,<sup>190</sup> originates in John Milton's 1644 *Areopagitica*.<sup>191</sup> John Stuart Mill then elaborated on the marketplace of ideas model over 200 years later in *On Liberty*.<sup>192</sup> As Professor Kent Greenawalt explains, the contention "that speech promotes the discovery of truth"<sup>193</sup> forms "the core of John Stuart Mill's defense of freedom of speech in *On Liberty*."<sup>194</sup>

Importantly for this Article, Mill emphasized protecting *opinions*, not empirically disprovable falsehoods. Specifically, *On Liberty's* chapter "Of the Liberty of Thought and Discussion" is devoted to what Mill termed "the subject of freedom of opinion."<sup>195</sup> He directed his analysis against "the mischief of denying a hearing to opinions."<sup>196</sup> Perhaps more famously, Mill asserted that

the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>197</sup>

As summarized by Professor Frederick Schauer, "Mill focuses our attention on the possibility that truth may lie in the *suppressed opinion*."<sup>198</sup> In a nutshell, Mill's ideal marketplace shunned the stifling of opinions, not factual falsehoods.

Against this Millian philosophical backdrop, the marketplace theory was imported into First Amendment law by Justice Oliver Wendell

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190. See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 15 (1982) ("Milton's *Areopagitica*, the earliest comprehensive defence of freedom of speech, is based substantially on the premise that the absence of government restrictions on publishing (particularly the absence of licensing) will enable society to locate truth and reject error.").

191. *Supra* notes 1-2.

192. JOHN STUART MILL, *ON LIBERTY* (Gertrude Himmelfarb ed., Penguin Books 1974) (1859). See Nicholas A. Primrose, *Has Society Become Tolerant of Further Infringement on First Amendment Rights?*, 19 BARRY L. REV. 313, 333, n.132 (2013) ("The 'marketplace of ideas' was originally developed in the book *On Liberty* by John Stuart Mill.").

193. Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130 (1989).

194. *Id.*

195. MILL, *supra* note 191, at 116.

196. *Id.* at 83.

197. *Id.* at 76.

198. SCHAUER, *supra* note 189, at 24 (emphasis added).

Holmes, Jr.,<sup>199</sup> nearly 100 years ago in *Abrams v. United States*.<sup>200</sup> Although Professor Vincent Blasi calls Holmes' holding an "irreverent attitude toward the concept of truth,"<sup>201</sup> the justice paved the path for the marketplace theory in *Abrams*, opining in dissent that

when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>202</sup>

Consistent with Mill's emphasis on safeguarding opinions, Holmes's above-quoted language focuses on protecting "ideas"<sup>203</sup> and "thought[s],"<sup>204</sup> not disprovable facts. The impact of his message on First Amendment jurisprudence is profound. As Professor Joseph Blocher notes, "[n]ever before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law."<sup>205</sup>

The U.S. Supreme Court in *Hustler Magazine v. Falwell*<sup>206</sup> embraced both the marketplace of ideas and its emphasis on protecting opinions, rather than false facts. Delivering the Court's decision, Chief Justice William Rehnquist explained that "[f]alse statements of fact are particularly valueless; they interfere with the truth-seeking function of the marketplace of ideas."<sup>207</sup> Indeed, this important fact-versus-opinion dichotomy builds from the Court's 1974 observation in *Gertz v. Robert Welch, Inc.*<sup>208</sup> that

[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its

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199. See Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984) (writing that although the marketplace of ideas "classic image of competing ideas and robust debate dates back to English philosophers John Milton and John Stuart Mill, Justice Holmes first introduced the concept into American jurisprudence in his 1919 dissent to *Abrams v. United States*").

200. *Abrams v. United States*, 250 U.S. 616 (1919).

201. Blasi, *supra* note 187, at 15.

202. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

203. *Id.*

204. *Id.*

205. Blocher, *supra* note 185, at 824-825.

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

207. *Id.* at 52 (emphasis added).

208. 418 U.S. 323 (1974).

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.<sup>209</sup>

Similar, and consistent with this article's narrow definition of proscribable fake news as limited to knowingly false factual statements,<sup>210</sup> is the Supreme Court's analysis in *New York Times Co. v. Sullivan*.<sup>211</sup> In *Sullivan*, the Court suggested that a well-functioning idea marketplace – one both embracing “the principle that debate on public issues should be uninhibited, robust, and wide-open”<sup>212</sup> and “gathered out of a multitude of tongues”<sup>213</sup> – did not protect, per actual malice, a defamatory factual assertion published “with knowledge that it was false.”<sup>214</sup> More recently, Justice Stephen Breyer reasoned in *United States v. Alvarez*<sup>215</sup> that “false factual statements are less likely than are true factual statements to make a valuable contribution to *the marketplace of ideas*.”<sup>216</sup>

Ultimately, while the marketplace theory certainly provides strong support for protecting opinions and arguments on topics involving “unprovable normative judgments,”<sup>217</sup> such as political policies and social morality, it “provides a much weaker footing for protecting expression that can be readily disproved.”<sup>218</sup> As Professor Steven Gey powerfully argued:

If the determination of truth is the objective of the entire marketplace mechanism, there is no point in permitting the further dissemination of proven falsehoods. Indeed, disseminating falsehoods directly undermines the purpose of having a marketplace in the first place. The only purpose of the marketplace of ideas is to advance human understanding about the nature of the world and the best way to live within it; it directly contravenes that purpose if the marketplace is used to keep human society mired in socially dysfunctional misunderstandings about

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209. *Id.* at 339–40.

210. *See supra* notes 30–33 and accompanying text (providing the hypothetical statute's definition of fake news in the text that corresponds to these footnotes).

211. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

212. *Id.* at 270.

213. *Id.* (quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (D.C. S.D.N.Y. 1943)).

214. *Id.* at 280.

215. *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

216. *Id.* at 2552 (Breyer, J., concurring) (emphasis added).

217. Gey, *supra* note 48, at 9.

218. *Id.*

the nature of the world and its history.<sup>219</sup>

In brief, the marketplace of ideas theory does not support protecting fake news, as defined in this article. Disseminating fake news does not foster the type of rational debate or discussion<sup>220</sup> that moves toward an ever closer truth or, in the words of First Amendment scholar Lee Bollinger, toward “as close an approximation of the truth as we can.”<sup>221</sup> If, as Yale Law School Dean Robert Post notes, “the search for truth presupposes rational deliberation,”<sup>222</sup> then fake news must be driven from the marketplace simply because it conflicts, by its very nature, with rational deliberation. William Williams explains this via an analogy:

Deliberately false statements were never envisioned as a useful component of this marketplace. They are analogous to counterfeit money in the physical marketplace: both equally worthless, yet both potentially very harmful. In the same way that counterfeit money is properly excluded from the physical marketplace, so too is deliberately false speech properly excluded from the marketplace of ideas.<sup>223</sup>

The bottom line is that marketplace theory does not support protecting fake news from government censorship. Might the philosophy of democratic self-governance that is closely associated with Alexander Meiklejohn provide a better rationale for safeguarding it? The next section considers that question.

### *B. Democratic Self-Governance*

As with the marketplace of ideas, democratic self-governance is a highly influential free speech theory.<sup>224</sup> Robert Post, for example,

219. *Id.*

220. As Professor Frederick Schauer observes, a well-functioning marketplace of ideas is dependent on “rational thinking.” SCHAUER, *supra* note 189, at 15.

221. LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 45 (1986).

222. Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473, 480 (1997).

223. William A. Williams, *A Necessary Compromise: Protecting Electoral Integrity Through the Regulation of False Campaign Speech*, 52 S.D. L. REV. 321, 350-51 (2007).

224. Eugene Volokh, *Response: In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 595 (2011) (writing that “a broad vision of democratic self-government is one important justification for free speech”). Although this article concentrates on the marketplace of ideas and democratic self-governance theories of free speech, there are numerous other rationales supporting free expression. See Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 274 (1999) (“The freedoms of speech and press, for example, are said to promote and to protect discovery of truth, democratic self-

deems it one of three “major candidates” – along with knowledge creation and individual autonomy – for best embodying key values safeguarded by the First Amendment.<sup>225</sup> He adds that when it comes to judicial rulings affecting free expression, “the value of democratic self-governance is the most powerful explanation of the general pattern of First Amendment decisions . . . and . . . the only value that can convincingly account for the specific set of decisions protecting the abusive, outrageous and indecent speech.”<sup>226</sup>

Although the theory certainly is not without criticism,<sup>227</sup> Post asserts that Alexander Meiklejohn<sup>228</sup> provided “an especially clear revelation of the theory’s essential constitutional structure.”<sup>229</sup> Indeed, Professor Richard Epstein dubs Meiklejohn “the father of modern First Amendment theory,”<sup>230</sup> while Professor Steven Smith anoints him “a seminal modern free speech theorist.”<sup>231</sup>

Professor Joseph Russomanno contends<sup>232</sup> that such accolades are largely due to Meiklejohn’s powerful influence on Justice William Brennan’s opinion for the Supreme Court in the defamation case of *New York Times Co. v. Sullivan*.<sup>233</sup> As Professor Lucas Powe puts it, the Court’s *Sullivan* decision “combined the insights of the philosopher

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governance, self-realization, dissent, tolerance, and honest government.”) (citations omitted).

225. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011).

226. Robert C. Post, *Reply to Bender*, 29 ARIZ. ST. L.J. 495, 495 (1997).

227. See, e.g., Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1055-59 (2016) (offering three criticisms of Meiklejohn’s conception of democratic self-governance theory); Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CALIF. L. REV. 267, 291 (1991) (“The more important fallacy . . . is Meiklejohn’s failure to recognize the substantial differences between a town meeting and the realities of modern life.”); Martin H. Redish & Abbie Marie Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1313 (2009) (observing that some scholars “have questioned Meiklejohn’s analogy to the New England town meeting as a metaphor for what speech regulations the First Amendment does not prohibit,” while others have “suggested that Meiklejohn was blinded by a rather myopic understanding of the kinds of speech relevant to democratic decisionmaking”).

228. See Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1111 (1993) [hereinafter Post, *Meiklejohn’s Mistake*] (asserting that “Meiklejohn anchors the First Amendment firmly to the value of self-government”).

229. *Id.*

230. Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 782 (1986).

231. Steven D. Smith, *Believing Persons, Personal Believings: The Neglected Center of the First Amendment*, 2002 U. ILL. L. REV. ONLINE 1233, 1250 (2002).

232. Joseph Russomanno, *The “Central Meaning” and Path Dependence: The Madison-Meiklejohn-Brennan Nexus*, 20 COMM. L. & POL’Y 117, 117-18 (2015).

233. 376 U.S. 254 (1964). In *Sullivan*, the Court held that public officials who sue for libel based on speech relating to their official conduct must prove that the defamatory statement “was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *Id.* at 279-80.



Alexander Meiklejohn on the necessities of political speech with those of William Brennan, lawyer and jurist, on the practical effects of litigation.”<sup>234</sup>

Given this theory’s importance in First Amendment law<sup>235</sup> and Meiklejohn’s status as its “leading proponent,”<sup>236</sup> a question logically arises: whether Meiklejohnian philosophy of democratic self-governance would shield fake news – as defined and hypothetically criminalized in this Article<sup>237</sup> – from government censorship. As this section argues, the answer is a resounding no.

This conclusion flows naturally from (1) the reasons why speech is protected under a Meiklejohnian perspective, and (2) the occasions when he believed it could rightfully be suppressed. They are briefly described here.

For Meiklejohn, as Columbia University President Lee Bollinger explains, “the principle of free speech plays a practical role for a self-governing society, protecting discussion among citizens so that they can best decide what to do about the issues brought before them.”<sup>238</sup> More simply phrased by Meiklejohn himself in *Free Speech and Its Relation to Self-Government*, speech is protected to facilitate “the voting of wise decisions.”<sup>239</sup> He later elaborated in a law journal article that “[s]elf-government can exist only insofar as the voters acquire the intelligence . . . that, in theory, casting a ballot is assumed to express.”<sup>240</sup>

It is then, as Post writes, a “collectivist theory of the First Amendment”<sup>241</sup> under which “the minds of the hearers”<sup>242</sup> – the minds of voters, in other words – take precedence over speakers’ rights.<sup>243</sup> Using the metaphor of a town hall meeting to emphasize this point, Meiklejohn asserted that “[w]hat is essential is not that everyone shall

234. LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA* 87 (1991).

235. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 554 (1977) (“The most influential scholarly analysis of the First Amendment to be published since World War II is Professor Alexander Meiklejohn’s *Free Speech and Its Relation to Self-Government*.”).

236. BUNKER, *supra* note 182, at 8.

237. *See supra* notes 30-33 and accompanying text (providing this article’s definition of fake news).

238. BOLLINGER, *supra* note 220, at 48.

239. MEIKLEJOHN, *supra* note 45, at 25.

240. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961).

241. Post, *Meiklejohn’s Mistake*, *supra* note 227, at 1111. *See* ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 269 (1995) (“The most influential exposition of the collectivist theory of the First Amendment is by the American philosopher Alexander Meiklejohn; his work continues to inspire and guide the theory’s contemporary advocates.”).

242. MEIKLEJOHN, *supra* note 45, at 25.

243. *See id.* (asserting that “in that method of political self-government, the point of ultimate interest is not the words of the speakers, but the minds of the hearers”).

speech, but that everything worth saying shall be said.”<sup>244</sup> Speech is protected at the meeting only as a means “to get business done”<sup>245</sup> and, more specifically, to make voters “as wise as possible.”<sup>246</sup> Such speech, in turn, must “be fully and fairly presented”<sup>247</sup> as part of a “responsible and regulated discussion.”<sup>248</sup>

Significantly, Meiklejohn seemingly provided no shelter to false factual statements. As he wrote in 1961, referencing a storied aphorism penned by Justice Oliver Wendell Holmes in *Schenck v. United States*,<sup>249</sup>

a man is not allowed to shout “Fire!” *falsely* in a theater. But, if, during a performance in a theater, a person sees a fire which threatens to spread, he is not only allowed, he is duty-bound, to try to find some way of informing others so that a panic may not ensue with its disastrous consequences. The distinction between “falsely” and “truly” is here fundamental to an understanding of what freedom is.<sup>250</sup>

As Meiklejohn ultimately concluded, “[i]t is the mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.”<sup>251</sup> With this primer on Meiklejohnian theory in mind, it is readily apparent his theory would not protect fake news – as defined here<sup>252</sup> – from government censorship.

First and foremost, dissemination of fake news actually mutilates the thinking process of the community by permitting voters to consider information that is empirically verifiable as false. If a key tenet of Meiklejohnian theory is that “the minds of the hearers”<sup>253</sup> constitute “the point of ultimate interest”<sup>254</sup> in political self-governance, then fake news must be jettisoned from the field of speech and from Meiklejohn’s metaphorical town-hall meeting due to its potential to confuse the minds of those who hear it. Put more bluntly, propagation of fake news may lead to the voting of troublingly *unwise* decisions, in direct

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244. *Id.*

245. *Id.* at 23.

246. *Id.* at 25.

247. *Id.*

248. *Id.* at 23.

249. 249 U.S. 47 (1919). Holmes opined that “[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” *Id.* at 52.

250. Meiklejohn, *supra* note 239, at 261-262 (emphasis in original).

251. Meiklejohn, *supra* note 45, at 26.

252. *Supra* notes 30-33 and accompanying text.

253. MEIKLEJOHN, *supra* note 45, at 25.

254. *Id.*

contravention of Meiklejohn's final goal.

Second, Meiklejohn apparently would have no qualms or quibbles in censoring individuals who knowingly create and trade in fake news. If, as Meiklejohn believed, it is *not* essential that everyone shall speak,<sup>255</sup> then censoring individuals whose speech is *not* worth saying is unproblematic. Using Meiklejohn's words, the purveyors and mongers of fake news are "out of order"<sup>256</sup> when they deal in fake news.

Third, Meiklejohn emphasized that all facts must "be fully and *fairly* presented"<sup>257</sup> as part of "*responsible* and regulated discussion."<sup>258</sup> The knowing presentation to voters of empirically verifiable false facts on issues of public concern constitutes a decidedly *unfair* and *irresponsible* transmission of information. In brief, fake news is *unfair information*, while those who knowingly convey it are *irresponsible speakers*.

Regardless of whether a speaker transmits fake news to deliberately confuse an audience or to simply obtain an economic benefit via immense internet clicks, the bottom line is that such speech finds no shelter under Meiklejohnian theory. Additionally, as Section A explained, the marketplace of ideas model would not safeguard fake news from government censorship. Thus, two of the most important rationales for shielding speech from suppression fail to offer any resistance or opposition to a hypothetical statute criminalizing the knowing creation and dissemination of fake news.

### III. PROTECTING FAKE NEWS UNDER A STRUCTURAL RIGHTS APPROACH: RECONCILING DOCTRINE AND THEORY

Part I argued that a law criminalizing the knowing creation and dissemination of fake news – a measure adopted in the interest of preventing voter confusion<sup>259</sup> – almost inevitably would not pass constitutional muster. Specifically, under the doctrines of strict scrutiny and underinclusivity, this Article's hypothetical statute would surely be struck down.<sup>260</sup>

Yet, as Part II explained, neither the marketplace of ideas nor democratic self-governance theories seemingly provide any shelter from censorship for fake news. Because fake news, as defined in this

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255. *See id.* ("What is essential is *not* that everyone shall speak, but that everything worth saying shall be said.") (emphasis added).

256. *Id.* at 23.

257. *Id.* at 25 (emphasis added).

258. *Id.* at 23 (emphasis added).

259. *See supra* note 44 and accompanying text (identifying the interests underlying the hypothetical statute in this article).

260. *Supra* Part I.

Article,<sup>261</sup> neither promotes truth discovery nor leads to wise voting, it ostensibly could be banished per these theories.<sup>262</sup>

Such a disconnect between the First Amendment doctrine and theory is far from new. Lamenting what he called “the sorry state of First Amendment doctrine,”<sup>263</sup> Robert Post observed more than a dozen years ago that the “First Amendment doctrine veers between theory and the exigencies of specific cases.”<sup>264</sup> This is problematic because, at least ideally, “the function of doctrine is both to implement the objectives attributed by theory to the Constitution and to offer principled grounds of justification for particular decisions.”<sup>265</sup> Post emphasized that “[d]octrine becomes confused when the requirements of theory make little sense in the actual circumstances of concrete cases, or when doctrine is required to articulate the implications of inconsistent theories. First Amendment doctrine has unfortunately suffered both from these difficulties.”<sup>266</sup>

Is it possible, then, to reconcile First Amendment doctrine with free speech theory when it comes to fake news or, at the very least, to explain why First Amendment doctrine should protect fake news in the face of conflicting free speech theory? Professor Steven Gey’s analysis of why speech denying the Holocaust – speech that, like this Article’s definition of fake news, is empirically verifiable as false – is safeguarded by the First Amendment provides a possible path forward.<sup>267</sup> Gey examined the Holocaust denial issue through two First Amendment lenses – a structural rights interpretation and an individual rights interpretation. Ultimately, he concluded that only the former understanding adequately explains why speech denying the existence of the Holocaust merits First Amendment protection.<sup>268</sup>

Structural rights, as Gey defined them,<sup>269</sup> are “constitutional provisions that structure the government’s interaction with its citizens and limit the power of government in order to prevent governmental overreaching and ensure over the long term the preservation of popular

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261. See *supra* notes 30-33 and accompanying text (providing this article’s definition of fake news).

262. *Supra* Part II.

263. Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 153, 172-73 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

264. *Id.* at 153.

265. *Id.*

266. *Id.*

267. See Gey, *supra* note 48 (examining how a structural rights interpretation supports protecting Holocaust-denial speech).

268. *Id.* at 17.

269. Gey, *supra* note 50, at 1.

consent to the exercise of political power.”<sup>270</sup> Put differently, a structural rights perspective views the values of laws *not* in terms of the individual benefits they may yield, but rather in terms of the freedom from government control they produce. As Gey posited, a structural rights interpretation “is entirely negative,”<sup>271</sup> concentrating only “on the problematic nature of collective power.”<sup>272</sup> This contrasts directly with an individual rights perspective, which focuses on “the social benefits arising from speech”<sup>273</sup> and the “beneficial character”<sup>274</sup> of protected speech.

Thus, as applied to the First Amendment, “[t]he core of the structural rights justification for free speech is the claim that democratic self-governance is inconsistent with a regime that permits political majorities to suppress free speech.”<sup>275</sup> In other words, the government’s control over speech as an intellectual arbiter of the truth must be constricted, if not completely denied.<sup>276</sup> Baked into the architecture of the First Amendment then – at least from a structural rights interpretation – is “a deep skepticism about the good faith of those controlling the government.”<sup>277</sup> That skepticism flows from two facts: (1) decisions about what is true or false, when made by those in power, “are bound up with political perspectives that the government seeks to undermine;”<sup>278</sup> and (2) “the government’s natural tendency [is] to twist reality to its own purposes.”<sup>279</sup>

One only needs to consider the current presidential administration’s use of so-called “alternative facts”<sup>280</sup> as a vehicle to try to dictate what is true to understand Gey’s assertion above regarding the “government’s natural tendency to twist reality to its own purposes.”<sup>281</sup> As Jim Rutenberg of the *New York Times* contends, the Trump administration’s communication “strategy has consistently presumed that low public opinion of mainstream journalism (which Mr. Trump has been only too happy to help stoke) creates an opening to *sell the Trump version of*

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270. *Id.* at 4.

271. Gey, *supra* note 48, at 17.

272. *Id.* at 16.

273. *Id.* at 21.

274. *Id.* at 16.

275. *Id.* at 19.

276. *See id.* at 21 (“Under the structural interpretation, government is neither an intellectual nor a moral arbiter.”).

277. *Id.*

278. *Id.* at 22.

279. *Id.*

280. *See* David Jackson, *Conway Backs Spicer’s Version of ‘Facts,’* USA TODAY, Jan. 23, 2017, at 3A (reporting the use of this term by White House counselor Kellyanne Conway during an interview on *Meet the Press* to dispute crowd-size estimates for the inauguration of President Donald J. Trump).

281. Gey, *supra* note 48, at 22.

*reality, no matter its adherence to the facts.*<sup>282</sup>

The structural rights approach thus explains why the speech of both Holocaust deniers and fake news purveyors must be shielded from government control. In brief, the First Amendment must protect such speech *not* because of any benefits it provides to either truth discovery or voting wisely, but simply because a truly self-governing democracy cannot allow those temporarily vested with power to dictate what is true or false. As Gey encapsulated, the government

cannot suppress statements of fact simply because they are demonstrably untrue and may lead astray those who hear the statements and are too lazy or dim-witted to sort out truth from falsehood. Under the structural interpretation, *government has no paternalistic role over matters of the intellect*, just as it has no paternalistic role over matters of the soul. *It is up to individual citizens alone to sort out truth from falsehood.*<sup>283</sup>

In a nutshell, individuals who trade in fake news – “purveyors of nonsense,”<sup>284</sup> to borrow Gey’s fine phrase about Holocaust deniers – are protected merely as “incidental beneficiaries of the ideological agnosticism”<sup>285</sup> that is part and parcel of a structural rights interpretation of the First Amendment.

Gey’s structural rights interpretation of the First Amendment, therefore, provides the intellectual glue holding doctrine and theory together. While jettisoning fake news from the marketplace of ideas and keeping it out of the hands of voters may yield benefits, these gains are far outweighed by the danger of vesting the government with the power to determine truth from untruth.<sup>286</sup> As Gey wrote, “[a]llowing the government to encourage truthfulness by punishing falsehood has the potential for lulling the citizenry into taking what the government says at face value.”<sup>287</sup> Ultimately, focusing on the negative consequences of governmental interference with truth determinations in idea marketplaces and at metaphorical town hall meetings explains why the government must not be allowed to censor fake news.

Alexander Meiklejohn contended that in a self-governing democracy

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282. Jim Rutenberg, ‘Alternative Facts’ and The Costs of Trump’s Brand of Reality, N.Y. TIMES, Jan. 22, 2017, at B1 (emphasis added).

283. Gey, *supra* note 48, at 21.

284. *Id.* at 22.

285. *Id.*

286. *Id.*

287. *Id.* at 22.

“there is only one group – the self-governing people”<sup>288</sup> and that “[r]ulers and ruled are the same individuals.”<sup>289</sup> If that is correct, then he too might embrace a structural rights perspective of democratic self-governance under which the “rulers” – those temporarily vested with power – must not be granted separate authority to tell the “ruled” what is and is not true. Similarly, Oliver Wendell Holmes, Jr., who “did not believe in truth”<sup>290</sup> and who recognized “no universal truths other than a pragmatic recognition of the universal Hobbesian reality that in politics the powerful always triumph over the powerless,”<sup>291</sup> would surely embrace a structural rights interpretation of the marketplace theory that pushes back against government-dictated truths.

The bottom line is that a structural rights approach to the First Amendment bridges the seeming disconnect between doctrine and theory described in Parts I and II when it comes to criminalizing the knowing creation and dissemination of fake news.

#### IV. CONCLUSION

*“This story is FAKE NEWS and everyone knows it!”*<sup>292</sup>

That’s how Donald J. Trump responded on Twitter in March 2017 to allegations that his associates conspired with Russian officials to tilt the 2016 presidential election in his favor.<sup>293</sup> Although “fake news” is so loosely bandied about today that some consider the term meaningless,<sup>294</sup> Trump’s fixation with it,<sup>295</sup> renders its proscription plausible,<sup>296</sup> when coupled with his virulent anti-press sentiment<sup>297</sup> and Hillary Clinton’s

288. MEIKLEJOHN, *supra* note 45, at 6.

289. *Id.*

290. SMOLLA, *supra* note 3, at 8.

291. Gey, *supra* note 48, at 7.

292. See Susan Page, *FBI Bombshell Creates ‘A Big Gray Cloud’ Over Trump’s White House*, USA TODAY, Mar. 2021, 2017, at 1A (quoting this tweet issued from President Trump’s personal twitter account as one “of a string of early morning tweets” sent on Monday, March 20, 2017, by Trump regarding the F.B.I.’s investigation into “whether Trump associates colluded with Russia in the effort by one of the United States’ leading global adversaries to affect the outcome of the presidential campaign”).

293. *Id.*

294. See Dave Itzkoff, *The Same Show, but a Changed World*, N.Y. TIMES, Feb. 8, 2017, at C1 (“The phrase ‘fake news’ has now been used so liberally, it’s meaningless.”).

295. See Kirsten Powers, *Trumping Obama’s War with ‘Fox News’; ‘Fake News’ Rant is the Sort of Bullying that Conservatives Used to Rage Against*, USA TODAY, Feb. 21, 2017, at 7A (reporting that Trump “relentlessly accuses non-conservative outlets of being ‘fake news’”).

296. See Kirsten Powers, *Trumping Obama’s War with ‘Fox News’; ‘Fake News’ Rant is the Sort of Bullying that Conservatives Used to Rage Against*, USA TODAY, Feb. 21, 2017, at 7A (reporting that Trump “relentlessly accuses non-conservative outlets of being ‘fake news’”).

297. Trump has derisively called the news media “the enemy of the American people.” Michael

post-election call for regulating fake news.<sup>298</sup>

Using a precise definition of fake news that involves only verifiable falsehoods on matters of public concern,<sup>299</sup> this Article asserted that criminalizing it to prevent voter confusion assuredly violates First Amendment doctrine.<sup>300</sup> Yet, two free speech theories – the marketplace of ideas and democratic self-governance – upon which much of that doctrine ostensibly is premised, would likely not safeguard fake news from censorship.<sup>301</sup> In brief, the Article illustrated an apparent disconnect between the First Amendment doctrine and theory.

The Article contended, however, that a structural rights interpretation – one focusing neither on the benefits nor the “social good”<sup>302</sup> of speech, but instead “on the problematic nature of collective power”<sup>303</sup> – provides ample philosophical fodder for why the First Amendment protects empirically disprovable falsehoods like fake news from government control.<sup>304</sup> Simply put, permitting the government to tell society what is and is not true is treacherous, for it vests officials temporarily in charge of the country with the power to twist narratives to serve their own purposes.<sup>305</sup>

That is disturbingly akin to the function of the Ministry of Truth in George Orwell’s *Nineteen Eighty-Four*.<sup>306</sup> Its “purpose was to dictate and protect the government’s version of reality.”<sup>307</sup> As Professor Gey said,

politicians’ claims of factual veracity should never be taken at face value – even when there is independent evidence that the government is actually correct. This is not to say that the politicians are always wrong; it is to say that determinations of right and wrong should not be in the hands of politicians.<sup>308</sup>

At bottom, the key is who gets to decide what content is appropriate

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M. Grynbaum, *Trump Calls News Media the ‘Enemy of the American People,’* N.Y. TIMES, Feb. 17, 2017, at A15.

298. *Supra* note 14 and accompanying text.

299. *See supra* notes 30-33 and accompanying text (setting forth this article’s definition of fake news).

300. *Supra* Part I.

301. *Supra* Part II.

302. Gey, *supra* note 48, at 15.

303. *Id.* at 16.

304. *Supra* Part III.

305. Gey, *supra* note 48, at 22.

306. *Supra* note 57 and accompanying text.

307. Flemming Rose & Jacob Mchangama, *Shutting Down Fake News Could Move Us Closer to a Modern-Day ‘1984,’* WASH. POST, Feb. 10, 2017, at A17.

308. Gey, *supra* note 48, at 22.



to circulate in the marketplace of ideas. Rodney Smolla posits that “[i]n an open culture, that decision presumptively rests with speakers, not government officials, high or petty.”<sup>309</sup> And while a self-governing democracy might function better without fabulist litter like fake news polluting the media ecosystem, trusting and relying on the government to paternalistically sweep it away only lulls voters into both indifference and passivity, rather than a “Holmesian skepticism”<sup>310</sup> about what is true. As John Stuart Mill might have phrased it, people must reject such “mental despotism.”<sup>311</sup>

Although the government must not manage fake news, it does not logically follow that private actors and entities must be complacent. To the contrary, individuals and businesses should combat fake news through both counterspeech and self-regulatory mechanisms, such as online social media platforms deploying algorithms to search for fake news and asking readers to flag its existence.<sup>312</sup>

If the government is to play any part in fighting fake news, its role must be educational, not censorial. This means ramping up digital media literacy efforts in the nation’s classrooms.<sup>313</sup> Such remedies are especially important in an era when the nation’s president bypasses traditional news media channels and delivers messages directly to citizens via tweets.<sup>314</sup> Ultimately, fact-checking conducted by news organizations and non-profit entities, along with both improved educational efforts and self-regulatory mechanisms, provide effective means for mitigating harms allegedly flowing from fake news while simultaneously safeguarding First Amendment rights.

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309. SMOLLA, *supra* note 3, at 5.

310. Gey, *supra* note 48, at 22.

311. MILL, *supra* note 191, at 96.

312. *Supra* Part I, Section A.

313. *Id.*

314. See Dan Colasimone, *Donald Trump’s ‘Misinformation Ecosystem’: Q&A on Fake News and the Role of the Media*, ABC NEWS, Mar. 20, 2017, (stating how “[b]ecause of Twitter, he can go directly to his audiences and say whatever he likes”).